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# Rules and Regulations

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

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

## DEPARTMENT OF AGRICULTURE

### Farm Service Agency

### 7 CFR Parts 761, 762, 764, and 767

**RIN 0560–AH82**

### Farm Loan Programs

**AGENCY:** Farm Service Agency, USDA.

**ACTION:** Final rule.

**SUMMARY:** This rule amends the Farm Service Agency (FSA) regulations for direct and guaranteed Farm Operating loans and Farm Ownership loans, and the lease and disposal of inventory property. This rule implements changes required by the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill). The maximum loan amount authorized for direct Farm Ownership loans and direct Farm Operating loans is being increased. The existing Beginning Farmer Downpayment Loan Program is being amended to include socially disadvantaged farmers and to reduce the size of the required down payment. Regulations governing lease and disposal of FSA's real estate inventory, which currently give priority to beginning farmers, are being amended to also give socially disadvantaged farmers priority.

**DATES:** *Effective Date:* January 7, 2009.

**FOR FURTHER INFORMATION CONTACT:** James Radintz, Director, Loan Making Division, Farm Loan Programs, Farm Service Agency, United States Department of Agriculture, STOP 0522, 1400 Independence Avenue, SW., Washington, DC 20250–0522; telephone: 202–720–1632; e-mail: *jim.radintz@wdc.usda.gov*. Persons with disabilities who require alternative means for communication (Braille, large print, audio tape, etc.) should contact the USDA Target Center at (202) 720–2600 (voice and TDD).

**SUPPLEMENTARY INFORMATION:**

**Background**

FSA makes and services a variety of direct and guaranteed loans to farmers who are temporarily unable to obtain private commercial credit. FSA also provides direct loan customers with credit counseling and supervision so they have a better chance for success. FSA loan applicants are often beginning farmers and socially disadvantaged farmers who do not qualify for conventional loans because of insufficient net worth or established farmers who have suffered financial setbacks due to natural disasters or economic downturns. FSA loans are tailored to a customer's needs and may be used to buy farmland and to finance agricultural production. All of the changes in this rule are required by the 2008 Farm Bill (Pub. L. 110–246) enacted June 18, 2008. This law repealed Public Law 110–234, dated May 22, 2008, that inadvertently omitted Title III (Trade) and reenacted those provisions with the missing title.

This rule changes the defined term ''Beginning Farmer Downpayment Loan'' in section 761.2, Abbreviations and definitions, to ''Downpayment Loan'' because these types of loans now will be available to socially disadvantaged ''farmers'' as well. This change is required by section 5004 of the 2008 Farm Bill. Corresponding reference changes are made in parts 761, 762, and 764, including changes to the definitions of ''Farm Ownership loan'' and ''Socially disadvantaged applicant or farmer.''

The Farm Ownership (FO) loan program assists beginning and established farmers to purchase farmland, to build or repair structures or other fixtures, and to promote soil and water conservation. The Operating Loan (OL) loan program assists producers with the purchase or lease of items needed for a successful farm operation, such as livestock, farm equipment, feed, seed, fuel, farm chemicals, insurance, or other operating expenses. Additionally, these loans can be used to pay for minor improvements to buildings, costs associated with land and water development, family subsistence, as well as to refinance debts under certain conditions. This rule amends section 761.8, Loan Limitations, to increase the maximum loan amount authorized for both types of loans from $200,000 to $300,000. These changes are required by sections 5003 and 5102 of the 2008 Farm Bill. Corresponding changes have been made to the combination loan limits in paragraph (a)(4) to change $200,000 to $300,000 and in paragraph (a)(6) to change $700,000 to $800,000. (**Note:** The limit for emergency loans of $500,000 remains unchanged.)

This rule amends section 762.122 to correct a paragraph reference.

The current Beginning Farmer Downpayment Loan Program is used to assist qualified beginning farmers finance the purchase of a family farm. This rule modifies part 764 to expand this program to include socially disadvantaged farmers and make other changes required by section 5004 of the 2008 Farm Bill. To reflect the expansion of the program, the name of the program is being changed from ''Beginning Farmer Downpayment Loan Program'' to ''Downpayment Loan Program.''

This rule also reduces the minimum down payment that the applicant must provide from ten percent to five percent by amending section 764.203, Limitations. In the current regulation, the lower of the purchase price or the appraised value of the farm must not exceed $250,000. This section currently provides that downpayment loans may not exceed 40 percent of the purchase price or the appraised value of the farm to be acquired and total financing provided by the Agency and by all other creditors must not exceed 90 percent of the purchase price or the appraised value of the farm. This rule amends section 764.203 in accordance with the 2008 Farm Bill to specify that each downpayment loan may not exceed 45 percent of the least of (1) the purchase price of the farm, (2) the appraised value of the farm, or (3) $500,000. Total financing provided by the Agency and all other creditors may not exceed 95 percent.

This rule amends section 764.204, Rates and terms, to provide that the interest rate for downpayment loans will be the regular direct FO rate less 4 percent with a floor of 1.5 percent rather than the current set rate of 4 percent. The maximum loan term also is being extended from 15 to 20 years as required by the 2008 Farm Bill. Additionally, this section is amended accordingly to provide that non-Agency financing cannot have a balloon payment due within the first 20 years of the loan, which is an extension from the current

15 years to correspond with the change in loan term.

In accordance with section 5302 of the 2008 Farm Bill, this rule amends several sections on leasing and disposing of inventory real estate. Section 767.101 is revised to give socially disadvantaged farmers all rights regarding lease eligibility, terms, and the option to purchase currently only extended to beginning farmers. Sections 767.151 through 767.153 are revised to ensure that socially disadvantaged farmers are granted rights to purchase inventory property that currently apply to only beginning farmers, including the right to purchase the property before it is offered to the general public and the waiver of the 10 percent down payment. The current provision in the regulation specifying that property becomes available only after the rights of the previous owner have expired is not changing.

**Notice and Comment**

The notice and comment provisions of 5 U.S.C. 553 and the Statement of Policy of the Secretary of Agriculture effective July 24, 1971 (36 FR 13804), relating to notices of proposed rulemaking and public participation in rulemaking, provide that certain rules may go forward without public notice and comment when they are in the public interest. This regulation adopts changes mandated in the 2008 Farm Bill, sections 5003, 5004, 5102, and 5302. All these provisions are nondiscretionary in nature and became effective when the 2008 Farm Bill became law. Furthermore, these changes impose no additional paperwork burden. Accordingly, this rule is published without requesting public comment and will be effective 30 days from the date of publication in the **Federal Register**.

**Executive Order 12866**

The Office of Management and Budget (OMB) designated this rule as not significant under Executive Order 12866 and, therefore, OMB was not required to review this final rule.

**Regulatory Flexibility Act**

This rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601–602), since FSA is not required to publish a notice of proposed rulemaking for this rule.

**Environmental Evaluation**

The environmental aspects of this final rule have been considered in a manner consistent with the provisions of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321–4347, the regulations of the Council on Environmental Quality (40 CFR parts 1500–1508) and the FSA regulations for compliance with NEPA (7 CFR part 1940, subpart G). The changes are non-discretionary, and, as such, no new significant circumstances or information relevant to environmental concerns have been established. In consideration of the previous analysis documented in the 2003 Programmatic Environmental Assessment (PEA) and the reasons outlined in the 2004 Finding of No Significant Impact (FONSI), FSA has concluded that this final rule will not have a significant impact on the quality of the human environment either individually or cumulatively, and, therefore, is categorically excluded and not subject to an environmental assessment or environmental impact statement in accordance with 7 CFR 1940.310(e)(3). The Final PEA and a copy of the FONSI are available at: *http://www.fsa.usda.gov/FSA/webapp?area=home&subject=ecrc&topic=enl-ea*.

**Executive Order 12372**

This program is not subject to Executive Order 12372, which requires consultation with State and local officials. See the notice related to 7 CFR part 3015, subpart V, published in the **Federal Register** on June 24, 1983 (48 FR 29115).

**Executive Order 12988**

This rule has been reviewed in accordance with Executive Order 12988, Civil Justice Reform. All State and local laws and regulations that are in conflict with this rule will be preempted. This rule is not retroactive. It will not effect agreements entered into prior to the effective date of the rule. Before any judicial action may be brought regarding the provisions of this rule, the administrative appeal provisions of 7 CFR parts 11 and 780 must be exhausted.

**Executive Order 13132**

The policies contained in this rule do not have any substantial direct effect on states, the relationship between the national government and the states, or the distribution of power and responsibilities among the various levels of government. Nor does this rule impose substantial direct compliance costs on state and local governments. Therefore, consultation with the states is not required.

**Unfunded Mandates**

This rule contains no Federal mandates under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995 (URMA) (Pub. L. 104–4) for State, local, and tribal governments or the private sector. In addition, FSA was not required to publish a notice of proposed rulemaking for this rule. Therefore, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

**Federal Assistance Programs**

The changes in this rule affect the following FSA programs as listed in the Catalog of Federal Domestic Assistance:

10.406—Farm Operating Loans.

10.407—Farm Ownership Loans.

**Paperwork Reduction Act**

The Agency's information collection requirements, currently approved under OMB control numbers 0560–0234, 0560–0237, and 0560–0238, are not affected by the final rule. The rule does not increase the information collection burden.

**E-Government Act Compliance**

FSA 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.

**List of Subjects**

*7 CFR Part 761*

Loan programs—Agriculture.

*7 CFR Part 762*

Agriculture, Credit, Loan programs—Agriculture.

*7 CFR Part 764*

Agriculture, Credit, Loan programs—Agriculture.

*7 CFR Part 767*

Agriculture, Credit, Loan programs—Agriculture.

■ For the reasons discussed above, this rule amends 7 CFR chapter VII, Subchapter D—Special Programs, as follows:

## PART 761—GENERAL PROGRAM ADMINISTRATION

■ 1. The authority citation for part 761 continues to read as follows:

**Authority:** 5 U.S.C. 301 and 7 U.S.C. 1989.

■ 2. Amend § 761.2 paragraph (b) as follows:

■ a. Remove the definitions of ''Beginning Farmer Downpayment Loan'' and ''Socially disadvantaged applicant,''

■ b. Add definitions, in alphabetical order, for ''Downpayment Loan'' and

''Socially Disadvantaged Applicant or Farmer'' to read as set forth below, and

■ c. In the definition of ''Farm Ownership loan'' remove the words ''Beginning Farmer.''

**§ 761.2 Abbreviations and definitions.**

* * * * *

(b) * * *

*Downpayment Loan* is a type of FO loan made to beginning farmers and socially disadvantaged farmers to finance a portion of a real estate purchase under part 764, subpart E of this chapter.

* * * * *

*Socially Disadvantaged Applicant or Farmer* is an individual or entity who is a member of a socially disadvantaged group. For an entity, the majority interest must be held by socially disadvantaged individuals. For married couples, the socially disadvantaged individual must have at least 50 percent ownership in the farm business and make most of the management decisions, contribute a significant amount of labor, and generally be recognized as the operator of the farm.

* * * * *

**§ 761.8 [Amended]**

■ 3. Amend § 761.8 as follows:

■ a. In paragraph (a)(1) remove the words ''Beginning Farmer,''

■ b. In paragraphs (a)(1)(i), (a)(2)(i), and (a)(4) remove the amount ''$200,000'' and add, in its place, the amount ''$300,000,'' and

■ c. In paragraph (a)(6) remove the amount ''$700,000'' and add, in its place, the amount ''$800,000.''

■ 4. Revise § 761.210 paragraph (a) to read as follows:

**§ 761.210 Transfer of funds.**

* * * * *

(a) August 1 of each fiscal year, the Agency will use available unsubsidized guaranteed OL loan funds to make approved direct FO loans to beginning farmers and socially disadvantaged farmers under the Downpayment loan program; and

* * * * *

## PART 762—GUARANTEED FARM LOANS

■ 5. The authority citation for part 762 continues to read as follows:

**Authority:** 5 U.S.C. 301 and 7 U.S.C. 1989.

**§ 762.121 [Amended]**

■ 6. Amend § 762.121 paragraph (b)(1) by removing the words ''beginning farmer.''

**§ 762.122 [Amended]**

■ 7. Amend § 762.122 paragraph (b)(2) by removing the reference to ''(c)(1) of this section'' and add in its place a reference to ''(b)(1) of this section.''

**§ 762.124 [Amended]**

■ 8. Amend § 762.124 paragraph (e)(3) by removing the words ''for beginning farmers.''

■ 9. Revise § 762.130 paragraph (d)(4)(iii)(C) to read as follows:

**§ 762.130 Loan approval and issuing the guarantee.**

* * * * *

(d) * * *

(4) * * *

(iii) * * *

(C) Loans to farmers involved in the direct downpayment program.

* * * * *

## PART 764—DIRECT LOAN MAKING

■ 10. The authority citation for part 764 continues to read as follows:

**Authority:** 5 U.S.C. 301 and 7 U.S.C. 1989.

**§ 764.1 [Amended]**

■ 11. Amend § 764.1 paragraph (b)(1) by removing the words ''Beginning Farmer.''

**§ 764.103 [Amended]**

■ 12. Amend § 764.103 paragraphs (c) and (e) by removing the words ''beginning farmer.''

### Subpart E—Downpayment Loan Program

■ 13. Revise Subpart E heading to read as shown above.

**§ 764.201 [Amended]**

■ 14. Amend § 764.201 as follows:

■ a. In the heading remove the words ''Beginning Farmer'' and

■ b. In the undesignated paragraph remove the words ''Beginning Farmer'' the first time they appear and add the words ''or socially disadvantaged farmer'' at the end.

**§ 764.202 [Amended]**

■ 15. Amend § 764.202 paragraph (b) by adding the words ''or socially disadvantaged farmer'' at the end.

■ 16. Amend § 764.203 as follows:

■ a. In paragraph (a)(2) remove the number ''10'' and add, in its place, the number ''5,''

■ b. Revise paragraphs (b) and (c) to read as set forth below, and

■ c. Remove paragraph (d).

**§ 764.203 Limitations.**

* * * * *

(b) Downpayment loans will not exceed 45 percent of the lesser of:

(1) The purchase price,

(2) The appraised value of the farm to be acquired, or

(3) $500,000.

(c) Financing provided by the Agency and all other creditors must not exceed 95 percent of the purchase price. Financing provided by eligible lenders may be guaranteed by the Agency under part 762 of this chapter.

■ 17. Amend § 764.204, as follows:

■ a. Revise paragraph (a) to read as set forth below,

■ b. In paragraph (b)(1) remove the words ''Beginning Farmer,'' and

■ c. In paragraphs (b)(1) and (2) remove the number ''15'' and add, in its place, the number ''20.''

**§ 764.204 Rates and terms.**

(a) *Rates.* The interest rate for Downpayment loans will be the regular direct FO rate minus 4 percent, but in no case less than 1.5 percent.

* * * * *

**§ 764.205 [Amended]**

■ 18. Amend § 764.205 introductory paragraph by removing the words ''Beginning Farmer.''

## PART 767—INVENTORY PROPERTY MANAGEMENT

■ 19. The authority citation for part 767 continues to read as follows:

**Authority:** 5 U.S.C. 301 and 7 U.S.C. 1989.

**§ 767.101 [Amended]**

■ 20. Amend § 767.101 paragraphs (a)(2), (c)(2), (d)(3), and (g) by adding the words ''or socially disadvantaged farmer'' immediately after the words ''beginning farmer.''

**§ 767.151 [Amended]**

■ 21. Amend § 767.151 as follows:

■ a. In paragraphs (a), (b), and (d) add the words ''or socially disadvantaged farmers'' immediately after ''beginning farmers'' and

■ b. In paragraph (c) add the words ''or socially disadvantaged farmer'' immediately after the words ''beginning farmer.''

**§ 767.152 [Amended]**

■ 22. Amend § 767.152 paragraph (a) by adding the words ''or socially disadvantaged farmer'' immediately after the words ''beginning farmer.''

**§ 767.153 [Amended]**

■ 23. Amend § 767.153 paragraph (b)(3) by removing the words ''non-beginning farmer purchasers'' and adding, in their place, the words ''purchasers who are

not beginning farmers or socially disadvantaged farmers.''

Signed at Washington, DC, on December 2, 2008.

**Glen L. Keppy,**

*Acting Administrator, Farm Service Agency.*

[FR Doc. E8–28903 Filed 12–5–08; 8:45 am]

**BILLING CODE 3410–05–P**

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

### 7 CFR Part 946

**[Docket No. AMS–FV–08–0037; FV08–946–2 FR]**

## Irish Potatoes Grown in Washington; Modification of Late Payment and Interest Charge Regulation

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This rule modifies the late payment and interest charge regulation prescribed under the Washington potato marketing order. The marketing order regulates the handling of Irish potatoes grown in Washington, and is administered locally by the State of Washington Potato Committee (Committee). This rule revises the date interest is charged on late assessment payments from 30 to 60 days from the billing date shown on the handler's assessment statement received from the Committee. This rule will contribute to the efficient operation of the marketing order by reducing billing for nominal late payment interest charges on handlers who pay within 60 days of the billing date, while continuing those interest charges necessary to encourage payment, thereby ensuring that adequate funds are available to cover the Committee's authorized expenses.

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

**FOR FURTHER INFORMATION CONTACT:** Teresa Hutchinson or Gary Olson, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Telephone: (503) 326–2724, Fax: (503) 326–7440, or e-mail: *Teresa.Hutchinson@usda.gov* or *GaryD.Olson@usda.gov*.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or e-mail: *Jay.Guerber@usda.gov*.

**SUPPLEMENTARY INFORMATION:** This final rule is issued under Marketing Order No. 946, as amended (7 CFR part 946), regulating the handling of Irish potatoes grown in Washington, hereinafter referred to as the ''order.'' The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

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

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This final rule modifies the late payment and interest charge regulation prescribed under the order. This rule revises the date interest is charged on late assessment payments from 30 to 60 days from the billing date shown on the handler's assessment statement received from the Committee. This rule will contribute to the efficient operation of the order by reducing the number of nominal billings for late payment interest charges on handlers who pay within 60 days of the billing date, while continuing those interest charges necessary to encourage payment, thereby ensuring that adequate funds are available to cover the Committee's authorized expenses.

The Washington potato marketing order provides authority for the Committee, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Committee are producers and handlers of Washington potatoes. They are familiar with the Committee's needs and the costs for goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate and the authority to recommend late payment charges or interest charges on late payment, are formulated and discussed at a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

Section 946.41 of the order specifies that if handlers do not pay their assessments within the time prescribed by the Committee, the assessments may be increased by a late payment charge or an interest charge, or both, at rates prescribed by the Committee with approval of USDA.

Prior to this regulatory change, section 946.141 of the order's administrative rules and regulations prescribed that the Committee impose a monthly interest charge of one percent of the unpaid balance on any handler who fails to pay his or her assessment within thirty days of the billing date. The interest charge regulation has been effective since May 25, 1995 (60 FR 27683). At that time, the committee expressed difficulty with handlers that were continually late with their assessment payments and recommended the interest charge to be incurred 30 days after the billing date. It was believed that the charges were high enough to encourage timely payment and that this would be an effective means to ensure the Committee had adequate funds to administer the program.

The Committee unanimously recommended this rule during a video conference meeting held on April 16, 2008, followed by an unanimous mail vote. The Committee has determined that most handlers pay their assessments within 60 days but there are a few that pay later than 60 days. The interest billing that occurs 30 days after the billing date has proven to be administratively cumbersome as the amounts billed are nominal amounts and many times the handler's payment is received shortly after the bill including interest is mailed.

As an example, the Committee's budget for the current fiscal year (2008–2009) is $38,600 and estimated assessment income is $35,000. Since there are approximately 43 handlers, the average each handler will pay in assessments is approximately $814. Committee records indicate that for the most recent fiscal year, there were 316 invoices billed to handlers. The average amount on an invoice was $110.44, with

a high of $626.54 and a low of $0.18. Therefore, the interest amount owed on a payment that is 30 days late, but not more than 60, would often be less than a dollar, rarely more than five dollars. The Committee believes that handlers that pay later than 60 days would be considered a greater risk for nonpayment than handlers who pay within 60 days.

The Committee recommended retaining § 946.141, but recommended modifying the regulation by providing an additional 30 days for handlers to pay. By waiting until 60 days past the billing date to charge interest on late assessment payments, the Committee will only have to charge interest to the few handlers who do not pay within 60 days. The Committee believes the interest charge applied after 60 days will continue to encourage handlers to pay promptly.

**Final Regulatory Flexibility Analysis**

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

Currently, there are approximately 43 handlers of Washington potatoes who are subject to regulation under the marketing order and approximately 267 potato producers in the regulated area. Small agricultural service firms are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than $7,000,000, and small agricultural producers are defined as those having annual receipts of less than $750,000.

During the 2006–2007 marketing year, 9,932,874 hundredweight of Washington potatoes were inspected under the order and sold into the fresh market by 43 handlers, according to Committee data. The Committee reports that an industry consensus estimate of an average fresh potato f.o.b. price is $8.45 per hundredweight. Multiplying the 2006–2007 fresh shipments of 9,932,874 hundredweight by the average f.o.b. price of $8.45 yields a handler-level fresh market crop value of $83,932,785. Dividing $83,933,785 by 43 handlers gives an average annual sales value per handler estimate of about $1,951,949. The Committee estimates that 41, or about 95 percent of these 43 handlers, had annual receipts of less than $7,000,000.

A comparable computation can be made to estimate annual average revenue per producer. Based on information provided by the National Agricultural Statistics Service, the 2006 season average producer price for Washington potatoes was $6.25 per hundredweight. Multiplying the 2006–2007 fresh shipments of 9,932,874 hundredweight by the average producer price of $6.25 provides a producer-level fresh market crop value of $62,080,463. Dividing $62,080,463 by 267 Washington potato producers yields an average annual fresh market sales value per producer of approximately $232,511.

In view of the foregoing, it can be concluded that the majority of the Washington potato producers and handlers may be classified as small entities.

This final rule changes the date interest is charged on late assessment payments from 30 to 60 days past the billing date. This rule will contribute to the efficient operation of the marketing order by reducing billing for nominal late payment interest charges on handlers who pay within 60 days of the billing date, while continuing those interest charges necessary to encourage payment, thereby ensuring that adequate funds are available to cover the Committee's authorized expenses.

The authority for late payment and interest charges is provided in § 946.41 of the order. Section 946.141 of the order's administrative rules and regulations prescribes the amount of interest charged and when interest charges are imposed.

This change is expected to reduce the cost to administer the order.

Regarding the impact of this rule on affected entities, modification of the late payment and interest charge regulation is expected to benefit handlers. Most handlers pay their assessments within 60 days of the billing date. Only a few handlers pay later than 60 days. Imposing the interest charge on late assessment payments at 60 days instead of 30 days past due will allow the Committee to operate more efficiently by only billing after 60 days to handlers whose late payments are considered more serious and a greater risk. The benefits of this rule are not expected to be disproportionately greater or lesser for small entities than large entities.

The Committee discussed several alternatives to this recommendation, including not changing the date interest charges would be imposed and suspending the entire section. However, the Committee believed that it is important that interest charges be continued to encourage handlers to pay assessments in a timely manner. Further, the additional 30 days should allow adequate time to receive assessment payments by mail and allow the Committee to reduce administrative costs.

This final rule will not impose any additional reporting or recordkeeping requirements on either small or large potato handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

As noted in the initial regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule.

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

In addition, the Committee's meeting was widely publicized throughout the Washington potato industry and all interested persons were invited to participate in Committee deliberations. Like all Committee meetings, the April 16, 2008, meeting was a public meeting and all entities, both large and small, were able to express views on this issue.

A proposed rule concerning this action was published in the **Federal Register** on October 20, 2008 (73 FR 62215). Copies of the rule were mailed or sent via facsimile to all Committee members and potato handlers. The rule was also made available through the Internet by USDA and the Office of the Federal Register. A 15-day comment period ending November 4, 2008, was provided to allow interested persons to respond to the proposal. No comments were received.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateN&page=MarketingOrdersSmallBusinessGuide*. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant matter presented, including the

information and recommendation submitted by the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

It is further found that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** (5 U.S.C. 553) because handlers are already being billed for assessments and this rule will allow an additional 30 days to remit assessment payments. Further, handlers are aware of this rule, which was recommended at a public meeting. Also, a 15-day comment period was provided for in the proposed rule.

**List of Subjects in 7 CFR Part 946**

Marketing agreements, Potatoes, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR part 946 is amended as follows:

## PART 946—IRISH POTATOES GROWN IN WASHINGTON

■ 1. The authority citation for 7 CFR part 946 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

■ 2. Section 946.141 is revised to read as follows:

### § 946.141 Late payment and interest charge.

The Committee shall impose an interest charge on any handler who fails to pay his or her assessment within sixty (60) days of the billing date shown on the handler's assessment statement received from the Committee. The interest charge shall, after 60 days, be one percent of the unpaid assessment balance. In the event the handler fails to pay the delinquent assessment, the one percent interest charge shall be applied monthly thereafter to the unpaid balance, including any accumulated unpaid interest. Any amount paid by a handler as an assessment, including any charges imposed pursuant to this paragraph, shall be credited when the payment is received in the Committee office.

Dated: December 3, 2008.

**James E. Link,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. E8–29045 Filed 12–5–08; 8:45 am]

**BILLING CODE 3410–02–P**

## DEPARTMENT OF COMMERCE

## Bureau of Industry and Security

## 15 CFR Part 760

**[Docket No. 080220216–81424–03]**

**RIN 0694–AD59**

## Conforming Changes to Certain End-User/End-Use Based Controls in the EAR; Clarification of the Term ''Transfer'' and Related Terms as Used in the EAR; Correction

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

**ACTION:** Correcting amendment.

**SUMMARY:** The Bureau of Industry and Security (BIS) published a final rule in the **Federal Register** on Tuesday, November 18, 2008 (73 FR 68321) that amended the Export Administration Regulations (EAR) to, among other things, clarify that the terms ''transferred'' and ''transfer'', in the context of two sections of the EAR, meant ''assigned to'' and ''assignment'', respectively. That final rule contained one inadvertent error in the amendatory instruction used for revising one of those two sections. This error in the amendatory instruction led to one sentence of the revised regulatory text to not be revised as was intended in the regulatory text of that final rule. This document corrects that amendatory instruction error by revising that one sentence from that section.

**DATES:** *Effective Date:* This rule is effective: December 8, 2008.

**ADDRESSES:** Written comments on this rule may be sent to the **Federal Register** eRulemaking Portal: *http://www.regulations.gov*, or by e-mail to *publiccomments@bis.doc.gov*. Include RIN 0694–AD59 in the subject line of the message. Comments may be submitted by mail or hand delivery to Timothy Mooney, Office of Exporter Services, Regulatory Policy Division, Bureau of Industry and Security, U.S. Department of Commerce, 14th St. & Pennsylvania Avenue, NW., Room H2705, Washington, DC 20230, ATTN: RIN 0694–AD59; or by fax to (202) 482–3355.

Send comments regarding the collection of information 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 Regulatory Policy Division, Bureau of Industry and Security, U.S. Department of Commerce, 14th St. & Pennsylvania Avenue, NW., Room H2705, Washington, DC 20230.

**FOR FURTHER INFORMATION CONTACT:** Timothy Mooney, Office of Exporter Services, Bureau of Industry and Security, U.S. Department of Commerce; by telephone: (202) 482–2440; or by fax: 202–482–3355.

**SUPPLEMENTARY INFORMATION:**

### Background

On November 18, 2008, the final rule, Conforming Changes to Certain End-User/End-Use Based Controls in the EAR; Clarification of the Term ''Transfer'' and Related Terms as Used in the EAR was published in the **Federal Register** (73 FR 68321). The amendments in that rule included a revision to paragraph (b)(4)(viii) in Section 760.1 (Definitions). The November 18 rule intended to revise the first three sentences of paragraph (b)(4)(viii), but because of an inadvertent error in the amendatory instruction the third sentence of that paragraph was not revised as was intended in the regulatory text of that final rule. This rule corrects that amendatory instruction error by revising the third sentence of paragraph (b)(4)(viii).

*Savings Clause*

Shipments of items removed from eligibility for a License Exception or export or reexport without a license (NLR) as a result of this regulatory action that were on dock for loading, on lighter, laden aboard an exporting or reexporting carrier, or en route aboard a carrier to a port of export or reexport, on November 18, 2008, pursuant to actual orders for export or reexport to a foreign destination, may proceed to that destination under the previous eligibility for a License Exception or export or reexport without a license (NLR) so long as they are exported or reexported before December 30, 2008. Any such items not actually exported or reexported before midnight, on December 30, 2008, require a license in accordance with this rule.

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 final 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. This final rule is expected to have a minimal increase on the total number of license applications submitted to BIS. Send comments regarding these burden estimates or any other aspect of these collections of information, including suggestions for reducing the burden, to Jasmeet Seehra, Office of Management and Budget (OMB), and to the Regulatory Policy Division, Bureau of Industry and Security as indicated in the **ADDRESSES** section of this rule.

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. Although the formal comment period closed on June 17, 2008, public comments on this regulation are welcome on a continuing basis. Comments should be submitted to one of the addresses listed in the **ADDRESSES** section of the preamble of this final rule.

**List of Subjects in 15 CFR Part 760**

Boycotts, Exports, Reporting and recordkeeping requirements.

■ Accordingly, part 760 of the Export Administration Regulations (15 CFR parts 730–774) is corrected by making the following correcting amendment:

## PART 760—[CORRECTED]

■ 1. The authority citation for 15 CFR part 760 continues 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 760.1 is amended by revising the third sentence of paragraph (b)(4)(viii) to read as follows:

**§ 760.1 Definitions.**

* * * * *

(b) * * *

(4) * * *

(viii) * * * A, a U.S. national who will reside in Y, has agreed to the assignment provided he is able to retain his insurance, pension, and other benefits. * * *

* * * * *

Dated: December 3, 2008.

**Bernard Kritzer,**

*Director, Office of Exporter Services.*

[FR Doc. E8–29012 Filed 12–5–08; 8:45 am]

BILLING CODE 3510–33–P

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

### 21 CFR Part 101

**[Docket No. FDA–2000–N–0011] (formerly Docket No. 2000N–1596)**

### Uniform Compliance Date for Food Labeling Regulations

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is establishing January 2, 2012, as the uniform compliance date for food labeling regulations that are issued between January 1, 2009, and December 31, 2010. (January 1, 2012, falls on a Sunday; therefore, the uniform compliance date will be January 2, 2012). FDA periodically announces uniform compliance dates for new food labeling requirements to minimize the economic impact of label changes. On December 21, 2006, FDA established January 1, 2010, as the uniform compliance date for food labeling regulations issued between January 1, 2007, and December 31, 2008.

**DATES:** This rule is effective December 8, 2008. Submit written or electronic comments by February 23, 2009.

**ADDRESSES:** You may submit comments, identified by Docket No. FDA–2000–N–0011, formerly Docket No. 2000N–1596, by any of the following methods:

*Electronic Submissions*

Submit electronic comments in the following way:

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

*Written Submissions*

Submit written submissions in the following ways:

• FAX: 301–827–6870.

• Mail/Hand delivery/Courier [For paper, disk, or CD–ROM submissions]: Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

To ensure more timely processing of comments, FDA is no longer accepting comments submitted to the agency by e-mail. FDA encourages you to continue to submit electronic comments by using the Federal eRulemaking Portal, as described previously, in the **ADDRESSES** portion of this document under *Electronic Submissions*.

*Instructions*: All submissions received must include the agency name and docket number for this rulemaking. All comments received may be posted without change to *http://www.regulations.gov*, including any personal information provided. For additional information on submitting comments, see the ''Comments'' paragraphs of the **SUPPLEMENTARY INFORMATION** section of this document.

*Docket*: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** Louis B. Brock, Center for Food Safety and Applied Nutrition (HFS–24), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–2378.

**SUPPLEMENTARY INFORMATION:** FDA periodically issues regulations requiring changes in the labeling of food. If the effective dates of these labeling changes were not coordinated, the cumulative economic impact on the food industry of having to respond separately to each change would be substantial. Therefore, the agency periodically has announced uniform compliance dates for new food labeling requirements (see, e.g., the **Federal Registers** of October 19, 1984

(49 FR 41019), December 24, 1996 (61 FR 67710), December 27, 1996 (61 FR 68145), December 23, 1998 (63 FR 71015), November 20, 2000 (65 FR 69666), and December 31, 2002 (67 FR 79851), and December 21, 2006 (71 FR 76599)). Use of a uniform compliance date provides for an orderly and economical industry adjustment to new labeling requirements by allowing sufficient lead time to plan for the use of existing label inventories and the development of new labeling materials. This policy serves consumers' interests as well because the cost of multiple short-term label revisions that would otherwise occur would likely be passed on to consumers in the form of higher prices.

The agency has determined under 21 CFR 25.30(k) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

This final rule contains no collections of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

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

The establishment of a uniform compliance date does not in itself lead to costs or benefits. We will assess the costs and benefits of the uniform compliance date in the regulatory impact analyses of the labeling rules that take effect at that date.

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant economic impact of a rule on small entities. Because the final rule does not impose compliance costs on small entities, the agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

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

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

This action is not intended to change existing requirements for compliance dates contained in final rules published before January 1, 2009. Therefore, all final FDA regulations published in the **Federal Register** before January 1, 2009, will still go into effect on the date stated in the respective final rule.

The agency generally encourages industry to comply with new labeling regulations as quickly as feasible, however. Thus, when industry members voluntarily change their labels, it is appropriate that they incorporate any new requirements that have been published as final regulations up to that time.

In rulemaking that began with publication of a proposal on April 15, 1996 (61 FR 16422), and ended with a final rule on December 24, 1996, FDA provided notice and an opportunity for comment on the practice of establishing uniform compliance dates by issuance of a final rule announcing the date. Receiving no comments objecting to this practice, FDA finds any further rulemaking unnecessary for establishment of the uniform compliance date. Nonetheless, under 21 CFR 10.40(e)(1), FDA is providing an opportunity for comment on whether this uniform compliance date should be modified or revoked.

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*.

The new uniform compliance date will apply only to final FDA food labeling regulations that require changes in the labeling of food products and that publish after January 1, 2009, and before December 31, 2010. Those regulations will specifically identify January 1, 2012, as their compliance date. All food products subject to the January 1, 2012, compliance date must comply with the appropriate regulations when initially introduced into interstate commerce on or after January 1, 2012. If any food labeling regulation involves special circumstances that justify a compliance date other than January 1, 2012, the agency will determine for that regulation an appropriate compliance date, which will be specified when the final regulation is published.

Dated: December 1, 2008.

**Jeffrey Shuren,**

*Associate Commissioner for Policy and Planning.*

[FR Doc. E8–28920 Filed 12–5–08; 8:45 am]

**BILLING CODE 4160–01–S**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 80

**[EPA–HQ–OAR–2008–0558; FRL–8742–6]**

**RIN 2060–AP17**

## Regulation of Fuel and Fuel Additives: Gasoline and Diesel Fuel Test Methods

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

**ACTION:** Direct final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is taking action to allow

refiners and laboratories to use more current and improved fuel testing procedures with twelve American Society for Testing and Materials (ASTM) analytical test methods. Once these test method changes are adopted, they will supersede the corresponding earlier versions of these test methods in EPA's motor vehicle fuel regulations. EPA is also taking action to allow an alternative test method for olefins in gasoline. As explained further below in the preamble of this document, EPA views these changes as non-controversial and we anticipate no adverse comment.

**DATES:** This rule is effective February 6, 2009 without further notice, unless EPA receives adverse comment by January 7, 2009. If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. Comments or a request for a public hearing must be received on or before January 7, 2009. The incorporation by reference of certain publications listed in this rule were approved by the Director of the Federal Register as of February 6, 2009.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2008–0558, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: a-and-r-Docket@epa.gov.*
- *Fax:* (202) 566–9744.
- *Mail:* ''EPA–HQ–OAR–2008–0558, Environmental Protection Agency, Mailcode: 2822T, 1301 Constitution Ave., NW., Washington, DC 20460.''
- *Hand Delivery:* EPA Headquarters Library, Room 3334, EPA West Building, 1301 Constitution Ave., NW., Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA–HQ–OAR–2008–0558. EPA's policy is that all comments will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional instructions on submitting comments, go to Unit 1.B of the **SUPPLEMENTARY INFORMATION** section of this document: *http://www.epa.gov/epahome/dockets.htm.*

*Docket:* All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air Docket, EPA Headquarters Library, Mail Code: 2822T, EPA West Building, 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 holidays. The telephone number for the Public Reading Room is (202) 566–1742, and the facsimile number for the Air Docket is (202) 566–9744.

**FOR FURTHER INFORMATION CONTACT:** Joe Sopata, Chemist, Environmental Protection Agency, 1200 Pennsylvania Ave., NW. (6406J), Washington, DC 20460; telephone number: (202) 343–9034; fax number: (202) 343–2801; e-mail address: *sopata.joe@epa.gov.*

**SUPPLEMENTARY INFORMATION:** The contents of today's preamble are listed in the following outline.

I. General Information
A. Does this Action Apply to Me?
B. What Should I Consider as I Prepare My Comments for EPA?
II. Rule Changes
A. Updating ASTM Test Methods to Their Most Recent Version
B. Alternative Test Method for Olefins in Gasoline
III. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act of 1995 (UMRA)
E. Executive Order 13123: Federalism
F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer Advancement Act
J. Executive Order 12898: Federal Actions to Address Environmental Justice and Minority Populations and Low-Income Populations
K. Congressional Review Act
IV. Statutory Provisions and Legal Authority

## I. General Information

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

Regulated categories and entities potentially affected by this proposed action include those involved with the production, importation, distribution, sale and storage of gasoline motor fuel and diesel motor fuel.

The table below is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this proposed action. This table lists the types of entities that EPA is now aware could be potentially regulated by this proposed action. Other types of entities not listed in the table could also be regulated. To determine whether an entity is regulated by this proposed action, one should carefully examine the existing regulations in 40 CFR part 80. If you have questions regarding the applicability of this proposed action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

| Category | NAICS codes [a] | SIC codes [b] | Examples of potentially regulated parties |
|---|---|---|---|
| Industry | 324110 | 2911 | Petroleum Refiners. |
| Industry | 54138 | 8734 | Testing Laboratories. |
| Industry | 422710<br>422720 | 5171<br>5172 | Gasoline Marketers and Distributors. |

[a] North American Industry Classification System (NAICS).
[b] Standard Industrial Classification (SIC) System code.

*B. What Should I Consider as I Prepare My Comments for EPA?*

1. *Submitting CBI.* Do not submit this information to EPA through EDOCKET, regulations.gov or e-mail. Clearly mark the part of 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 rulemaking by docket 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 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. Rule Changes

*A. Updating ASTM Test Methods to Their Most Recent Version*

Refiners, importers and oxygenate blenders producing gasoline and diesel motor vehicle fuel are required to test reformulated gasoline (RFG), conventional gasoline (CG) and diesel fuel for various fuel parameters including aromatics, benzene, distillation, olefins, Reid Vapor Pressure, oxygenate content and sulfur. American Society for Testing and Materials (ASTM) test method D2622 is currently the designated test method for measuring sulfur [1 2] in gasoline and diesel fuel at the 500 ppm sulfur standard. ASTM test methods D5453, D6920, D3120 and D7039 are currently alternative test methods for measuring sulfur [3 4 5 6] in gasoline. ASTM test methods D5453 and D6920 are also alternative test method for measuring sulfur [7] in diesel fuel at the 500 ppm sulfur standard. ASTM D1319 is currently the designated test method for measuring olefins [8] in gasoline and aromatics [9] in diesel fuel and is also allowed as an alternative test method for measuring aromatics [10] in gasoline. ASTM test method D5599 is currently the designated test method for measuring oxygenates [11] in gasoline. ASTM test method D4815 is currently an alternative test method for measuring oxygenates [12] in gasoline. ASTM test method D5769 is currently the designated test method for measuring aromatics [13] in gasoline. ASTM test method D3606 is currently the designated test method for measuring benzene [14] in gasoline. ASTM test method D86 is currently the designated test method for measuring the distillation [15] of gasoline. ASTM test method D5191 is currently the designated test method for measuring the Reid Vapor Pressure [16] of gasoline.

Table 1 lists the designated analytical test methods and alternative analytical test methods which are being updated for parameters measured under RFG, CG, and diesel fuels program in today's action. The Agency has reviewed these updated ASTM test methods and we are in agreement with the revisions contained in them which will result in improvements in the utilization of these test methods for the regulated industry. We believe that the revisions in the test method changes in today's action are not significant changes that would cause a user of an older version of the same method to incur significant costs. All of the revisions were deemed necessary by ASTM so that improvements in the test method's procedures would ensure better operation for the user of the test method. Thus, EPA is updating the regulations for the following ASTM test methods: (1) ASTM D2622–05, the designated test method for measuring sulfur in RFG, CG, and alternative test method for diesel fuel at the 500 ppm sulfur standard, (2) ASTM D3120–06 $^{\varepsilon 1}$, alternative test method for sulfur in gasoline, (3) ASTM D5453–08a, alternative test method for sulfur in gasoline and diesel fuel at the 500 ppm sulfur standard, (4) ASTM D6920–07, alternative test method for sulfur in gasoline and diesel fuel at the 500 ppm sulfur standard, (5) ASTM D7039–07, alternative test method for sulfur in gasoline, (6) ASTM D1319–03 $^{\varepsilon 1}$, designated test method for measuring olefins in gasoline and aromatics in diesel fuel, as well as the alternative test method for measuring aromatics in gasoline, (7) ASTM D4815–04, alternative test method for measuring oxygenate content in gasoline, (8) ASTM D5599–00(2005), the designated test method for measuring oxygen content in gasoline, (9) ASTM D5769–04, the designated test method for measuring aromatics in gasoline, (10) ASTM D3606–07, the designated test method for measuring benzene in gasoline, (11)

[1] 40 CFR 80.46(a)(1).
[2] 40 CFR 80.580(b)(2).
[3] 40 CFR 80.46(a)(3)(i).
[4] 40 CFR 80.46(a)(3)(ii).
[5] 40 CFR 80.46(a)(3)(iii).
[6] 40 CFR 80.46(a)(3)(iv).
[7] 40 CFR 80.580(c)(2).
[8] 40 CFR 80.46(b).
[9] 40 CFR 80.2(z).
[10] 40 CFR 80.46(f)(3).
[11] 40 CFR 80.46(g)(1).
[12] 40 CFR 80.46(g)(2).
[13] 40 CFR 80.46(f)(1).
[14] 40 CFR 80.46(e).
[15] 40 CFR 80.46(d).
[16] 40 CFR 80.46(c).

ASTM D86–07b, the designated test method for measuring distillation properties of gasoline, and (12) ASTM D5191–07, the designated test method for measuring the Reid Vapor Pressure of gasoline.

TABLE 1—DESIGNATED & ALTERNATIVE ASTM ANALYTICAL TEST METHODS UNDER RFG, CG & DIESEL MOTOR VEHICLE FUEL PROGRAMS

| Fuel parameter | ASTM analytical test method |
|---|---|
| Sulfur (gasoline) | ASTM D2622–05, entitled ''Standard Test Method for Sulfur in Petroleum Products by Wavelength Dispersive X-Ray Fluorescence Spectrometry'' |
| Sulfur (500 ppm diesel) | ASTM D2622–05, entitled ''Standard Test Method for Sulfur in Petroleum Products by Wavelength Dispersive X-Ray Fluorescence Spectrometry'' |
| Sulfur (gasoline) | ASTM D5453–08a, entitled, ''Standard Test Method for Determination of Total Sulfur in Light Hydrocarbons, Spark Ignition Engine Fuel, Diesel Engine Fuel, and Engine Oil by Ultraviolet Fluorescence'' |
| Sulfur (500 ppm sulfur diesel) | ASTM D5453–08a, entitled, ''Standard Test Method for Determination of Total Sulfur in Light Hydrocarbons, Spark Ignition Engine Fuel, Diesel Engine Fuel, and Engine Oil by Ultraviolet Fluorescence'' |
| Sulfur (gasoline) | ASTM D6920–07, entitled, ''Standard Test Method for Total Sulfur in Naphthas, Distillates, Reformulated Gasolines, Diesels, Biodiesels, and Motor Fuels by Oxidative Combustion and Electrochemical Detection'' |
| Sulfur (500 ppm sulfur diesel) | ASTM D6920–07, entitled, ''Standard Test Method for Total Sulfur in Naphthas, Distillates, Reformulated Gasolines, Diesels, Biodiesels, and Motor Fuels by Oxidative Combustion and Electrochemical Detection'' |
| Sulfur (gasoline) | ASTM D3120–06$^{\varepsilon 1}$, entitled, ''Standard Test Method for Trace Quantities of Sulfur in Light Petroleum Hydrocarbons by Oxidative Microcoulometry'' |
| Sulfur (gasoline) | ASTM D7039–07, entitled, ''Standard Test Method for Sulfur in Gasoline and Diesel Fuel by Monochromatic Wavelength Dispersive X-ray Fluorescence Spectrometry'' |
| Oxygen content (gasoline) | ASTM D5599–00(2005), entitled, ''Standard Test Method for Determination of Oxygenates in Gasoline by Gas Chromatography and Oxygen Selective Flame Ionization Detection'' |
| Oxygen content (gasoline) | ASTM D4815–04, entitled ''Standard Test Method for Determination of MTBE, ETBE, TAME, DIPE, tertiary-Amyl Alcohol and $C_1$ to $C_4$ Alcohols in Gasoline by Gas Chromatography'' |
| Olefins (gasoline) | ASTM D1319–03$^{\varepsilon 1}$, entitled ''Standard Test Method for Hydrocarbon Types in Liquid Petroleum Products by Fluorescent Indicator Adsorption'' |
| Aromatics (gasoline and diesel) | ASTM D1319–03$^{\varepsilon 1}$, entitled, ''Standard Test Method for Hydrocarbon Types in Liquid Petroleum Products by Fluorescent Indicator Absorption'', for diesel fuel, this method is the designated test method, for gasoline, this method is an alternative test method and if used as an alternative method, its results must be correlated to ASTM D5769–04. |
| Aromatics (gasoline) | ASTM D5769–04, entitled, ''Standard Test Method for Determination of Benzene, Toluene, and Total Aromatics in Finished Gasolines by Gas Chromatography/Mass Spectrometry'' |
| Benzene (gasoline) | ASTM D3606–07, entitled, ''Standard Test Method for Determination of Benzene and Toluene in Finished Motor and Aviation Gasoline by Gas Chromatography'' |
| Distillation (gasoline) | ASTM D86–07b, entitled, ''Standard Test Method for Distillation of Petroleum Products at Atmospheric Pressure'' |
| Reid Vapor Pressure (gasoline) | ASTM D5191–07, entitled, ''Standard Test Method for Vapor Pressure of Petroleum Products (Mini-Method)'' |

*B. Alternative Test Method for Olefins in Gasoline*

Refiners, importers and oxygenate blenders producing gasoline are required to test RFG and CG for various fuel parameters including olefins. The test method for determining olefin content is specified in the regulation.

Recently, the American Petroleum Institute (API) requested in a letter to EPA that ASTM D6550–05 be designated by EPA as an alternative test method in the regulations for olefins [15] in gasoline. EPA has evaluated API's request on this test method issue and agrees. Thus, EPA is taking action today to allow ASTM D6550–05 as an alternative test method in the regulations for olefins in gasoline, provided that its results are correlated to ASTM D1319. The allowance of this additional alternative test method for olefins in gasoline will provide the regulated community additional flexibility in meeting their testing requirements.

In the ''Proposed Rules'' section of today's **Federal Register**, we are publishing a proposed rule that matches the substance of this direct final rule. If the Agency receives adverse comment or a request for public hearing by January 7, 2009, we will withdraw the direct final rule by publishing a timely withdrawal notice in the **Federal Register**. If the Agency receives no adverse comment or a request for public hearing by January 7, 2009, these test method changes will be effective sixty (60) days after publication of the final rule in the **Federal Register**. We are confident that sixty (60) days is sufficient lead time for industry to become familiar and implement these ASTM test methods for the applications mentioned above.

## III. Statutory and Executive Order Reviews

*A. Executive Order 12866: Regulatory Planning and Review*

This action is not a ''significant regulatory action'' under the terms of Executive Order (EO) 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the EO.

*B. Paperwork Reduction Act*

This direct final rule does not impose any new information collection burden. However, the Office of Management and Budget (OMB), under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, has approved the information collection requirements contained in the final RFG and anti-dumping rulemaking and gasoline sulfur control rulemaking, and has

[15] See Air Docket #EPA–HQ–OAR–2008–0558–0001.

assigned OMB control number 2060–0277. OMB, under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, has also approved the information collection requirements contained in the final Tax Exempt (Dyed) Highway Diesel Fuel rulemaking, and has assigned OMB control number 2060–0308. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

*C. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's direct final rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. The impact of concern is any significant *adverse* economic impact on small entities since the primary purpose of the regulatory flexibility analysis is to identify and address regulatory alternatives ''which minimize any significant economic impact of the rule on small entities.'' 5 U.S.C. 603 and 604.

After considering the economic impacts of today's direct final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant *adverse* economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the rule on small entities.'' 5 U.S.C. 603 and 604. Thus an Agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

All of the test method updates in this proposed rule will improve the performance and/or utilization by industry of ASTM standard test methods. This direct final rule does not impose a regulatory burden on anyone, including small businesses. Instead, this direct final rule will have a positive impact by improving performance of the industry, including small businesses, by enabling them to use more current voluntary consensus-based standard test methods. In addition, the allowance of ASTM D 6550–05 will provide additional flexibility to the regulated community, including small businesses, in meeting olefins in gasoline testing requirements. We have therefore concluded that today's direct final rule will relieve regulatory burden for all effected small entities.

*D. Unfunded Mandates Reform Act of 1995 (UMRA)*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538, requires Federal agencies, unless otherwise prohibited by law, to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Federal agencies must also develop a plan to provide notice to small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates and must inform, educate, and advise small governments on compliance with the regulatory requirements.

This rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. All of the test method updates in today's action will improve the performance and/or utilization by industry of the test methods already allowed by our regulations. The allowance of ASTM D 6550–05 will provide additional flexibility to the regulated community in meeting olefins in gasoline testing requirements. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA. This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments.

*E. Executive Order 13132: Federalism*

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), 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 direct final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. All of the test method updates in today's action will improve the performance and/or utilization by industry of ASTM standard test methods. The allowance of ASTM D 6550–05 will provide additional flexibility to the regulated community in meeting olefins in gasoline testing requirements. Thus, Executive Order 13132 does not apply to this direct final rule.

*F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 6, 2000). This action applies to gasoline refiners, blenders and importers that supply gasoline or diesel fuel. All of the test method updates in today's action will improve the performance and/or utilization by industry of the test methods. The allowance of ASTM D6500–05 will provide additional flexibility to the regulated community in meeting olefins in gasoline testing requirements. Thus, Executive Order 13175 does not apply to this action.

*G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risk*

EPA interprets EO 13045 (62 F.R. 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

*H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This action is not subject to Executive Order 13211 (66 FR 18355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866.

*I. National Technology Transfer Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law No. 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This direct final rule involves technical standards. EPA will adopt ASTM standards as described in Units II.A, and II.B of the **SUPPLEMENTARY INFORMATION** section of this document. All technical standards included in today's rule are standards developed by ASTM, a voluntary consensus standards body, and thus raises no issues under the NTTAA. The ASTM standards in today's action may be obtained from ASTM International at 100 Barr Harbor Drive, PO Box C700, West Conshohocken, PA 19428–2959, 610–832–9585 (phone), 610–832–9555 (fax), or *service@astm.org* (e-mail); or through the ASTM Web site (*http://www.astm.org*).

*J. Executive Order 12898: Federal Actions To Address Environmental Justice and Minority Populations and Low-Income Populations*

Executive Order (EO) 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. All of the test method updates in this direct final rule will improve the performance and/or utilization by industry of the test methods. The allowance of ASTM D6500–05 will provide additional flexibility to the regulated community in meeting olefins in gasoline testing requirements. This final rule amendment does not relax control measures on sources regulated by the rule and therefore will not cause emission increases from these sources.

*K. Congressional Review Act*

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 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 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). This rule will be effective February 6, 2009.

## IV. Statutory Provisions and Legal Authority

Statutory authority for today's rule comes from sections 211(c), 211(i) and 211(k) of the CAA (42.U.S.C. 7545(c) and (k)). Section 211(c) and 211(i) allows EPA to regulate fuels that contribute to air pollution which endangers public health or welfare, or which impairs emission control equipment. Section 211(k) prescribes requirements for RFG and CG and requires EPA to promulgate regulations establishing these requirements. Additional support for the fuels controls in today's rule comes from sections 114(a) and 301(a) of the CAA.

## List of Subjects in 40 CFR Part 80

Environmental protection, Air pollution control, Fuel additives, Gasoline, Diesel, Imports, Incorporation by reference, Motor vehicle pollution, Reporting and recordkeeping requirements.

Dated: November 13, 2008.

**Stephen L. Johnson,**

*Administrator.*

■ For the reasons set forth in the preamble, part 80 of title 40, chapter I of the Code of Federal Regulations is amended as follows:

## PART 80—REGULATION OF FUELS AND FUEL ADDITIVES

■ 1. The authority citation for part 80 continues to read as follows:

**Authority:** 42 U.S.C. 7414, 7521(l) ,7545 and 7601(a).

■ 2. Section 80.2 is amended by revising paragraph (z) to read as follows:

### § 80.2 Definitions.

* * * * *

(z) *Aromatic content* is the aromatic hydrocarbon content in volume percent as determined by ASTM standard test method D1319–03 $^{\varepsilon 1}$, entitled, ''Standard Test Method for Hydrocarbon Types in Liquid Petroleum Products by Fluorescent Indicator Adsorption''. ASTM standard test method D1319–03$^{\varepsilon 1}$, approved November 1, 2003, is incorporated by reference. This incorporation by reference was approved by the Director of the Federal Register in accordance 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from the American Society for Testing and Materials, 100 Barr Harbor Dr., West Conshohocken, PA 19428–2959, or by contacting ASTM customer service at 610–832–9585, or by contacting the e-mail address of *service@astm.org* from the ASTM Web site of *http://www.astm.org.* For further information on this test method, please contact the Environmental Protection Agency at 734–214–4582. Copies may be inspected at the Air Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC, or at the National Archives and Records Administration (NARA). The telephone number for the Air Docket Public Reading Room is (202) 566–1742. For information on the availability of this material at NARA, call 202–741–6030 or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

* * * * *

## Subpart D—[Amended]

■ 3. Section 80.46 is amended as follows:

■ a. By revising paragraphs (a)(1), (a)(3)(i), (a)(3)(ii), (a)(3)(iii) and (a)(3)(iv).

■ b. Revising paragraph (b).

■ c. Revising paragraph (c).
■ d. Revising paragraph (d).
■ e. Revising paragraph (e)(1).
■ f. Revising paragraphs (f)(1) and (f)(3)(i).
■ g. Revising paragraphs (g)(1) and (g)(2)(i).
■ h. Revising paragraph (h).

**§ 80.46 Measurement of reformulated gasoline fuel parameters.**

(a) * * *

(1) The sulfur content of gasoline must be determined by use of American Society for Testing and Materials (ASTM) standard method D2622 (incorporated by reference, see paragraph (h) of this section) or by one of the alternative methods specified in paragraph (a)(3) of this section.

(3) * * *

(i) ASTM standard method D5453 (incorporated by reference, see paragraph (h) of this section) or

(ii) ASTM standard method D6920 (incorporated by reference, see paragraph (h) of this section) or

(iii) ASTM standard method D3120 (incorporated by reference, see paragraph (h) of this section) or

(iv) ASTM standard method D7039 (incorporated by reference, see paragraph (h) of this section).

* * * * *

(b) *Olefins.* Olefin content must be determined by use of the following methods:

(1) Olefin content must be determined by use of ASTM standard method D1319 (incorporated by reference, see paragraph (h) of this section).

(2)(i) Any refiner or importer may determine olefin content using ASTM standard method ASTM D6550 (incorporated by reference, see paragraph (h) of this section) for purposes of meeting any testing requirement involving olefin content; provided that the refiner or importer test result is correlated with the method specified in paragraph (b)(1) of this section using a formula to convert the result in mass percent to volume percent as follows: Volume % = 0.857 × Mass %.

(ii) [Reserved]

(c) *Reid vapor pressure (RVP).* Reid vapor pressure must be determined using ASTM standard test method ASTM D5191 (incorporated by reference, see paragraph (h) of this section), except that the following correlation equation must be used:

RVP psi = (0.956 * X) − 0.347

RVP kPa = (0.956 * X) − 2.39

(d) *Distillation.* Distillation parameters must be determined using ASTM standard test method D86 (incorporated by reference, see paragraph (h) of this section).

(e) *Benzene.* (1) Benzene content must be determined using ASTM standard test method ASTM D3606–07 (incorporated by reference, see paragraph (h) of this section), except that.

* * * * *

(f)(1) Aromatic content must be determined using ASTM D5769 (incorporated by reference, see paragraph (h) of this section), except that the sample chilling requirements in section 8 of this standard method are optional.

* * * * *

(3)(i) Any refiner or importer may determine aromatics content using ASTM standard method D1319 (incorporated by reference, see paragraph (h) of this section) for purposes of meeting any testing requirement involving aromatics content; provided that

* * * * *

(g) *Oxygen and oxygenate content analysis.* (1) Oxygen and oxygenate content must be determined using ASTM standard method D5599 (incorporated by reference, see paragraph (h) of this section).

(2)(i) When oxygenates present are limited to MTBE, ETBE, TAME, DIPE, tertiary-amyl alcohol and $C_1$ to $C_4$ alcohols, any refiner, importer, or oxygenate blender may determine oxygen and oxygen content using ASTM standard method D4815 (incorporated by reference, see paragraph (h) of this section) for purposes of meeting any testing requirement; provided that:

* * * * *

(h) *Materials Incorporated by reference.* The Director of the Federal Register approved the incorporation by reference of the documents listed in this section as prescribed in 5 U.S.C. 552(a) and 1 CFR 51. Anyone may inspect copies at the U.S. EPA, Air and Radiation Docket and Information Center, 1301 Constitution Ave., NW., Room B102, EPA West Building, Washington, DC, 20460, under EPA docket ID Number EPA–HQ–OAR–2008–0558, or at the National Archives and Records Administration (NARA). The telephone number for the Air Docket Public Reading Room is (202) 566–1742. For information on the availability of this material at NARA, call 202–741–6030 or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.* For further information on these test methods, please contact the Environmental Protection Agency at 734–214–4582.

(1) *ASTM material.* Anyone may purchase copies of these materials from the American Society for Testing and Materials (ASTM), 100 Barr Harbor Dr., West Conshohocken, PA 19428–2959, or by contacting ASTM customer service at 610–832–9585, or by contacting the email address of *service@astm.org* from the ASTM Web site of *http://www.astm.org.*

(i) ASTM standard method D3606–07 (''ASTM D3606''), Standard Test Method for Determination of Benzene and Toluene in Finished Motor and Aviation Gasoline by Gas Chromatography, approved November 1, 2007.

(ii) ASTM standard method D1319–03 $^{\varepsilon 1}$ (''ASTM D1319''), Standard Test Method for Hydrocarbon Types in Liquid Petroleum Products by Fluorescent Indicator Adsorption, approved November 1, 2003.

(iii) ASTM standard method D6550–05 (''ASTM D6550''), Standard Test Method for Determination of Olefin Content of Gasolines by Supercritical-Fluid Chromatography, approved November 1, 2005.

(iv) ASTM standard method D4815–04 (''ASTM D4815''), Standard Test Method for Determination of MTBE, ETBE, TAME, DIPE, tertiary-Amyl Alcohol and $C_1$ to $C_4$ Alcohols in Gasoline by Gas Chromatography, approved November 1, 2004.

(v) ASTM standard method D2622–05 (''ASTM D2622''), Standard Test Method for Sulfur in Petroleum Products by Wavelength Dispersive X-Ray Fluorescence Spectrometry, approved November 1, 2005.

(vi) ASTM standard method D3246–96 (''ASTM D3246''), Standard Test Method for Sulfur in Petroleum Gas by Oxidative Microcoulometry.

(vii) ASTM standard method D5191–07 (''ASTM D5191''), Standard Test Method for Vapor Pressure of Petroleum Products (Mini Method), approved May 1, 2007.

(viii) ASTM standard method D5599–00(2005) (''ASTM D5599''), Standard Test Method for Determination of Oxygenates in Gasoline by Gas Chromatography and Oxygen Selective Flame Ionization Detection, approved November 1, 2005.

(ix) ASTM standard method D5769–04 (''ASTM D5769''), Standard Test Method for Determination of Benzene, Toluene, and Total Aromatics in Finished Gasolines by Gas Chromatography/Mass Spectrometry, approved May 1, 2004.

(x) ASTM standard method D86–07b (''ASTM D86''), Standard Test Method for Distillation of Petroleum Products at Atmospheric Pressure, approved November 15, 2007.

(xi) ASTM standard method D5453–08a (''ASTM D5453''), Standard Test Method for Determination of Total Sulfur in Light Hydrocarbons, Spark Ignition Engine Fuel, Diesel Engine Fuel, and Engine Oil by Ultraviolet Fluorescence, approved February 1, 2008.

(xii) ASTM standard method D6920–07 (''ASTM D6920''), Standard Test Method for Total Sulfur in Naphthas, Distillates, Reformulated Gasolines, Diesels, Biodiesels, and Motor Fuels by Oxidative Combustion and Electrochemical Detection, approved December 1, 2007.

(xiii) ASTM standard method D3120–06$^{\varepsilon 1}$ (''ASTM D3120''), Standard Test Method for Trace Quantities of Sulfur in Light Petroleum Hydrocarbons by Oxidative Microcoulometry, approved December 1, 2006.

(xiv) ASTM standard method D7039–07 (''ASTM D7039''), Standard Test Method for Sulfur in Gasoline and Diesel Fuel by Monochromatic Wavelength Dispersive X-ray Fluorescence Spectrometry, approved May 1, 2007.

(xv) ASTM standard method D6667–01 (''ASTM D6667''), Standard Test Method for Determination of Total Volatile Sulfur in Gaseous Hydrocarbons and Liquefied Petroleum Gases by Ultraviolet Fluorescence.

(xvi) ASTM standard method D4468–85 (reapproved 2000) (''ASTM D4468''), Standard Test Method for Total Sulfur in Gaseous Fuels by Hydrogenolysis and Rateometric Colorimetry.

(2) [Reserved]

## Subpart I—[Amended]

■ 4. Section 80.580 is amended as follows:

■ a. By revising paragraph (b)(2)

■ b. By revising paragraph (c)(2)(i).

■ c. By revising paragraphs (e).

### § 80.580 What are the sampling and testing methods for sulfur?

* * * * *

(b) * * *

(2) For motor vehicle diesel fuel and diesel fuel additives subject to the 500 ppm sulfur standard of § 80.520(c), and NRLM diesel fuel subject to the 500 ppm sulfur standard of § 80.510(a)(1), sulfur content may be determined using ASTM D2622 (incorporated by reference, see paragraph (e) of this section).

* * * * *

(c) * * *

(2) * * *

(i) For motor vehicle diesel fuel and diesel fuel additives subject to the 500 ppm sulfur standard of § 80.520(c), and for NRLM diesel fuel subject to the 500 ppm sulfur standard of § 80.510(a), sulfur content may be determined using ASTM D4294, ASTM D5453, or ASTM D6920 (all incorporated by reference, see paragraph (e) of this section), provided that the refiner or importer test result is correlated with the appropriate method specified in paragraph (b)(2) of this section; or

* * * * *

(e) *Materials incorporated by reference.* The Director of the Federal Register approved the incorporation by reference of the document listed in this section as prescribed in 5 U.S.C. 552(a) and 1 CFR part 51. Anyone may inspect copies at the U.S. EPA, Air and Radiation Docket and Information Center, 1301 Constitution Ave., NW., Room B102, EPA West Building, Washington, DC 20460, under EPA docket ID Number EPA–HQ–OAR–2008–0558, or at the National Archives and Records Administration (NARA). The telephone number for the Air Docket Public Reading Room is (202) 566–1742. For information on the availability of this material at NARA, call 202–741–6030 or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.* For further information on these test methods, please contact the Environmental Protection Agency at 734–214–4582.

(1) *ASTM material.* Anyone may purchase copies of these materials from the American Society for Testing and Materials (ASTM), 100 Barr Harbor Dr., West Conshohocken, PA 19428–2959, or by contacting ASTM customer service at 610–832–9585, or by contacting the e-mail address of *service@astm.org* from the ASTM Web site of *http://www.astm.org.*

(i) ASTM standard method D2622–05 (''ASTM D2622''), Standard Test Method for Sulfur in Petroleum Products by Wavelength Dispersive X-Ray Fluorescence Spectrometry, approved November 1, 2005.

(ii) [Reserved].

(iii) ASTM standard method D4294–03 (''ASTM D4294), Standard Test Method for Sulfur in Petroleum and Petroleum Products by Energy Dispersive X-ray Fluorescence Spectrometry, approved November 1, 2003.

(iv) ASTM standard method D5453–08a (''ASTM D5453''), Standard Test Method for Determination of Total Sulfur in Light Hydrocarbons, Spark Ignition Engine Fuel, Diesel Engine Fuel, and Engine Oil by Ultraviolet Fluorescence, approved February 1, 2008.

(v) ASTM standard method D6920–07 (''ASTM D6920''), Standard Test Method for Total Sulfur in Naphthas, Distillates, Reformulated Gasolines, Diesels, Biodiesels, and Motor Fuels by Oxidative Combustion and Electrochemical Detection, approved December 1, 2007.

(2) [Reserved]

[FR Doc. E8–28370 Filed 12–5–08; 8:45 am]

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## DEPARTMENT OF THE INTERIOR

## Fish and Wildlife Service

## 50 CFR Part 17

[FWS-R2-ES-2008-0031; 92220-1113-0000-C3]

RIN 1018-AU68

# Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of Rio Grande Silvery Minnow in the Big Bend Reach of the Rio Grande in Texas

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), in cooperation with the National Park Service and the United States Section of the International Boundary and Water Commission, will reestablish the Rio Grande silvery minnow (*Hybognathus amarus*), a federally-listed endangered fish, into its historical habitat in the Big Bend reach of the Rio Grande in Presidio, Brewster, and Terrell Counties, Texas.

We are reestablishing the Rio Grande silvery minnow under section 10(j) of the Endangered Species Act of 1973, as amended (Act), and are classifying it as a nonessential experimental population (NEP). On the Rio Grande, the geographic boundaries of the NEP extend from Little Box Canyon downstream of Fort Quitman, Hudspeth County, Texas, through Big Bend National Park and the Rio Grande Wild and Scenic River, to Amistad Dam (Big Bend reach of the Rio Grande), Val Verde County, Texas. On the Pecos River, the geographic boundaries of the NEP extend from the river's confluence with Independence Creek to its confluence with the Rio Grande.

This action is part of the recovery actions that the Service, Federal and State agencies, and other partners are conducting throughout the historic range of the species. This final rule

establishes the NEP and provides for limited allowable legal taking of Rio Grande silvery minnows within the defined NEP area. An Environmental Assessment (EA) and Finding of No Significant Impact have been prepared for this action (see **ADDRESSES** section below).

**DATES:** The effective date of this rule is December 8, 2008.

**ADDRESSES:** This final rule and environmental assessment are available on the Internet at *http://www.regulations.gov* and *http://www.fws.gov/southwest/es/AustinTexas/*. Supporting documentation we used in preparing this final rule will be available for public inspection, by appointment, during normal business hours, at the Fish and Wildlife Service's office at 500 West Avenue H, Suite 104F, Alpine, Texas 79830.

**FOR FURTHER INFORMATION CONTACT:** Adam Zerrenner, Field Supervisor, Austin Ecological Services Field Office, 107011 Burnet Road, Suite 200, Austin, Texas 78758 (telephone 512-490-0057, facsimile 512-490-0974). If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

**SUPPLEMENTARY INFORMATION:**

## Background

It is our intent to discuss only those topics directly relevant to the establishment of a Rio Grande silvery minnow NEP in this final rule. For more information on the Rio Grande silvery minnow, refer to the September 5, 2007, proposed rule (72 FR 50918) and the Rio Grande Silvery Minnow Draft Revised Recovery Plan (Service 2007a) (Draft Revised Recovery Plan).

### *Legislative*

The Act provides that species listed as endangered or threatened are afforded protection primarily through the prohibitions of section 9 and the requirements of section 7. Section 9 of the Act, among other things, prohibits the take of endangered wildlife. ''Take'' is defined by the Act as harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct. Service regulations (50 CFR 17.31) generally extend the prohibitions of take to threatened wildlife. Section 7 of the Act outlines the procedures for Federal interagency cooperation to conserve federally listed species and protect designated critical habitat. It mandates that all Federal agencies use their existing authorities to further the purposes of the Act by carrying out programs for the conservation of listed species. It also states that Federal agencies will, in consultation with the Service, ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. Section 7 of the Act does not affect activities undertaken on private land unless they are authorized, funded, or carried out by a Federal agency.

Under section 10(j) of the Act, the Secretary of the Department of the Interior can designate reintroduced populations established outside the species' current range, but within its historical range, as ''experimental.'' With the experimental population designation, the relevant population is treated as threatened for purposes of section 9 of the Act, regardless of the species' designation elsewhere in its range. Threatened designation allows us greater discretion in devising management programs and special regulations for such a population. Section 4(d) of the Act allows us to adopt whatever regulations are necessary and advisable to provide for the conservation of a threatened species. In these situations, the general regulations that extend most section 9 prohibitions to threatened species do not apply to that species, and the 10(j) rule contains the prohibitions and exemptions necessary and appropriate to conserve that species.

Based on the best scientific and commercial data available, we must determine whether the experimental population is *essential* or *nonessential* to the continued existence of the species. The regulations (50 CFR 17.80(b)) state that an experimental population is considered essential if its loss would be likely to appreciably reduce the likelihood of survival of that species in the wild. All other populations are considered nonessential.

For the purposes of section 7 of the Act, we treat an NEP as a threatened species when the NEP is located within a National Wildlife Refuge or National Park, and section 7(a)(1) and the consultation requirements of section 7(a)(2) of the Act apply. Section 7(a)(1) requires all Federal agencies to use their authorities to carry out programs for the conservation of listed species. Section 7(a)(2) requires that Federal agencies, in consultation with the Service, insure that any action authorized, funded, or carried out is not likely to jeopardize the continued existence of a listed species or adversely modify its critical habitat. When NEPs are located outside a National Wildlife Refuge or National Park, we treat the population as proposed for listing, and only two provisions of section 7 apply—section 7(a)(1) and section 7(a)(4). In these instances, NEPs provide additional flexibility because Federal agencies are not required to consult with us under section 7(a)(2). Section 7(a)(4) requires Federal agencies to confer (rather than consult) with the Service on actions that are likely to jeopardize the continued existence of a species proposed to be listed. The results of a conference are in the form of conservation recommendations that are optional as the agencies carry out, fund, or authorizeactivities. Activities that are not carried out, funded, or authorized by Federal agencies and are not on Federal lands are not affected by an NEP designation.

Rio Grande silvery minnows that are used to establish an experimental population may come from a donor population, provided their removal will not create adverse impacts upon the parent population, and provided appropriate permits are issued in accordance with our regulations (50 CFR 17.22) prior to their removal. In the case of the Rio Grande silvery minnow, the donor population is a captive-bred population that was propagated with the intention of re-establishing wild populations to achieve recovery goals. In addition, it is possible that stock raised from wild eggs could also be released into the NEP area. Rio Grande silvery minnow eggs are collected from the wild population in New Mexico each year and are raised in captivity to provide individuals for captive propagation and augmentation of the wild population.

Critical habitat has been designated for the Rio Grande silvery minnow in New Mexico (68 FR 8088-8135; February 19, 2003), and the designated critical habitat does not include this NEP area. Section 10(j)(2)(C)(ii) of the Act states that critical habitat shall not be designated for any experimental population that is determined to be nonessential. Accordingly, we cannot designate critical habitat in areas where we have already established an NEP.

### *Biological Information*

The Rio Grande silvery minnow is one of seven species in the genus Hybognathus found in the United States (Pflieger 1980, p. 177). The species was first described by Girard (1856 in Service 1999, p. 38) from specimens taken from the Rio Grande near Fort Brown, Cameron County, Texas. It is a stout silvery minnow with moderately small eyes and a small, slightly oblique mouth. Adults may reach 5 inches (in)

(125 millimeters (mm)) in total length (Remshardt 2006). Its dorsal fin is distinctly pointed with the front of it located slightly closer to the tip of the snout than to the base of the tail. The fish is silver with emerald reflections. Its belly is silvery white; its fins are plain; and it does not have barbels (Sublette *et al.* 1990, pp. 129-130).

This species was historically one of the most abundant and widespread fishes in the Rio Grande Basin, occurring from Española, New Mexico, to the Gulf of Mexico (Bestgen and Platania 1991, p. 225). It was also found in, but is now absent from, the Pecos River, a major tributary of the Rio Grande, from Santa Rosa, New Mexico, downstream to its confluence with the Rio Grande (Pflieger 1980, p. 177). The Rio Grande silvery minnow is extirpated from the Pecos River and also from the Rio Grande downstream of Elephant Butte Reservoir and upstream of Cochiti Reservoir (Bestgen and Platania 1991, pp. 226-229). The current distribution of the Rio Grande silvery minnow is limited to the Rio Grande between Cochiti Dam and Elephant Butte Reservoir in New Mexico, which is only about 5 percent of its historical range (Bestgen and Platania 1991, pp. 226-229). Throughout much of its historical range, the decline of the Rio Grande silvery minnow has been attributed to modification of the flow regime (hydrological pattern of flows that vary seasonally in magnitude and duration, depending on annual precipitation patterns such as runoff from snowmelt), channel drying, reservoirs and dams, stream channelization, decreasing water quality, and perhaps interactions with nonnative fish (Cook *et al.* 1992, p. 42; Bestgen and Platania 1991, pp. 229-230; Service 1999, pp. 1-2). Decreased river water quality caused by municipal and agricultural runoff (i.e., sewage and pesticides) as a result of the development of irrigated agriculture and the growth of cities within the historical range of the Rio Grande silvery minnow is also likely to have adversely affected the range and distribution of the Rio Grande silvery minnow (Service 1999, p. 2).

The various life history stages of the Rio Grande silvery minnow require low-velocity habitats with a sandy and silty substrate that is generally associated with a meandering river that includes side channels, oxbows, and backwaters (Bestgen and Platania 1991, pp. 227-228). It is not uncommon for Rio Grande silvery minnows in captivity to live beyond 2 years (Service 2007a, p. 8). However, although the Rio Grande silvery minnow is a hardy fish, capable of withstanding many of the natural stresses of the desert aquatic environment, its maximum documented longevity in the wild is about 25 months, and very few survive more than 13 months. Thus, a successful annual spawn (reproductive event) is key to the survival of the species (Service 1999, p. 20; Dudley and Platania 2001, pp. 16-21; Dudley and Platania 2002, p. 3). More information about the life history of, decline of, and threats to the Rio Grande silvery minnow can be found in the final designation of critical habitat for the species (February 19, 2003; 68 FR 8088-8090), in the Rio Grande Silvery Minnow Recovery Plan (Recovery Plan; Service 1999, pp. 1-38), and the Draft Revised Recovery Plan (Service 2007a).

The Rio Grande silvery minnow is extirpated from the Big Bend reach of the Rio Grande (Service 2007a, p. 10). The last documentation of a Rio Grande silvery minnow in the Big Bend reach of the Rio Grande was in 1960 (Bestgen and Platania 1991, p. 229). Natural repopulation is not possible without human assistance due to extensive reaches of river lacking Rio Grande silvery minnow habitat (including large reservoirs, where this species cannot survive) between where the species currently exists in the wild in New Mexico and the Big Bend reach.

The Service contracted a study examining the suitability of the habitat in the Big Bend reach of the Rio Grande for the Rio Grande silvery minnow (Edwards 2005). The completed study indicates that there is a reasonable likelihood that Rio Grande silvery minnows will survive in this portion of the Rio Grande and become established. It also identifies the need for habitat restoration projects, with an emphasis on the removal of nonnative species, such as salt cedar (*Tamarix chinensis*) and giant river cane (also known as giant reed; *Arundo donax*), which can adversely affect aquatic habitat, including Rio Grande silvery minnow habitat (Edwards 2005, pp. 43-44). Reasons for the species' extirpation in the Rio Grande in Texas are uncertain, but are believed to have been due to a combination of low flows, caused by drought and water diversion from the river, and water pollution in the 1950s (Edwards 2005, p. 3). However, the Big Bend reach has not experienced extensive drying since the drought of the 1950s and the extirpation of the Rio Grande silvery minnow. The continuing presence of members of the pelagic spawning guild (group of fish who broadcast semi-buoyant eggs into the water during reproduction) with life history requirements similar to the Rio Grande silvery minnow is evidence that the Big Bend reach of the Rio Grande may support reestablishment of Rio Grande silvery minnows (Edwards 2005, pp. 37-38). In addition, water quality in the Big Bend reach, which may have been one of the factors in the decline of the species, appears to be generally improving over time (Edwards 2005, p. 26).

Throughout most of the NEP area, the lands along the Rio Grande are protected and managed on both the United States and Mexico side of the border by Federal, State, and private conservation-oriented landowners. These entities are all working together to conserve the aquatic and riparian habitats along 281 miles (452 kilometers) of the Rio Grande/Rio Bravo. This provides a unique and significant measure of protection for the Rio Grande silvery minnow in the NEP area. We anticipate working with land managers and other interested parties, on a voluntary basis, to develop plans to further guide and accomplish habitat management and restoration activities, including removal and control of nonnative species, such as salt cedar and giant river cane.

*Recovery Efforts*

We published the final rule to list the Rio Grande silvery minnow as an endangered species on July 20, 1994 (59 FR 36988). Restoring an endangered or threatened species to the point where it is recovered is a primary goal of our endangered species program. Thus, on July 1, 1994, the Rio Grande Silvery Minnow Recovery Team (Recovery Team) was established under section 4(f)(2) of the Act and our cooperative policy on recovery plan participation, a policy intended to involve stakeholders in recovery planning (July 1, 1994; 59 FR 34272). Numerous individuals, agencies, and affected parties were involved in the development of the Recovery Plan or otherwise provided assistance and review (Service 1999, pp. 63-67). On July 8, 1999, we finalized the Recovery Plan (Service 1999, 71 pp.). The Recovery Plan has been updated and revised, and the Draft Revised Recovery Plan (Service 2007a) was released for public comment on January 18, 2007 (72 FR 2301). The Draft Revised Recovery Plan is currently in the process of being finalized, and thus, the final published version could be slightly different. In implementing and evaluating the success of this reintroduction effort, we will rely on the information in the Draft Revised Recovery Plan until the final revised Rio Grande Silvery Minnow Recovery Plan is published.

The Draft Revised Recovery Plan describes recovery goals for the Rio

Grande silvery minnow (Service 2007a, pp. 66-73) and actions for their completion (Service 2007a, pp. 74-109). The three goals identified for the recovery and delisting of the Rio Grande silvery minnow are:

(1) Prevent the extinction of the Rio Grande silvery minnow in the middle Rio Grande of New Mexico;

(2) Recover the Rio Grande silvery minnow to an extent sufficient to change its status on the List of Endangered and Threatened Wildlife from endangered to threatened (downlisting). This may be considered when three populations (including at least two that are self-sustaining) of the species have been established within the historical range of the species and have been maintained for at least 5 years; and

(3) Recover the Rio Grande silvery minnow to an extent sufficient to remove it from the List of Endangered and Threatened Wildlife (delisting). This may be considered when three self-sustaining populations have been established within the historical range of the species, and they have been maintained for at least 10 years (Service 2007a, p. 66).

The Rio Grande silvery minnow's range has been so greatly restricted that the species is extremely vulnerable to catastrophic events, such as a prolonged period of low or no flow in its habitat in the middle Rio Grande in New Mexico (i.e., the loss of all surface water) (Dudley and Platania 2001, p. 21). Reestablishment of the Rio Grande silvery minnow in other areas of its historical range will assist in the species' recovery and long-term survival in part because it is unlikely that any single event would simultaneously eliminate the Rio Grande silvery minnow from three geographic areas (Service 1999, pp. 57-61).

The Recovery Team developed a reach-by-reach analysis of the Rio Grande and Pecos River basins to identify the salient hydrological, chemical, and biological features of each reach. This analysis addressed the threats to the Rio Grande silvery minnow and considered the suitability of each reach for potential reestablishment (Service 2007a, pp. 159-171). The Recovery Team's reach-by-reach analysis considered: (1) the reasons for the species' extirpation from the selected reach; (2) the presence of other members of the reproductive guild (pelagic spawner; non-adhesive, semibuoyant eggs); (3) habitat conditions (including susceptibility to river drying and presence of diversion structures); and (4) the presence of congeners (i.e., other fishes in the genus Hybognathus). After completing their analysis, the Recovery Team identified the Big Bend reach of the Rio Grande as the first priority for reestablishment efforts (Service 2007a, p. 160) (see ''Reestablishment Area'' below for more details).

In accordance with the Recovery Plan (Service 1999, pp. 60-61), we initiated a captive propagation program as a strategy to assist in the recovery of the Rio Grande silvery minnow in 2000. We currently have Rio Grande silvery minnows housed at: (1) the Service's Dexter National Fish Hatchery and Technology Center, Dexter, New Mexico; (2) the City of Albuquerque's Biological Park, Albuquerque, New Mexico; and (3) New Mexico State University, Las Cruces, New Mexico. These facilities are actively propagating and rearing Rio Grande silvery minnows. Offspring of these fish are currently being used to augment the Rio Grande silvery minnow population in the middle Rio Grande, New Mexico.

Ongoing recovery efforts involving the release of captive-bred Rio Grande silvery minnows for augmentation of the population in the middle Rio Grande of New Mexico have demonstrated the potential viability of reestablishment as a tool for Rio Grande silvery minnow conservation. Captive propagation is conducted in a manner that will, to the maximum extent possible, preserve the genetic and ecological distinctiveness of the Rio Grande silvery minnow and minimize risks to existing wild populations consistent with our 2000 policy for captive propagation (65 FR 56916) (Service 2007b, 26 pp.)

Since 2000, approximately one million silvery minnows have been propagated (using both adult wild silvery minnows and wild-caught eggs) and then released into the wild in the middle Rio Grande in New Mexico (Remshardt 2008, p. 23). Wild gravid adults are successfully spawned in captivity at the City of Albuquerque's propagation facilities. Eggs left in the wild in the Rio Grande in New Mexico have a very low survivorship because many of them end up in Elephant Butte Reservoir where there is no suitable habitat for the species and the eggs are subject to a high rate of depredation. Spawning in captivity ensures that an adequate number of spawning adults are present to repopulate the river each year. While hatcheries continue to successfully spawn silvery minnows, wild eggs are collected to ensure genetic diversity within the remaining population. This program is carefully monitored so that it will not have an adverse effect on the wild population of Rio Grande silvery minnows in New Mexico.

Direct and indirect evidence from the Rio Grande silvery minnow monitoring program indicates that augmentation efforts in the Rio Grande near Albuquerque, New Mexico, are contributing to an increase in catch rates (i.e., during seining) of marked and unmarked Rio Grande silvery minnows. The success of this augmentation effort indicates that hatchery-raised individuals can be released back to the wild with adequate retention in or near original release sites, experiencing survival of at least 2 years after release, and ultimately can contribute to future spawning efforts (Remshardt 2008, pp. 11-12).

The source of Rio Grande silvery minnows for releases in the Big Bend reach will likely be from the Service's Dexter National Fish Hatchery and Technology Center, or another Service facility set up to provide fish specifically for this purpose. Expanding the Rio Grande silvery minnow's propagation program for potential releases into the Big Bend reach will result in more fish being produced overall and will not negatively impact the current program, which is producing Rio Grande silvery minnows for augmentation of the population in New Mexico (Service 2007b, pp. 6-7, 17-18).

*Reestablishment Area*

The primary factors resulting in the determination by the Recovery Team that the Rio Grande reach from Presidio to Amistad Reservoir is the most suitable area for reintroduction efforts are: water quality and quantity; the presence of suitable habitat; an absence of barriers to fish movement within the reach; a lack of ongoing activities that are likely to adversely affect the Rio Grande silvery minnow; and the presence of designated conservation areas on both sides of the river that are managed for habitat protection and improvement by the State of Texas, the National Park Service, and governmental agencies and private organizations in Mexico (Edwards 2005, p. 11).

River flow in the Big Bend reach is generally perennial, with a base flow of approximately 400 cubic feet per second (11.3 cubic meters per second). Severe flow reductions occurred only during the severest droughts in the 1950s. A period of intermittent drying did occur in 2003. However, this drying event appears to have been brief and occurred in a small area. In addition, this reach of the river does not have flood control levies. It also contains only a few small, rock dam weirs, all but one of which

does not appear to be a barrier to fish movement (Foster's weir may be a barrier, but it is at the downstream end of the river reach deemed as suitable). The substrate ranges from silt to cobble and boulder depending on local conditions. Almost half of this reach is in canyons, including Big Bend National Park. The reach known as the lower canyons, from approximately Reagan Canyon to Bullis Fold, within the Rio Grande Wild and Scenic River, has spring input resulting in improved water quality and quantity. Outside the canyon reaches, the river is braided in some sections with a moderate gradient, providing areas of suitable habitat for Rio Grande silvery minnows. In addition, there are no regular channel maintenance activities in this reach.

Based on the above information, we believe that the Rio Grande, from Mulato Dam (near the western border of Big Bend Ranch State Park) to Foster's Weir, east of the Terrell/Val Verde county line (the expected extent of reestablishment), contains suitable habitat for the Rio Grande silvery minnow and that it is likely the species can be successfully reestablished in the Big Bend reach. Establishing a viable population of Rio Grande silvery minnows in the Big Bend reach of the Rio Grande under this NEP designation would help achieve one of the primary recovery goals for downlisting and eventually delisting this species (see ''Recovery Efforts'' section above for more information). It is expected to take multiple introductions and several years of monitoring to evaluate if Rio Grande silvery minnows have become established and can be self-sustaining in this river reach.

Therefore, we intend to release the Rio Grande silvery minnow into its historical habitat in this area. The NEP area, which encompasses all potential release sites, is located (1) in the Rio Grande, from Little Box Canyon downstream of Fort Quitman, Hudspeth County, Texas, through Big Bend National Park and the Rio Grande Wild and Scenic River, to Amistad Dam; and (2) in the Pecos River, from its confluence with Independence Creek to its confluence with the Rio Grande.

Section 10(j) of the Act requires that an experimental population be geographically separate from other wild populations of the same species. This NEP area is isolated from existing populations of this species by large reservoirs. This fish is not known to survive in or move through large reservoirs due to the presence of unsuitable habitat and predators (64 FR 36275); therefore, the reservoirs will act as barriers to the species' downstream movement in the Rio Grande below Amistad Reservoir, and will ensure that this NEP remains geographically isolated and easily distinguishable from existing upstream wild populations in New Mexico. Based on the habitat requirements of the Rio Grande silvery minnow, we do not expect them to become established outside the NEP because they are unlikely to move into the unsuitable habitat at the edges of the NEP beyond the expected extent of reestablishment and are not able to move past physical barriers (dams and weirs) at either end of the NEP.

The geographic extent of the NEP designation is larger than needed as only portions of the NEP area contain suitable habitat. However, as described above, this area represents what we believe to be the maximum geographic extent to which the fish could move if released in the Big Bend reach of the Rio Grande. We believe including this additional area provides a more effective recovery strategy by eliminating changing regulatory requirements in case Rio Grande silvery minnows unexpectedly move beyond the expected establishment area. If any of the released Rio Grande silvery minnows, or their offspring, move outside the designated NEP area, then the Service would consider these fish to have come from the NEP area, and we would propose to amend this 10(j) rule to enlarge the boundaries of the NEP area to include the entire range of the expanded populations.

*Release Procedures*

Based on our experience with releasing the species to augment its population in New Mexico, we have determined that it would be best to release fish once per year in December or January. An implementation plan, including information about potential release sites, methods, and the number of individuals to be released, is appended to our environmental assessment (EA) and includes additional information on release sites, release timing, monitoring, and suggested management and research.

As part of the Rio Grande silvery minnow augmentation program in New Mexico, we evaluated different release strategies such as time of year, time of day, specific release habitats, and various hatchery environments (natural outdoor ponds versus indoor facilities). All of this information adds to our knowledge of the species and will assist us in future recovery actions, such as providing release procedures and monitoring strategies for the reestablishment of Rio Grande silvery minnows in the Big Bend reach.

*Status of Reestablished Population*

As described in the Recovery Plan and the Draft Revised Recovery Plan, reestablishment of populations within the Rio Grande silvery minnow's historical range is necessary to further the conservation and recovery of this species (Service 2007a, p. 67). The anticipated success of this reestablishment would enhance the conservation and recovery potential of this species by extending its present range into currently unoccupied historical habitat (Service 2007a, pp. 159-171). However, as required by section 10(j)(2)(B) of the Act, we have determined that this experimental population is not essential to the continued existence of the species in the wild for the following reasons:

(1) We will ensure, through our section 10 permitting authority and the section 7 consultation process, that the use of Rio Grande silvery minnows from any donor population for releases in the Big Bend reach is not likely to jeopardize the continued existence of the species in the wild;

(2) A population of Rio Grande silvery minnows exists in the middle Rio Grande, New Mexico, and the possible failure of the NEP that is the subject of this rule will not appreciably reduce the likelihood of survival of the species' existing wild population. Captive propagation facilities maintain a captive population, maximizing genetic diversity to the extent possible, and provide adequate numbers of Rio Grande silvery minnows to maintain the wild New Mexico population and also provide fish for releases in the Big Bend reach. The additional number of Rio Grande silvery minnows needed for reestablishment in the Big Bend reach will not inhibit the population augmentation efforts in the middle Rio Grande, New Mexico; and,

(3) The captive population is protected against the threat of extinction from a single catastrophic event by housing Rio Grande silvery minnows in three separate facilities. Juvenile minnows produced in excess of the numbers needed to maintain the captive population and augment the wild population in New Mexico are available for reintroduction to the Big Bend reach. Some members of the experimental population are expected to die during the reintroduction efforts after removal from the captive population. The Service finds that even if the entire experimental population died, this would not appreciably reduce the prospects for future survival of the species in the wild. That is, the captive population could produce more surplus

minnows and future reintroductions still would be feasible if the reasons for the initial failure are understood. As a result, any loss of an experimental population in the wild will not threaten the survival of the species as a whole.

In view of all these safeguards the Service finds that the reintroduced population would not be ''essential'' under 50 CFR 17.81(c)(2). Essential status for experimental populations is not required by section 10(j) of the Act or the implementing regulations, and it has not been used in past reintroductions of captive-raised animals, such as the red wolf (*Canis rufus*), Mexican grey wolf (*Canis lupus baileyi*), blackfooted ferret (*Mustela nigripes*), and California condor (*Gymnogyps californianus*).

*Location of Reintroduced Population*

Section 10(j) of the Act requires that an experimental population be geographically separate from other populations of the same species. On the Rio Grande, the geographic boundaries of the NEP extend from Little Box Canyon downstream of Fort Quitman, Hudspeth County, Texas, through Big Bend National Park and the Rio Grande Wild and Scenic River, to Amistad Dam (Big Bend reach of the Rio Grande). On the Pecos River, the geographic boundaries of the NEP extend from the river's confluence with Independence Creek to its confluence with the Rio Grande. The NEP area is isolated from the existing population of this species in New Mexico by hundreds of river miles, including large reservoirs and other areas of unsuitable habitat. The best available information indicates that large reservoirs serve as a barrier to movement for the Rio Grande silvery minnow because they contain many predators and do not contain suitable habitat for the species (64 FR 36275). These reservoirs will ensure that this NEP remains geographically isolated and easily distinguishable from existing upstream wild populations in New Mexico. In addition, Amistad Reservoir will act as a barrier to the species' downstream movement in the Rio Grande.

*Management*

The aquatic resources in the reestablishment area are managed by the National Park Service, the International Boundary and Water Commission, the State of Texas, and private landowners. Multiple-use management of these waters will not change as a result of the experimental population designation. Agricultural, recreational, and other activities by private landowners within and near the NEP area will not be affected by this rule and the subsequent release of the Rio Grande silvery minnow. Because of the exceptions provided by NEP designation, we do not believe the reestablishment of Rio Grande silvery minnows will conflict with existing human activities or hinder public use of the area.

The Service, the National Park Service, the International Boundary and Water Commission, Texas Parks and Wildlife Department employees, and other conservation partners will plan and manage the reestablishment of Rio Grande silvery minnows. This group will closely coordinate on releases, monitoring, coordination with landowners and land managers, and public awareness, among other tasks necessary to ensure successful reestablishment of the species. The Service has also convened a Technical Team comprised of representatives from these agencies and other experts. This Technical Team assisted in the development of the Implementation and Monitoring Plan that is appended to the EA.

(a) *Mortality*: The regulations implementing the Act define ''incidental take'' as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity (50 CFR 17.3) such as recreation (e.g., fishing, boating, wading, trapping or swimming), forestry, agriculture, and other activities that are in accordance with Federal, Tribal, State, and local laws and regulations. Under this final 10(j) rule, take of Rio Grande silvery minnows within the experimental population area will be allowed provided that the take is unintentional and is not due to negligent conduct. The exception to this applies to Federal agencies, which must consult under section 7 of the Act on their activities that may affect the Rio Grande silvery minnow within Big Bend National Park or the Wild and Scenic River. We expect levels of incidental take to be low since the reestablishment is compatible with existing human use activities and practices for the area. More specific information regarding take can be found in the Final Regulation Promulgation section of this rule.

(b) *Special handling*: In accordance with 50 CFR 17.21(c)(3), any employee or agent of the Service, any other Federal land management agency, or State personnel, designated for such purposes, may, in the course of their official duties and in association with the reestablishment program in the Big Bend reach, handle Rio Grande silvery minnows for scientific purposes; relocate Rio Grande silvery minnows to avoid conflict with human activities; relocate Rio Grande silvery minnows to other release sites for recovery purposes; aid sick or injured Rio Grande silvery minnows; and salvage dead Rio Grande silvery minnows. However, non-Service personnel and their agents will need to acquire permits from the Service for these activities.

(c) *Coordination with landowners and land managers*: The Service and cooperators have identified issues and concerns associated with Rio Grande silvery minnow reestablishment through the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*) scoping comment period. The reestablishment also has been discussed with potentially affected State agencies and private landowners. Affected State agencies, landowners, and land managers have indicated support for the reestablishment, provided an NEP is designated and land and water use activities in the NEP area are not constrained.

(d) *Monitoring*: The Service has developed an implementation and monitoring plan specific to this NEP and associated reestablishment efforts. After the initial release of Rio Grande silvery minnows, we will monitor their presence or absence at least annually and document any spawning behavior or young-of-year fish that might be present. Section 6 funding has been approved for pre-release and quarterly monitoring associated with this project for the first 2 years. Depending on available resources, quarterly monitoring will likely continue, especially during the first few years of reestablishment efforts. This monitoring will be conducted primarily by seining and will be accomplished by Service, National Park Service, or State employees or by contracting with the appropriate species experts. Annual reports will be produced detailing stocking and monitoring activities that took place during the previous year. We will also fully evaluate these reestablishment efforts every 5 years to determine whether to continue or terminate them.

(e) *Disease*: All Federal fish hatcheries rearing and producing fish are inspected annually as per the Service's Aquatic Animal Health Policy using the American Fisheries Society, Fish Health Section Blue Book Standards. Facilities must maintain a Class-A certification, meaning they are free of all tested pathogens, in order to stock fish into the wild. Targeted pathogens include internal and external parasites, bacteria, and viruses. Dexter National Fish Hatchery and Technology Center, where Rio Grande silvery minnows are currently being raised for augmentation

and reintroduction efforts, has qualified as a Class-A facility for 76 years, since it was constructed. In addition to the standard yearly fish health inspection, an additional Fish Lot inspection will be completed on the Rio Grande silvery minnow destined for the Big Bend reach 30 days prior to being transported to release sites. This inspection will be conducted according to the guidelines listed above. If any of the targeted pathogens are diagnosed the fish will not be released and remedial actions will be taken immediately. Any additional facilities that are used to raise Rio Grande silvery minnows for this re-establishment effort will also be regularly inspected to ensure that they meet the standards described above.

(f) *Genetic variation*: In cooperation with conservation partners with expertise in the captive propagation of Rio Grande silvery minnows and genetics management, the Service has formed a Rio Grande Silvery Minnow Captive Propagation and Genetics Workgroup. This group worked with Dexter National Fish Hatchery and Technology Center to develop the Rio Grande Silvery Minnow Genetics Management and Propagation Plan (Service 2007b, 26 pp.) and meets regularly to plan the captive propagation contribution to the recovery of the Rio Grande silvery minnow and provide fish for restoration and augmentation in the middle Rio Grande and reintroduction of the species into other areas of its historical range.

The propagation strategy is based on two key elements: (1) the collection of eggs from the middle Rio Grande to meet the majority of targeted stocking numbers, and (2) maintaining fish from the annual wild egg collection as broodstock in the event catastrophic changes occur in the river. These actions minimize the risk to the extant population by preventing broodstock mining and maximize the potential to replicate as closely as possible a natural recruitment cycle. The propagation program will be contingent on an orchestrated balance between the use of wild-caught eggs and captive propagation that will require ongoing monitoring of river populations and genetic monitoring of wild and captive stocks (Service 2007b, p. 2).

The propagation program will use a combination of wild-egg collections and hatchery spawning of fish from wild-eggs (F1) to produce fish for stocking. Eggs will be collected in the river every spring from natural spawning events and delivered to propagation facilities. The majority of these eggs drift into hostile waters such as Elephant Butte reservoir or river reaches that become dewatered. The eggs will be hatched, and larval fish reared to adulthood in captivity. A small portion from each year class will be retained as captive broodstock. If recruitment fails in any given year, the captive stock can be used to produce fish to maintain the species through the next year (Service 2007b, p. 2).

Additionally, paired or communal spawning will be conducted annually. Ongoing genetic monitoring will be used to ensure a minimum number of breeding animals contribute to the next generation. We expect that in low water years, when natural spawning is not expected to yield adequate numbers of eggs for the program, captive propagation will be required in terms of increasing the genetic effective population size, and to meet targeted stocking numbers (Service 2007b, pp. 2-3).

The Rio Grande Silvery Minnow Genetics Management and Propagation Plan is designed to provide a strategy for maintenance of genetic diversity in the species. In concert with strategies to address the underlying cause of the species' decline, fish from collected eggs and captively propagated fish will ensure long-term survival and recovery of the Rio Grande silvery minnow by providing offspring appropriate for reintroduction as identified in the Draft Revised Recovery Plan (Service 2007a) and in the Service's conservation strategy for the species (67 FR 39212).

(g) *Protection of Rio Grande silvery minnows*: We will transport Rio Grande silvery minnows from hatcheries to release sites using methods developed from our experience with augmenting the species' population in New Mexico. We will release Rio Grande silvery minnows using a ''soft'' release technique that provides short-term protection from natural predators and allows individuals to acclimate to their new environment. This soft release technique includes placing the minnows in holding pens in the river before releasing them to the wild. Rio Grande silvery minnows will be released into reaches of the Rio Grande within the NEP that we have determined to have the best habitat available. Should causes of mortality be identified, we will work with the private landowners or agency land managers to try to correct the problem. As reestablishment and monitoring efforts proceed, we will use the knowledge gained to further refine transport and release methods.

(h) *Public awareness and cooperation*: On August 9, 2005, we mailed letters to potentially affected Congressional offices, Federal and State agencies, local governments, landowners, and interested parties to notify them that we were considering proposing NEP status in the Rio Grande and Pecos River for the Rio Grande silvery minnow. We received a total of 10 responses during the September 2005 scoping meetings and comment period. The comments received are listed in the EA and have been considered in the formulation of alternatives considered in the NEPA process. The following section describes the public outreach we conducted and the responses received during the public and peer review comment period on the proposed rule and draft EA.

**Summary of Public and Peer-Review Comments and Recommendations**

We requested written comments from the public on the proposed NEP and draft EA in the proposed rule published on September 5, 2007 (72 FR 50918). We also contacted the appropriate Federal, State, and local agencies; Tribes; scientific organizations; and other interested parties and invited them to comment on the proposed rule. The initial comment period was open from September 5, 2007, to November 5, 2007. In response to requests from interested parties, a second comment period was open from February 22, 2008, through March 10, 2008 (73 FR 9755).

In accordance with our policy on peer review, published on July 1, 1994 (59 FR 34270), we solicited opinions from three expert aquatic biologists who are familiar with this species regarding pertinent scientific or commercial data and assumptions relating to supportive biological and ecological information for the proposed rule. Reviewers were asked to review the proposed rule and the supporting data, to point out any mistakes in our data or analysis, and to identify any relevant data that we might have overlooked. All three of the peer reviewers submitted comments and were generally supportive of the proposal to reestablish Rio Grande silvery minnow in the Big Bend reach. Their comments are included in the summary below and/or incorporated directly into this final rule.

We reviewed all comments received from the peer reviewers, State agencies, and the public for substantive issues and new information regarding the proposed NEP. Substantive comments received during the comment period have either been addressed below or incorporated directly into this final rule. The comments are grouped below as peer review, State, or public comments.

We received comments from 14 parties, including comments from natural resource management agencies

in Mexico and from three peer reviewers. Nine of the 14 commenters specifically expressed support for reestablishing the silvery minnow in the Big Bend reach of the Rio Grande. None of the commenters specifically opposed the reintroduction of the Rio Grande silvery minnow to the Big Bend reach, except for one commenter, who stated that they would be opposed to reintrodcution if it would reduce or make less reliable El Paso's surface water supply. Seven of the 14 parties expressed an opinion on the proposal to designate the experimental population as nonessential; of these, five commenters expressed support for a NEP, while two commenters, including one peer reviewer, expressed concern that a NEP designation would not provide enough protection for the silvery minnow.

Comments in support of the proposed action by peer reviewers included agreement with the following determinations: (1) the proposed NEP is wholly separate geographically from existing populations of Rio Grande silvery minnows; (2) establishment of a second population of Rio Grande silvery minnows is essential for the recovery of the species; (3) the Big Bend reach of the Rio Grande likely provides the best location for a second population; and (4) it seems appropriate to assume that Rio Grande silvery minnows will not become established outside of the proposed NEP area. One peer reviewer also agreed with our assertion that the continuing presence of speckled chub (*Macrhybopsis aestivalis*) indicates that the proposed action seems to have a reasonably high probability of success. Commenters from Mexico's National Institute of Ecology indicated that the reintroduction of Rio Grande silvery minnows is a very important initiative for species conservation and habitat restoration on this reach of the Rio Grande.

**Peer-Review Comments**

(1) *Comment*: All three peer reviewers and one commenter asked whether an NEP is an acceptable component of recovery or if another rulemaking is necessary to reclassify the population before it can be counted toward recovery.

*Our Response*: Section 10(j) and its implementing regulations require that experimental reintroduction activities further the conservation of the species. Because these actions are directly guided by the Recovery Plan (Service 1999) and the Draft Revised Recovery Plan (Service 2007a), if our efforts to reestablish the Rio Grande silvery minnow in the Big Bend reach result in a self-sustaining population (as described in the species' Draft Revised Recovery Plan or the final revised version, once it is published), then the NEP will be counted toward the recovery of the species. This would not require an additional rulemaking effort.

Our intent is for the 10(j) rule to remain in place until the status of the species improves to a point where listing is no longer necessary, as defined by the Draft Revised Recovery Plan or the final revised version, and the Rio Grande silvery minnow can be delisted. Once the threats to the Rio Grande silvery minnow are reduced and at least three populations are self-sustaining, the Service will likely publish a proposed rule to delist the Rio Grande silvery minnow in the **Federal Register**. During the proposed delisting process, there would be opportunities for the public to comment and request public hearings. Information gathered during the public comment period would be incorporated into our evaluation of the species' listing status. If we were to determine that listing is no longer appropriate, a final rule delisting the Rio Grande silvery minnow would then be published in the **Federal Register**.

(2) *Comment*: An augmentation plan with a genetics management strategy is necessary and should be identified as the first step by the Service.

*Our Response*: The Implementation and Monitoring Plan, found in Appendix B of the EA, includes information about reintroduction implementation and genetic and population monitoring. In cooperation with conservation partners with expertise in the captive propagation of Rio Grande silvery minnows and genetics management, we have formed a Rio Grande Silvery Minnow Captive Propagation and Genetics Workgroup. This group worked with Dexter National Fish Hatchery and Technology Center to develop the Rio Grande Silvery Minnow Genetics Management and Propagation Plan. The group meets regularly to plan the captive propagation contribution to the recovery of the Rio Grande silvery minnow and provide fish for restoration and augmentation in the middle Rio Grande and reintroduction of the species into other areas of its historical range. Please refer to the Implementation and Monitoring Plan appended to the EA and the Rio Grande Silvery Minnow Genetics Management and Propagation Plan (Service 2007b) for more information.

(3) *Comment*: One peer reviewer and several commenters indicated that the implementation and monitoring plan lacked detailed information and should be expanded.

*Our Response*: We intend that the Implementation and Monitoring Plan, which is appended to the EA, be used as a guide for adaptive management and monitoring. We have added more specific information about release sites, techniques, and monitoring for the first year of the project and will be revisiting this document on a yearly basis, along with our partners in implementing the project, as part of an assessment of what we have learned and what might need to be adapted for best management. From our conservation efforts on this and other species, we know that it may take several years of effort before we can more clearly judge the likelihood of success of reintroduction. Information gathered as reintroduction proceeds will be used to evaluate the progress of the reintroduction program.

(4) *Comment*: One peer reviewer expressed concern that an NEP of Rio Grande silvery minnows in the Big Bend reach could be used to reduce the pressure towards conservation of the species in New Mexico. Another peer reviewer and a commenter stated that with the increasing reliance on augmentation of the only wild population of Rio Grande silvery minnows in New Mexico, captive populations are increasingly important and in need of protection. They further commented that establishment of ''nonessential'' populations should not be attempted if such efforts detract from recovery activities in the middle Rio Grande of New Mexico or adversely affect the species in that area. One commenter stated that there must be some assurance that use of captively propagated Rio Grande silvery minnows are not sacrificed for want of a detailed monitoring plan, reasoned assumptions, rigorous evaluations, and ample financial resources to implement the project.

*Our Response*: The Service will continue to use our authorities under the Act to protect the wild population of Rio Grande silvery minnows in New Mexico. The Draft Revised Recovery Plan clearly defines criteria for downlisting and delisting the species, including stabilizing the population in New Mexico, as well as establishing self-sustaining populations in other areas of the species' historical range. We will also ensure, through our section 10 permitting authority and the section 7 consultation process, that the use of Rio Grande silvery minnows from the captive population for releases in the Big Bend reach is not likely to jeopardize the continued existence of the species in the wild. Expanding the Rio Grande silvery minnow's propagation program for potential

releases into the Big Bend reach will result in more fish being produced overall and will not negatively affect the current program, which is producing Rio Grande silvery minnows for augmentation of the population in New Mexico.

Additionally, we note that conservation efforts by us and our conservation partners are always subject to funding support by Congress, State legislatures, or private individuals and organizations. Although we have no guarantees about funding in future years, we have a reasonable expectation that we and/or our partners will be able to carry out the monitoring activities that we have identified as appropriate. Please also see our response to Comment 3.

(5) *Comment*: The final rule should include an evaluation of threats to the species as they may exist in the area of the proposed NEP.

*Our Response*: Throughout much of its historical range, the decline of the Rio Grande silvery minnow has been attributed to modification of the flow regime, channel drying, reservoirs and dams, stream channelization, decreasing water quality, and perhaps interactions with non-native fish. Development of agriculture and the growth of cities within the historical range of the Rio Grande silvery minnow resulted in a decrease in the quality of river water caused by municipal and agricultural runoff (i.e., sewage and pesticides) that may have also adversely affected the range and distribution of the Rio Grande silvery minnow. More information on threats to the Rio Grande silvery minnow within its current and historical range can be found in the final designation of critical habitat for the species (February 19, 2003; 68 FR 8088-8090), in the Rio Grande Silvery Minnow Recovery Plan (Recovery Plan; Service 1999, pp. 1-38), and the Draft Revised Recovery Plan (Service 2007a).

Please see the Biological Information section of this rule for a brief summary of potential threats to the species in the Big Bend reach. A more detailed summary and evaluation of potential threats to the species in the Big Bend reach can be found in the document, Feasibility of Reintroducing Rio Grande Silvery Minnows (*Hybognathus amarus*) to the Rio Grande, Big Bend Region, Texas (Edwards 2005). In general, the threats described above apply to the Big Bend reach and were evaluated prior to publication of the proposed rule. However as described in the feasibility study (Edwards 2005) and as compared to other areas of the species' historical range, as well as its current range in New Mexico, the expected establishment area in the Big Bend reach does not have any major dams or diversions that would block the upstream movement of fish, has not experienced prolonged and extensive channel drying since the 1950s, and has water quality that has generally improved since the species' extirpation from the NEP area. Water quality improvements can be attributed to decreasing agricultural run-off along the banks of the Rio Grande (as a result of less agriculture in the area in general) and improved treatment of municipal sewage (Edwards 2005).

Until we release Rio Grande silvery minnows into the Big Bend reach and monitor the population, as well as that of other fish in the area, we do not know how Rio Grande silvery minnows will be affected by other native and non-native fish in this area. As the experimental reintroduction proceeds we will be gathering information to assist us in identifying and quantifying potential threats to the species in this area.

(6) *Comment*: The rule should identify that the Draft Revised Recovery Plan identifies a density of >5 fish/100 $m^2$ as necessary for downlisting and delisting the species and provide an evaluation, based on habitat relationships, of the likelihood that this density can be achieved in the NEP area.

*Our Response*: A Catch per Unit Effort (CPUE) of >5 fish/100 $m^2$ is identified in the Draft Revised Recovery Plan as a component of the down-listing and delisting goals for the species in the middle Rio Grande of New Mexico. The Service is currently working with the Conservation Breeding Specialist Group, which operates under the International Union for Conservation of Nature's Species Survival Commission; the Middle Rio Grande Endangered Species Collaborative Program; and other conservation cooperators to develop a population viability analysis for the middle Rio Grande and the Big Bend reach. This analysis will assist us in refining our conservation and recovery efforts for the species and in determining a realistic population goal for the species in the Big Bend reach.

(7) *Comment*: The experimental population in the Big Bend reach should be designated as an ''essential'' population under the Act. Much, if not all, of the argument for ''nonessential experimental'' is not biologically or scientifically based and is thus discountable. Because of the vulnerability of the New Mexico population, additional populations of Rio Grande silvery minnows are essential to the continued existence of the species.

*Our Response*: Although additional populations of Rio Grande silvery minnows are clearly essential to the recovery of the species, we have determined that the Big Bend population is not essential to the continued existence of the species in the wild and should therefore be designated as an NEP. Please see the ''Status of the Reestablished Population'' section of this final rule for more information.

We believe that releasing Rio Grande silvery minnows under the section 10(j) NEP provision of the Act is the most appropriate way to achieve conservation for this species in the Big Bend reach and that this action is consistent with the purposes of the Act. In coordination with the Rio Grande Captive Propagation and Genetic Management Working Group and our permitting authorities under section 10 of the Act, we will ensure that our efforts to reestablish the species in the Big Bend reach do not adversely affect the wild population of Rio Grande silvery minnows in New Mexico.

**State Comments**

(8) *Comment*: The New Mexico Interstate Stream Commission indicated that they understand the NEP will not adversely affect current beneficial uses of water and that they support the reestablishment of Rio Grande silvery minnows in the Big Bend reach as a means of ultimately recovering the species. They also noted that the Draft Revised Recovery Plan calls for reintroduction of the species into a total of three suitable parts of its historical range in addition to the current wild population in New Mexico. They suggested that the Service consider a programmatic approach for such reintroductions so that more than one reintroduction can be considered within the same NEPA and 10(j) rulemaking process.

*Our Response*: We appreciate the support and suggestion of the New Mexico Interstate Stream Commission. However, we feel it is prudent to focus on one initial area for reintroduction at this time so that we can gain a better understanding of the process of reintroducing this species and apply the lessons we learn to potential future reintroduction efforts in other areas of the species' historical range. Additionally, the Big Bend reach of the Rio Grande has been widely recognized as having the highest potential for successful reintroduction of the Rio Grande silvery minnow within its historical range. Other potential reintroduction areas need to be examined more closely and potential obstacles to successful reintroduction

addressed prior to making attempts at reintroduction. Please see the Draft Revised Recovery Plan (Service 2007a) for more information.

**Public Comments**

(9) *Comment*: El Paso Water Utilities (EPWU) stated that they are supportive of recovery efforts for the Rio Grande silvery minnow and would be very pleased for the species to recover to such an extent that it might no longer be endangered. However, comments from EPWU and also the Elephant Butte Irrigation District (EBID) indicated that they are mindful of the impact that the Rio Grande silvery minnow has had on water management in New Mexico and particularly on water delivered from U.S. Bureau of Reclamation projects. For this reason, they are opposed to any action that would reduce or make their surface water supply less reliable than it already is, including ''confiscating'' water from upstream users to enhance or maintain flows in the Rio Grande below El Paso.

*Our Response*: We appreciate the support of EPWU for our efforts to recover the Rio Grande silvery minnow and understand its concerns about water management. In the proposed rule, this final rule, and the draft and final versions of the EA, we clearly state that we do not intend to have an adverse effect on water rights in implementing this project.

Additionally, the NEP designation does not provide a mechanism for us to require upstream water users to provide water resources to the NEP area. If water was supplied to the NEP area from upstream water users to enhance or maintain flows it would be done as a voluntary conservation measure. In order to require that upstream users must deliver additional water resources downstream, we must determine that an action with a Federal nexus is causing jeopardy to the species and that the reasonable and prudent alternative to the proposed action was to let water down. Because this population has been determined to be nonessential to the existence of the species, we would not be able to make a determination of jeopardy to the species due to effects on the NEP. In other words, in order to determine if this population is ''essential'' or ''nonessential'' under section 10(j)(2)(B) of the Act, we have already found that the loss of the fish in the NEP area would not jeopardize the continued existence of the species. Thus, any projects occurring in the NEP area would not jeopardize the continued existence of the species and requiring water from upstream users would not be a necessity.

(10) *Comment*: If this experiment succeeds, what is the likelihood of the Service converting this NEP to one which is essential to the survival of the species? What are the realistic prospects that the NEP designation will be removed, thereby providing this population with the full protections of the Act, and then the Service designating the area as critical habitat? If an NEP for the Rio Grande silvery minnow is established in the Big Bend reach, the Service should, as has been done for other species, declare up front that it permanently guarantees to never change the NEP designation to essential experimental, threatened, or endangered.

*Our Response*: Section 10(j) of the Act does not give us the authority to ''permanently'' declare an NEP; however, we have made it clear that it is not our intention to change this designation until the species meets the requirements described in the Draft Revised Recovery Plan or the final revised version for delisting as an endangered species. Both the proposed and final rules contain language on this subject found in 50 CFR 17.85(a)(1)(iii), specifically: ''We do not intend to change the NEP designations to 'essential experimental,' 'threatened,' or 'endangered' within the NEP area. Additionally we will not designate critical habitat for the(se) NEP(s), as provided by 16 U.S.C. 1539(j)(2)(C)(ii).'' Please also see our response to Comment 1.

(11) *Comment*: To reintroduce a species into an ecosystem runs the risk of it being a vector for disease or parasites that can affect other native species, so it is important to control and monitor for these in the captive population of Rio Grande silvery minnows that will be reintroduced to the Big Bend reach.

*Our Response*: All Federal fish hatcheries rearing and producing fish are inspected annually as per the Service's Aquatic Animal Health Policy using the American Fisheries Society, Fish Health Section Blue Book Standards. Facilities must maintain a Class-A certification, meaning they are free of all tested pathogens, in order to stock fish into the wild. Targeted pathogens include internal and external parasites, bacteria, and viruses. Dexter National Fish Hatchery and Technology Center, where Rio Grande silvery minnows are currently being raised for augmentation and reintroduction efforts, has qualified as a Class-A facility for 76 years, since it was constructed. In addition to the standard yearly fish health inspection, an additional Fish Lot inspection will be completed on the Rio Grande silvery minnows destined for the Big Bend reach 30 days prior to being transported to release sites. This inspection will be conducted according to the guidelines listed above. If any of the targeted pathogens are diagnosed, the fish will not be released and remedial actions will be taken immediately. Any additional facilities that are used to raise Rio Grande silvery minnows for this re-establishment effort will also be regularly inspected to ensure that they meet the standards described above.

(12) *Comment*: Big Bend National Park guidelines allow anglers to capture minnows for bait. These guidelines may indirectly permit harm to silvery minnows, and if silvery minnows persist in the Big Bend region, should be the subject of a section 7 consultation between the Service and the National Park Service to avoid adverse impacts to silvery minnows.

*Our Response*: Section 7 consultations will be conducted with the National Park Service and other Federal agencies whose activities may affect the Rio Grande silvery minnow in the Rio Grande within the jurisdiction of the National Park Service, including Big Bend National Park and the Rio Grande Wild and Scenic River. Within this area and as described in section 10(j) of the Act, the species will be treated as threatened for the purposes of section 7. As described in the EA and based on the information provided by Big Bend National Park, it is unlikely that anglers capturing minnows for bait would have a significant effect on the Rio Grande silvery minnow because the number of people who engage in this activity is low. However, all activities conducted by the National Park Service within Big Bend National Park and the Rio Grande Wild and Scenic River will be evaluated to determine if section 7 consultation is necessary. We have added language to § 17.84(u)(2)(i) regarding section 7 consultation with Federal agencies for activities in these areas.

(13) *Comment*: One comment expressed concern that our section 10 recovery permitting process would not be adequate to protect the wild population of Rio Grande silvery minnows in New Mexico.

*Our Response*: We will use our permitting authorities under Section 10 to review and manage permit applications related to the existing Rio Grande silvery minnow population in New Mexico, as well as the NEP in Texas, and will ensure that permitted activities do not reduce the likelihood of its survival. Please also see our response to comments 2 and 4.

(14) *Comment*: What if the minnow does well and extends its range upward to Little Box Canyon and to other areas such as into the Pecos River in Texas?

*Our Response*: The designated NEP area includes the estimated maximum geographic extent to which Rio Grande silvery minnows could move from planned release sites. We expect the species could become established after releases within suitable habitat in the Rio Grande from Mulato Dam (near the western border of Big Bend Ranch State Park) to Foster's Weir (east of the Terrell/Val Verde county line). The reaches of river immediately outside of the expected establishment area that are included in the NEP do not contain suitable habitat, and thus Rio Grande silvery minnows are unlikely to move into these areas. These areas are included in the NEP area to extend it out to the nearest physical barrier that would prevent fish from moving beyond that point. Therefore, it is extremely unlikely that Rio Grande silvery minnows will move beyond the designated NEP area under current conditions.

(15) *Comment*: One commenter objected to the Services' commitment to amend the finalized rule and enlarge the NEP area if any Rio Grande silvery minnows move outside of it and provided the following comments. Individuals that leave the NEP area should retain the protections of its endangered listing. In the EA, the Service has not determined the impacts of current or future Federal activities in an expanded NEP or whether activities in the expanded NEP are compatible with silvery minnow recovery, and thus whether the relaxed protections of an NEP are adequate or whether the more stringent protections are required.

*Our Response*: It is extremely unlikely that Rio Grande silvery minnows will move beyond the designated NEP area under current conditions (see ''Reestablishment Area'' section in this rule). If Rio Grande silvery minnows do move beyond the current NEP designation and are able to persist, it will likely be because: (1) they are doing well in the current NEP area; (2) barriers to movement at the boundaries of the NEP area have been removed; and (3) aquatic habitat beyond the expected establishment area is greatly improved over current conditions. Should this occur it would likely mean that current activities in those areas are compatible with reestablishment, and thus it is our intention to amend the NEP to include the larger area. However, to do so, we would be required to first engage in the NEPA and rulemaking processes. This would include evaluating new information, seeking and considering public comment, and publishing new proposed and final rules in the **Federal Register**, as discussed in our response to Comment 1.

(16) *Comment*: The reach of river from Fort Quitman to Candelaria is included in the NEP area, but it is not suitable habitat for the silvery minnow, primarily because flow of water cannot be maintained, especially during drought. There is high salinity in the water, worsening with intermittent flows. Rio Grande flows only become reliable enough to support any fish population below the confluence with the Rio Conchos. If the Service seeks a reliable source of flowing water in the Fort Quitman to Candelaria reach, the only source of water belongs to the constituents of Elephant Butte Irrigation District and El Paso County Water Improvement District. The Service should not try to confiscate Rio Grande water to provide marginal habitat for Rio Grande silvery minnows in this reach.

*Our Response*: We agree that the reach of the Rio Grande from Fort Quitman to Candelaria does not contain suitable habitat for silvery minnows. We do not intend to reintroduce Rio Grande silvery minnows to these areas. In addition, we have no intention of confiscating anyone's water or water rights, nor the authority to do so. Please also see our response to Comments 9 and 14.

(17) *Comment*: The Service says that an NEP would minimize the regulatory burden on landowners along the Rio Grande, but it does not explain how that can be when the silvery minnow is not present in the area and is not likely to appear except through manmade efforts.

*Our Response*: The statement that an NEP would minimize the regulatory burden on landowners along the Rio Grande was made in comparison to regulations associated with an essential experimental population and with a species with full endangered status and not listed as an NEP.

(18) *Comment*: It appears the Draft EA and proposed rule downplay the potential for the quality of water to affect, in some regard, the survival of some fish or the recovery of the Rio Grande silvery minnow in this reach.

*Our Response*: It is not our intention to downplay the potential importance of water quality as it relates to the survival and recovery of Rio Grande silvery minnows in the NEP area. The water quality in the Big Bend reach has generally been improving since the species was extirpated from the area. In the Implementation and Monitoring Plan appended to the EA, we have identified research and monitoring needs for gaining a better understanding of water quality in the Big Bend reach, factors affecting it, and potential effects on the species.

(19) *Comment*: Two commenters suggested implementing a habitat management plan, especially for the semi-aquatic vegetation species, *Tamarix* spp. and *Arundo donax* in the NEP area, in order to recover the habitat and maintain a stable population.

*Our Response*: We are collaborating with the World Wildlife Fund, U.S. Geological Survey, the U.S. and Mexico Sections of the International Boundary and Water Commission, and superintendents and managers of six protected areas along the Big Bend Reach of the Rio Grande on a series of collaborative, bi-national ecological restoration efforts in the NEP area. Aquatic and riparian habitat studies and ecological restoration and enhancement projects, including the control of the invasive and exotic *Tamarix* spp. and *Arundo donax*, are currently underway within the following six protected areas in the United States and Mexico: Big Bend National Park (National Park Service, Department of the Interior), Big Bend Ranch State Park (Texas Parks & Wildlife Department (TPWD)), Black Gap Wildlife Management Area (TPWD), Área de Protección de Flora y Fauna Cañon Santa Elena (Secretaría de Medio Ambiente y Recursos Naturales (SEMARNAT)), Área de Protección de Flora y Fauna Maderas del Carmen (SEMARNAT), and Rio Grande Wild and Scenic River (National Park Service, Department of the Interior).

(20) *Comment*: Reintroduction of Rio Grande silvery minnows in the Big Bend reach could have an effect on other native species.

*Our Response*: Rio Grande silvery minnows historically occupied this reach of the Rio Grande, and the native flora and fauna that exist there evolved with the presence of this species. Thus, through reintroducing the Rio Grande silvery minnow, we are aiding in the restoration of this aquatic ecosystem. In addition, we do not expect any significant impact to any other listed or unlisted species to result from reintroduction of Rio Grande silvery minnows. Monitoring of the fish community as a whole and specifically of other native species with life history requirements similar to those of the Rio Grande silvery minnow will be conducted as part of the implementation of this project. If monitoring results indicate that the presence of Rio Grande silvery minnows is having an adverse effect on other native and rare or declining species, the reintroduction program will be re-evaluated and

modified, as appropriate. Please see the Implementation and Monitoring Plan appended to the EA for more information.

(21) *Comment*: The release of these fish into the Big Bend area is prudent; however, as with all reintroductions it may take several (100s or more) releases to actually get the population established, depending on habitat conditions, water conditions, and other environmental conditions that may not be currently known.

*Our Response*: We appreciate your comment and agree that it may take numerous releases for Rio Grande silvery minnows to become established within the NEP area. As described in the Implementation and Monitoring Plan, along with our conservation cooperators, we will be conducting population monitoring and gathering other information to help us determine the success of the project. Reintroduction, monitoring, and research efforts will be evaluated yearly to determine how we can improve our efforts and the likelihood of reestablishing the species. Our intent is to continue reintroduction efforts in the NEP area until it becomes clear that a self-sustaining population (as defined in the Draft Revised Recovery Plan) has been established or that the project is no longer a conservation benefit to the species.

(22) *Comment*: It is not clear how the Service will handle permitting of ''take'' where the species is classified as ''threatened'' in a national park or refuge. Would the 4(d) regulation apply where the State of Texas would issue ''take'' permits or would ''take'' remain entirely under Service control?

*Our Response*: Prohibited and allowable take is described at the end of this rule in the amendment to 50 CFR 17.84, which lists the NEP designation for Rio Grande silvery minnows. The Service will retain permitting authorities for intentional take of Rio Grande silvery minnows in the NEP area under section 10 for educational purposes, scientific purposes, enhancement of propagation or survival of the species, zoological exhibition, and other conservation purposes consistent with the Act. Incidental take permits may be issued by the Service via the section 7 consultation process to Federal agencies who propose actions that are likely to have an adverse effect on the Rio Grande silvery minnow within Big Bend National Park or the Rio Grande Wild and Scenic River.

## Finding

We followed the procedures required by the Act, NEPA, and the Administrative Procedure Act during this Federal rulemaking process. Therefore, we solicited public and peer-reviewer comment on the proposed NEP designation. As required by law, we have considered all comments received on the proposed rule, the draft EA, and the draft implementation and monitoring plan before making this final determination. Based on the above information, and using the best scientific and commercial data available (in accordance with 50 CFR 17.81), we find that creating an NEP of Rio Grande silvery minnows and releasing them into the NEP area in the Big Bend reach will further the conservation of the species.

## Effective Date

We are making this rule effective upon publication. In accordance with the Administrative Procedure Act, we find good cause as required by 5 U.S.C. 553(d)(3) to make this rule effective immediately upon publication in the **Federal Register**. Rio Grande silvery minnows to be released in the Big Bend reach are currently being housed at the Service's Dexter National Fish Hatchery and Technology Center. Careful timing, taking into consideration the age and size for reintroducing minnows and the conditions in the Rio Grande in the Big Bend reach, is important to increase their chances for survival. Based on our experience with releasing the species to augment its population in New Mexico, we have determined that it would be best to initiate the release of the fish in December of 2008.

## Required Determinations

### *Section 7 Consultation*

A special rule under section 4(d) of the Act is included in this establishment of an experimental population under section 10(j) of the Act. A population designated as experimental is treated for the purposes of section 9 of the Act as threatened, regardless of the species' designation elsewhere in its range. The Service is not required to consult on this special rule under section 7(a)(2) of the Act. The development of protective regulations for a threatened species is an inherent part of the section 4 listing process. The Service must make this determination considering only the ''best scientific and commercial data available.'' A necessary part of this listing decision is also determining what protective regulations are ''necessary and advisable to provide for the conservation of [the] species.'' Determining what prohibitions and authorizations are necessary to conserve the species, like the listing determination of whether the species meets the definition of threatened or endangered, is not a decision that Congress intended to undergo section 7 consultation.

### *Regulatory Planning and Review (E.O. 12866)*

The Office of Management and Budget (OMB) has determined that this rule is not significant and has not reviewed this rule under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

(a) Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(b) Whether the rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the rule raises novel legal or policy issues.

### *Regulatory Flexibility Act*

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 601 *et seq.*, whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. We are certifying that this rule will not have a significant economic effect on a substantial number of small entities. The following discussion explains our rationale.

The area affected by this rule includes the Big Bend reach of the Rio Grande in Texas. Because of the substantial regulatory relief provided by NEP designations, we do not expect this rule to have any significant effect on recreational, agricultural, or development activities within the NEP

area. In addition, when NEPs are located outside a National Wildlife Refuge or unit of the National Park System, we treat the population as a species proposed for listing and only two provisions of section 7 apply: section 7(a)(1) and section 7(a)(4). In these instances, NEPs provide additional flexibility because Federal agencies are not required to consult with us under section 7(a)(2). Section 7(a)(1) requires Federal agencies to use their authorities to carry out programs to further the conservation of listed species. Section 7(a)(4) requires Federal agencies to confer (rather than consult) with the Service on actions that are likely to jeopardize the continued existence of a proposed species. The results of a conference are advisory in nature and do not restrict agencies from carrying out, funding, or authorizing activities.

This rule authorizes incidental take of Rio Grande silvery minnows within the NEP area. The regulations implementing the Act define ''incidental take'' as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity such as military training, livestock grazing, recreation, and other activities that are in accordance with Federal, Tribal, State, and local laws and regulations. Intentional take for purposes other than authorized data collection will not be permitted. Intentional take for research or educational purposes will require a section 10 recovery permit under the Act.

This action will not affect recreational fishing or conservation actions, including removal of nonnative vegetation along the Rio Grande, such as salt cedar and giant river cane. The principal activities on private property near the NEP are agriculture, ranching, and recreation. We believe the presence of the Rio Grande silvery minnow will not affect the use of lands for these purposes because there will be no new or additional economic or regulatory restrictions imposed upon States, non-Federal entities, or members of the public due to the presence of the Rio Grande silvery minnow. Outside of Big Bend National Park and the Rio Grande Wild and Scenic River, Federal agencies will only have to comply with sections 7(a)(2) and 7(a)(4) of the Act. Within Big Bend National Park and the Rio Grande Wild and Scenic River, the species will be treated as threatened and Federal agencies whose activities may affect the species in this area will be required to consult under section 7(a)(2) of the Act. However, this area is currently being managed for conservation purposes and thus Federal activities affecting the species in this area are anticipated to be beneficial or relatively minor if they are adverse. Therefore, this rulemaking is not expected to have any significant adverse impacts to recreation, agriculture, or any development activities.

*Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

1. On the basis of information contained in the ''Regulatory Flexibility Act'' section above, this rule will not ''significantly or uniquely'' affect small governments. We have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502 *et seq.*, that this rulemaking will not impose a cost of $100 million or more in any given year on local or State governments or private entities. A Small Government Agency Plan is not required. As explained above, small governments will not be affected because the NEP designation will not place additional requirements on any city, county, or other local municipalities.

2. This rule will not produce a Federal mandate of $100 million or greater in any year (i.e., it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act). This NEP designation for the Rio Grande silvery minnow will not impose any additional management or protection requirements on the States or other entities.

*Takings (E.O. 12630)*

In accordance with Executive Order 12630, the rule does not have significant takings implications. When reestablished populations of federally-listed species are designated as NEPs, the Act's regulatory requirements regarding the reestablished listed species within the NEP are significantly reduced. Section 10(j) of the Act can provide regulatory relief with regard to the taking of reestablished species within an NEP area. For example, with the exception of Federal agencies, which must consult under section 7 on their activities that may affect the Rio Grande silvery minnow within Big Bend National Park or the Wild and Scenic River, this rule allows for the taking of reestablished Rio Grande silvery minnows when such take is incidental to an otherwise legal activity, such as recreation (e.g., fishing, boating, wading, trapping, swimming), forestry, agriculture, salt cedar and giant river cane control, and other activities that are in accordance with Federal, State, and local laws and regulations. Because of the substantial regulatory relief provided by NEP designations, we do not believe the reestablishment of this fish will conflict with existing or proposed human activities or hinder public use of the Big Bend reach of the Rio Grande and its tributaries.

A takings implication assessment is not required because this rule (1) will not effectively compel a property owner to suffer a physical invasion of property and (2) will not deny all economically beneficial or productive use of the land or aquatic resources. This rule will substantially advance a legitimate government interest (conservation and recovery of a listed fish species) and will not present a barrier to all reasonable and expected beneficial use of private property.

*Federalism (E.O. 13132)*

In accordance with Executive Order 13132, we have considered whether this rule has significant Federalism effects and have determined that a Federalism assessment is not required. This rule will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. In keeping with Department of the Interior policy, we requested information from and coordinated development of this rule with the affected resource agencies in Texas. Achieving the recovery goals for this species will contribute to its eventual delisting and its return to State management. No intrusion on State policy or administration is expected; roles or responsibilities of Federal or State governments will not change; and fiscal capacity will not be substantially directly affected. The special rule operates to maintain the existing relationship between the State and the Federal Government and is being undertaken in coordination with the State of Texas. Therefore, this rule does not have significant Federalism effects or implications to warrant the preparation of a Federalism Assessment under the provisions of Executive Order 13132.

*Civil Justice Reform (E.O. 12988)*

In accordance with Executive Order 12988 (February 7, 1996; 61 FR 4729), the Office of the Solicitor has determined that this rule will not unduly burden the judicial system and will meet the requirements of sections (3)(a) and (3)(b)(2) of the Order.

*Government-to-Government Relationship with Tribes*

In accordance with Secretarial Order 3206, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Act (June 5, 1997); the President's memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments (59 FR 22951); Executive Order 13175; and the Department of the Interior's requirement at 512 DM 2, we have notified the Native American Tribes within and adjacent to the NEP area about the proposed rule and this final rule. They have been advised through written contact, including informational mailings from the Service. Furthermore, the potential reintroduction area for Rio Grande silvery minnows in the Big Bend reach does not overlap with any Tribal lands, and we do not expect Rio Grande silvery minnows to move out of their preferred habitats. If future activities resulting from this rule may affect Tribal resources, the Service will communicate and consult on a Government-to-Government basis with any affected Native American Tribes in order to find a mutually agreeable solution.

*Paperwork Reduction Act*

Office of Management and Budget (OMB) regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), require that Federal agencies obtain approval from OMB before collecting information from the public. The Office of Management and Budget has approved our collection of information associated with reporting the taking of experimental populations and assigned control number 1018-0095. We may not collect or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

*National Environmental Policy Act*

We have prepared an EA and Finding of No Significant Impact, as defined under the authority of the National Environmental Policy Act of 1969. It is available from the Austin Ecological Services Field Office, 107011 Burnet Road, Suite 200, Austin, Texas 78758 and from our website at *http://www.fws.gov/southwest/es/Library/* and on *www.regulations.gov* at Docket No. FWS-R2_ES-2008-0031.

*Energy Supply, Distribution or Use (E.O. 13211)*

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule is not expected to significantly affect energy supplies, distribution, and use. Because this action is not a significant energy action, no Statement of Energy Effects is required.

**References Cited**

A complete list of all references cited in this rule is available upon request from the Austin Ecological Services Field Office (see **ADDRESSES** section).

**Authors**

The primary authors of this rule are staff of the Austin Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

**List of Subjects in 50 CFR Part 17**

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

**Final Regulation Promulgation**

■ Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

## PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

**Authority:** 16 U.S.C. 1361-1407; 16 U.S.C. 1531-1544; 16 U.S.C. 4201-4245; Pub. L. 99-625, 100 Stat. 3500; unless otherwise noted.

■ 2. Amend § 17.11(h) by revising the entry for ''Minnow, Rio Grande silvery'' under ''FISHES'' in the List of Endangered and Threatened Wildlife to read as follows:

**§ 17.11 Endangered and threatened wildlife.**

* * * * *

(h) * * *

| Species | | Historic Range | Vertebrate population where endangered or threatened | Status | When listed | Critical habitat | Special rules |
|---|---|---|---|---|---|---|---|
| Common name | Scientific name | | | | | | |
| * * * * * * * | | | | | | | |
| FISHES | | | | | | | |
| * * * * * * * | | | | | | | |
| Minnow, Rio Grande silvery | *Hybognathus amarus* | U.S.A.(NM, TX), Mexico. | Entire, except where listed as an experimental population. | E | 543 | 17.95(e) | NA |

| Species | | Historic Range | Vertebrate population where endangered or threatened | Status | When listed | Critical habitat | Special rules |
|---|---|---|---|---|---|---|---|
| Common name | Scientific name | | | | | | |
| Minnow, Rio Grande silvery | *Hybognathus amarus* | U.S.A.(NM, TX), Mexico. | Rio Grande, from Little Box Canyon (approximately 10.4 river miles downstream of Fort Quitman, TX) to Amistad Dam; and on the Pecos River, from its confluence with Independence Creek to its confluence with the Rio Grande. | XN | 761 | NA | 17.84(u) |
| * * * * * * * | | | | | | | |

■ 3. Amend §17.84 by adding a new paragraph (u) to read as follows:

**§ 17.84 Special rules—vertebrates.**

* * * * *

(u) Rio Grande silvery minnow (*Hybognathus amarus*).

(1) *Where are populations of this fish designated as nonessential experimental populations (NEP)?*

(i) The NEP area for the Rio Grande silvery minnow is within the species' historical range and is defined as follows: Rio Grande, from Little Box Canyon downstream of Fort Quitman, Hudspeth County, Texas, through Big Bend National Park and the Rio Grande Wild and Scenic River, to Amistad Dam; and on the Pecos River, from its confluence with Independence Creek to its confluence with the Rio Grande.

(ii) The Rio Grande silvery minnow is not currently known to exist in the Rio Grande or Pecos River in Texas. Based on the habitat requirements of this fish, we do not expect it to become established outside the NEP area. However, if any individuals of this species move upstream or downstream or into tributaries outside the designated NEP area, we would presume that they came from the reestablished populations. We would then amend paragraph (u)(1)(i) of this section to enlarge the boundaries of the NEP to include the entire range of the expanded population.

(iii) We do not intend to change the NEP designation to ''essential experimental,'' ''threatened,'' or ''endangered'' within the NEP area. Additionally, we will not designate critical habitat for this NEP, as provided by 16 U.S.C. 1539(j)(2)(C)(ii).

(2) *What take is allowed of this species in the NEP area?*

(i) A Rio Grande silvery minnow may be taken within the NEP area, provided that such take is either not willful, knowing, or due to negligence, or is incidental to and not the purpose of the carrying out of an otherwise lawful activity, such as recreation (e.g., fishing, boating, wading, trapping, or swimming), agriculture, and other activities that are in accordance with Federal, State, and local laws and regulations. However, Federal agencies, must consult under section 7 of the Act on their activities that may affect the Rio Grande silvery minnow within Big Bend National Park or the Wild and Scenic River.

(ii) Any person with a valid permit issued by the U.S. Fish and Wildlife Service (Service) under 50 CFR 17.32 may take Rio Grande silvery minnows for educational purposes, scientific purposes, the enhancement of propagation or survival of the species, zoological exhibition, and other conservation purposes consistent with the Act;

(iii) Any taking pursuant to paragraph (u)(2)(i) of this section must be reported within 7 days by contacting the Service, Austin Ecological Services Field Office, 107011 Burnet Road, Suite 200, Austin, TX 78758; (512) 490-0057. Once the Service is contacted, a determination will be made as to the disposition of any live or dead specimens. Reporting requirements for take pursuant to paragraph (u)(2)(ii) of this section will be specifically defined in the permit issued by the Service.

(3) *What take of this species is not allowed in the NEP area?*

(i) Except as expressly allowed in paragraph (u)(2) of this section, all the provisions of 50 CFR 17.31(a) and (b) apply to the fish identified in paragraph (u)(1) of this section.

(ii) Any manner of take not described under paragraph (u)(2) of this section is prohibited in the NEP area.

(iii) You may not possess, sell, deliver, carry, transport, ship, import, or export by any means whatsoever any of the identified fishes, or parts thereof, that are taken or possessed in violation of paragraph (u)(3) of this section or in violation of the applicable State or local fish and wildlife laws or regulations or the Act.

(iv) You may not attempt to commit, solicit another to commit, or cause to be committed any offense defined in paragraph (u)(3) of this section.

(4) *How will the effectiveness of the reestablishment be monitored?*

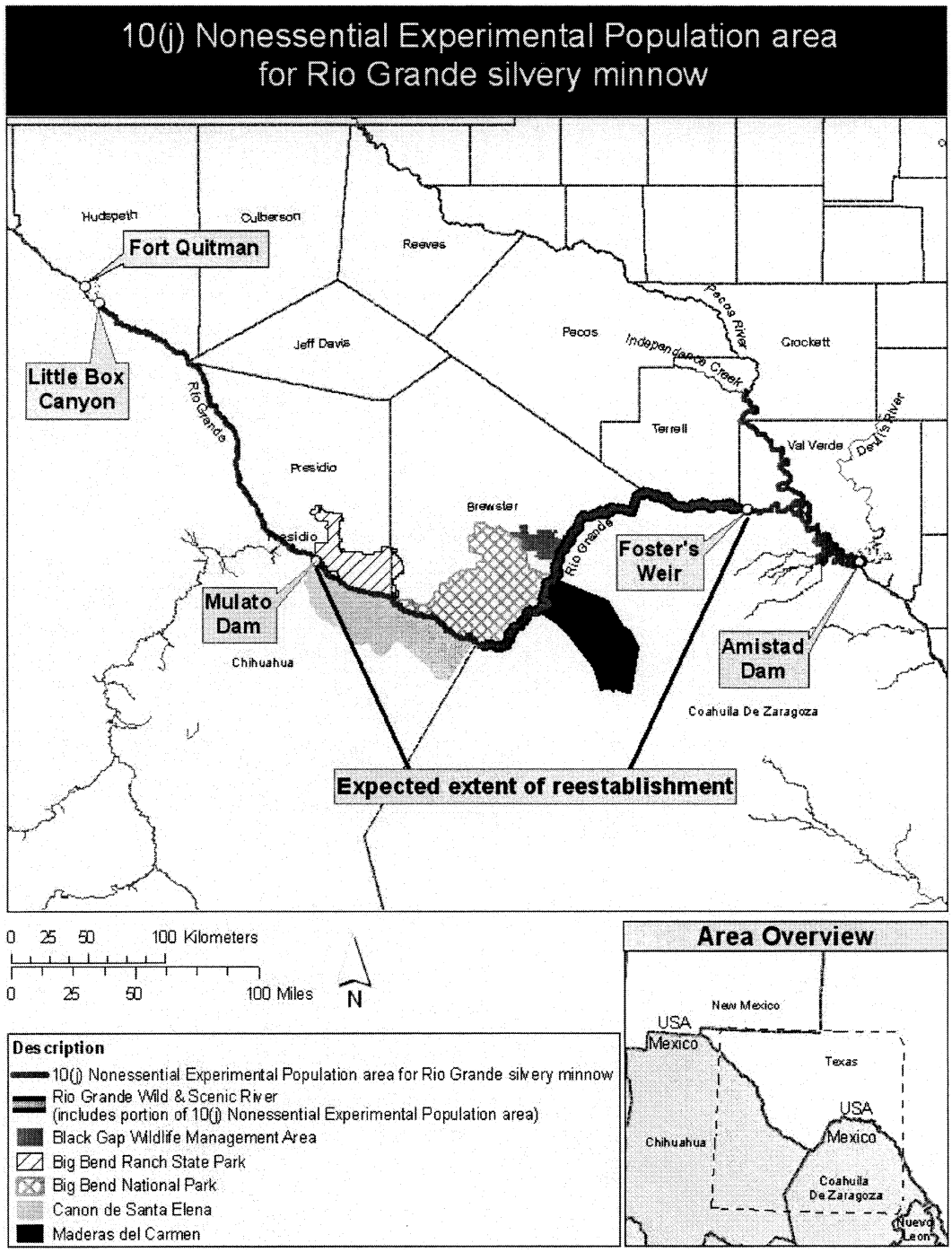
(a) After the initial stocking of this fish, we will monitor their presence or absence at least annually and document any spawning behavior or young-of-year fish that might be present. Depending on available resources, monitoring may occur more frequently, especially during the first few years of reestablishment efforts. This monitoring will be conducted primarily by seining and will be accomplished by Service, National

Park Service, or State employees or by contracting with the appropriate species experts. Annual reports will be produced detailing stocking and monitoring activities that took place during the previous year.

(b) The Service will fully evaluate these reestablishment efforts every 5 years to determine whether to continue or terminate them.

(c) Note: Map of the NEP area for the Rio Grande silvery minnow in Texas follows:

BILLING CODE 4310–55–S




Dated: November 25, 2008

**David M. Verhey,**

*Acting Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. E8–28904 Filed 12–3–08; 4:15 pm]

BILLING CODE 4310–55–C

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 648**

**[Docket No. 071212833–8179–02 ]**

**RIN 0648–XM09**

## Fisheries of the Northeastern United States; Atlantic Bluefish Fishery; Commercial Quota Harvested for New York

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Closure of commercial fishery.

**SUMMARY:** NMFS announces that the Atlantic bluefish commercial quota available to New York has been harvested. Vessels issued a commercial Federal fisheries permit for the Atlantic bluefish fishery may not land bluefish in New York for the remainder of calendar year 2008, unless additional quota becomes available through a transfer. Regulations governing the Atlantic bluefish fishery require publication of this notification to advise New York that the quota has been harvested and to advise vessel permit holders and dealer permit holders that no commercial quota is available for landing bluefish in New York.

**DATES:** Effective 0001 hours, December 5, 2008, through 2400 hours, December 31, 2008.

**FOR FURTHER INFORMATION CONTACT:** Emily Bryant, Fishery Management Specialist, (978) 281–9244.

**SUPPLEMENTARY INFORMATION:** Regulations governing the Atlantic bluefish fishery are found at 50 CFR part 648. The regulations require annual specification of a commercial quota that is apportioned on a percentage basis among the coastal states from Florida through Maine. The process to set the annual commercial quota and the percent allocated to each state is described in § 648.160.

The initial Federal coastwide commercial quota for Atlantic bluefish for the 2008 calendar year was set equal to 4,787,000 lb (2,171 mt) (73 FR 9958, February 25, 2008). The initial commercial quota was adjusted by transferring 2,918,693 lb (1,324 mt) from the initial recreational allocation, resulting in a total commercial quota of 7,705,244 lb (3,495 mt). The percent allocated to vessels landing bluefish in New York is 10.3851 percent, resulting in an initial commercial quota of 800,195 lb (363 mt). The 2008 allocation was reduced to 747,057 lb (339 mt) (73 FR 9958, February 25, 2008) due to a 2007 quota overage and the 2008 research set-aside quota allocation. Subsequently, during the 2008 fishing year, New York received six transfers of bluefish quota. In August 2008, New York received a transfer from North Carolina in the amount of 100,000 lb (45 mt) (73 FR 48306). In October, Florida transferred 100,000 lb (45 mt) of bluefish to New York (73 FR 60986). In November, Connecticut, Rhode Island, Maryland, and Delaware transferred 20,000 lb (10 mt), 50,000 lb (23 mt), 50,000 lb (23 mt), and 90,000 lb (41 mt), respectively, of their 2008 commercial quotas to New York (73 FR 71561). These transfers increased New York's bluefish quota allocation to 1,157,057 lb (525 mt).

The regulations at § 648.161(b) require the Administrator, Northeast Region, NMFS (Regional Administrator), to monitor state commercial quotas and to determine when a state's commercial quota has been harvested. NMFS then publishes a notification in the **Federal Register** to advise the state and to notify Federal vessel and dealer permit holders that, effective upon a specific date, the state's commercial quota has been harvested and no commercial quota is available for landing bluefish in that state. The Regional Administrator has determined, based upon dealer reports and other available information, that New York has harvested its quota for calendar year 2008.

The regulations at § 648.4(b) provide that Federal permit holders agree, as a condition of the permit, not to land bluefish in any state that the Regional Administrator has determined no longer has commercial quota available. Therefore, effective 0001 hours, December 5, 2008, further landings of bluefish in New York by vessels holding Atlantic bluefish commercial Federal fisheries permits are prohibited for the remainder of the 2008 calendar year, unless additional quota becomes available through a transfer and is announced in the **Federal Register**. Effective 0001 hours, December 5, 2008, federally permitted dealers are also notified that they may not purchase bluefish from federally permitted vessels that land in New York for the remainder of the calendar year, or until additional quota becomes available through a transfer.

### Classification

This action is required by 50 CFR part 648 and is exempt from review under Executive Order 12866.

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: December 1, 2008.

**Emily H. Menashes,**

*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. E8–28971 Filed 12–3–08; 4:15 pm]

BILLING CODE 3510–22–S

# Proposed Rules

Federal Register
Vol. 73, No. 236
Monday, December 8, 2008

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

## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 532

**RIN 3206–AL76**

### Prevailing Rate Systems; Redefinition of the Little Rock, AR, Southern Missouri, and Tulsa, OK, Appropriated Fund Federal Wage System Wage Areas

**AGENCY:** U.S. Office of Personnel Management.

**ACTION:** Proposed rule with request for comments.

**SUMMARY:** The U.S. Office of Personnel Management is issuing a proposed rule that would redefine the geographic boundaries of the Little Rock, AR, Southern Missouri, and Tulsa, OK, appropriated fund Federal Wage System (FWS) wage areas. The proposed rule would redefine Crawford and Sebastian Counties, AR, from the Little Rock wage area to the Tulsa wage area and Madison County, AR, and McDonald County, MO, from the Southern Missouri wage area to the Tulsa wage area. These changes are based on recent consensus recommendations of the Federal Prevailing Rate Advisory Committee to best match the counties proposed for redefinition to a nearby FWS survey area. No other changes are proposed for the Little Rock, Southern Missouri, and Tulsa FWS wage areas.

**DATES:** We must receive comments on or before January 7, 2009.

**ADDRESSES:** Send or deliver comments to Charles D. Grimes III, Deputy Associate Director for Performance and Pay Systems, Strategic Human Resources Policy Division, U.S. Office of Personnel Management, Room 7H31, 1900 E Street, NW., Washington, DC 20415–8200; e-mail *pay-performance-policy@opm.gov*; or FAX: (202) 606–4264.

**FOR FURTHER INFORMATION CONTACT:** Madeline Gonzalez, (202) 606–2838; e-mail *pay-performance-policy@opm.gov*; or FAX: (202) 606–4264.

**SUPPLEMENTARY INFORMATION:** The U.S. Office of Personnel Management (OPM) is issuing a proposed rule to redefine the Little Rock, AR, Southern Missouri, and Tulsa, OK, appropriated fund Federal Wage System (FWS) wage areas. This proposed rule would redefine Crawford and Sebastian Counties, AR, from the Little Rock wage area to the Tulsa wage area and Madison County, AR, and McDonald County, MO, from the Southern Missouri wage area to the Tulsa wage area.

OPM considers the following regulatory criteria under 5 CFR 532.211 when defining FWS wage area boundaries:

(i) Distance, transportation facilities, and geographic features;

(ii) Commuting patterns; and

(iii) Similarities in overall population, employment, and the kinds and sizes of private industrial establishments.

OPM recently completed reviews of the definitions of the Fayetteville-Springdale-Rogers, AR–MO and Fort Smith, AR–OK Metropolitan Statistical Areas (MSAs) and, based on analyses of the regulatory criteria for defining wage areas, is proposing the changes described below. The Federal Prevailing Rate Advisory Committee (FPRAC), the national labor-management committee responsible for advising OPM on matters concerning the pay of FWS employees, recommended these changes by consensus. FPRAC recommended no other changes in the geographic definitions of the Little Rock, Southern Missouri, and Tulsa wage areas. The affected employees in Crawford, Madison, and Sebastian Counties, AR, and McDonald County, MO, would be placed on the wage schedule for the Tulsa wage area on the first day of the first applicable pay period beginning on or after 30 days following publication of the final regulations.

Fayetteville-Springdale-Rogers, AR–MO MSA: Benton, Madison, and Washington Counties, AR, and McDonald County, MO, comprise the Fayetteville-Springdale-Rogers, AR–MO MSA. The Fayetteville-Springdale-Rogers MSA is split between the Little Rock, AR, Southern Missouri, and Tulsa, OK, wage areas. Madison County is part of the area of application of the Little Rock wage area, McDonald County is part of the area of application of the Southern Missouri wage area, and Benton and Washington Counties are part of the area of application of the Tulsa wage area.

Based on an analysis of the regulatory criteria for Washington County, the location of the main population center in the Fayetteville-Springdale-Rogers MSA, we recommend that the entire Fayetteville-Springdale-Rogers MSA be defined to the Tulsa wage area. The distance criterion for Washington County favors the Tulsa wage area more than Little Rock or Southern Missouri wage areas. All other criteria are inconclusive. We believe our regulatory analysis findings indicate that Washington County is appropriately defined to the Tulsa wage area. OPM regulations at 5 CFR 532.211 permit splitting MSAs only in very unusual circumstances (e.g., organizational relationships among closely located Federal activities). There appear to be no unusual circumstances that would permit splitting the Fayetteville-Springdale-Rogers MSA. To comply with OPM regulations not to split MSAs, Madison and McDonald Counties would be redefined to the Tulsa wage area. The remaining county in the Fayetteville-Springdale-Rogers MSA, Benton County, is already defined to the Tulsa wage area.

Fort Smith, AR–OK MSA: Crawford, Franklin, and Sebastian Counties, AR, and Le Flore and Sequoyah Counties, OK, comprise the Fort Smith, AR–OK MSA. The Fort Smith MSA is split between the Little Rock, AR, wage area and the Tulsa, OK, wage area. Crawford, Franklin, and Sebastian Counties are part of the area of application of the Little Rock wage area, and Le Flore and Sequoyah Counties are part of the area of application of the Tulsa wage area.

Based on an analysis of the regulatory wage area criteria in 5 CFR 532.211, we recommend that Crawford and Sebastian Counties be redefined to the Tulsa area of application. The distance criterion favors the Tulsa wage area more than the Little Rock wage area. All other criteria are inconclusive. Based on the mixed nature of our regulatory analysis findings, there is no clear indication that Crawford or Sebastian Counties should be placed in a different FWS wage area. However, since OPM regulations at 5 CFR 532.211 permit splitting MSAs only in very unusual circumstances (e.g., organizational relationships among closely located Federal activities) and the Fort Smith

MSA is adjacent to the Tulsa survey area but not adjacent to the Little Rock survey area, we recommend that Crawford and Sebastian Counties be redefined to the Tulsa wage area.

Based on an analysis of the regulatory wage area criteria, we recommend that Franklin County remain part of the Little Rock area of application. When measuring from cities, the distance criterion favors the Little Rock wage area. When measuring from host installations, the distance criterion favors the Tulsa wage area. All other criteria are inconclusive. Based on our regulatory analysis findings, there is no clear indication that Franklin County should be placed in a different FWS wage area. In addition, the western part of the Ozark National Forest is located in portions of Crawford and Franklin Counties. There are no FWS employees working in Crawford County, but there are nine FWS Forest Service employees working in Franklin County. OPM regulations at 5 CFR 532.211 permit splitting MSAs in unusual circumstances. Since there are FWS Forest Service employees working at Ozark National Forest locations in closely located counties, we recommend that Franklin County remain defined to the Little Rock wage area. This would continue to provide equal pay treatment for FWS employees with employment locations in the Forest.

**Regulatory Flexibility Act**

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

**List of Subjects in 5 CFR Part 532**

Administrative practice and procedure, Freedom of information, Government employees, Reporting and recordkeeping requirements, Wages.

U.S. Office of Personnel Management.

**Michael W. Hager,**

*Acting Director.*

Accordingly, the U.S. Office of Personnel Management is proposing to amend 5 CFR part 532 as follows:

## PART 532—PREVAILING RATE SYSTEMS

1. The authority citation for part 532 continues to read as follows:

**Authority:** 5 U.S.C. 5343, 5346; § 532.707 also issued under 5 U.S.C. 552.

2. In appendix C to subpart B, the wage area listing for the State of Arkansas is amended by revising the listing for Little Rock; for the State of Missouri, by revising the listing for Southern Missouri, and for the State of Oklahoma, by revising the listing for Tulsa, to read as follows:

**Appendix C to Subpart B of Part 532—Appropriated Fund Wage and Survey Areas**

* * * * *

**Arkansas**

**Little Rock**

*Survey Area*

Arkansas:
- Jefferson
- Pulaski
- Saline

*Area of Application. Survey area plus:*

Arkansas:
- Arkansas
- Ashley
- Baxter
- Boone
- Bradley
- Calhoun
- Chicot
- Clay
- Clark
- Cleburne
- Cleveland
- Conway
- Dallas
- Desha
- Drew
- Faulkner
- Franklin
- Fulton
- Garland
- Grant
- Greene
- Hot Spring
- Independence
- Izard
- Jackson
- Johnson
- Lawrence
- Lincoln
- Logan
- Lonoke
- Marion
- Monroe
- Montgomery
- Newton
- Ouachita
- Perry
- Phillips
- Pike
- Polk
- Pope
- Prairie
- Randolph
- Scott
- Searcy
- Sharp
- Stone
- Union
- Van Buren
- White
- Woodruff
- Yell

* * * * *

**Missouri**

* * * * *

**Southern Missouri**

*Survey Area*

Missouri:
- Christian
- Greene
- Laclede
- Phelps
- Pulaski
- Webster

*Area of Application. Survey area plus:*

Missouri:
- Barry
- Barton
- Benton
- Bollinger
- Butler
- Camden
- Cape Girardeau
- Carter
- Cedar
- Dade
- Dallas
- Dent
- Douglas
- Hickory
- Howell
- Iron
- Jasper
- Lawrence
- Madison
- Maries
- Miller
- Mississippi
- Moniteau
- Morgan
- New Madrid
- Newton
- Oregon
- Ozark
- Perry
- Polk
- Reynolds
- Ripley
- St. Clair
- Scott
- Shannon
- Stoddard
- Stone
- Taney
- Texas
- Vernon
- Wayne
- Wright

Kansas:
- Cherokee
- Crawford

* * * * *

**Oklahoma**

* * * * *

**Tulsa**

*Survey Area*

Oklahoma:
- Creek
- Mayes
- Muskogee
- Osage
- Pittsburg
- Rogers
- Tulsa
- Wagoner

*Area of Application. Survey area plus:*

Oklahoma:

Adair
Cherokee
Choctaw
Craig
Delaware
Haskell
Kay
Latimer
Le Flore
McCurtain
McIntosh
Nowata
Okfuskee
Okmulgee
Ottawa
Pawnee
Pushmataha
Sequoyah
Washington

Arkansas:
Benton
Carroll
Crawford
Madison
Sebastian
Washington

Missouri:
McDonald

* * * * *

[FR Doc. E8–28916 Filed 12–5–08; 8:45 am]
**BILLING CODE 6325–39–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 71

**[Docket No. FAA–2008–1105; Airspace Docket No. 08–AGL–10]**

### Proposed Amendment of Class E Airspace; Atlantic, IA

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

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This action proposes to amend Class E airspace at Atlantic Municipal Airport, Atlantic, IA. Additional controlled airspace is necessary to accommodate Standard Instrument Approach Procedures (SIAPs) at Atlantic Municipal Airport, Atlantic, IA. The FAA is taking this action to enhance the safety and management of Instrument Flight Rules (IFR) aircraft operations at Atlantic Municipal Airport.

**DATE:** 0901 UTC. Comments must be received on or before January 22, 2009.

**ADDRESSES:** Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. You must identify the docket number FAA–2008–1105/Airspace Docket No. 08–AGL–10, at the beginning of your comments. You may also submit comments on the Internet at *http://www.regulations.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527) is on the ground floor of the building at the above address.

**FOR FURTHER INFORMATION CONTACT:** Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76193–0530; telephone: (817) 222–5582.

**SUPPLEMENTARY INFORMATION:**

#### Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2008–1105/Airspace Docket No. 08–AGL–10.'' The postcard will be date/time stamped and returned to the commenter.

#### Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/.*

Additionally, any person may obtain a copy of this notice by submitting a request to the Federal Aviation Administration (FAA), Office of Air Traffic Airspace Management, ATA–400, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–8783. Communications must identify both docket numbers for this notice. Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

#### The Proposal

This action proposes to amend Title 14, Code of Federal Regulations (14 CFR), Part 71 by adding additional controlled Class E airspace for SIAP IFR operations at Atlantic Municipal Airport, Atlantic, IA. The area would be depicted on appropriate aeronautical charts.

Class E airspace areas are published in Paragraph 6005 of FAA Order 7400.9S, dated October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would amend controlled airspace at Atlantic Municipal Airport, Atlantic, IA.

**List of Subjects in 14 CFR Part 71**

Airspace, Incorporation by reference, Navigation (Air).

**The Proposed Amendment**

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

## PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

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

**Authority:** 49 U.S.C. 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

**§ 71.1 [Amended]**

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9S, Airspace Designations and Reporting Points, dated October 3, 2008, and effective October 31, 2008, is amended as follows:

*Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.*

* * * * *

**ACE IA E5 Atlantic, IA [Amended]**

Atlantic Municipal Airport , IA
(Lat. 41°24′26″ N., long. 95°02′49″ W.)

That airspace extending upward from 700 feet above the surface within a 6.8-mile radius of Atlantic Municipal Airport and within 3.4 miles each side of the 022° bearing from the airport extending from the 6.8-mile radius to 9.9 miles northeast of the airport.

* * * * *

Issued in Fort Worth, TX, on November 19, 2008.

**Walter L. Tweedy,**

*Acting Manager, Operations Support Group, ATO Central Service Center.*

[FR Doc. E8–29003 Filed 12–5–08; 8:45 am]

**BILLING CODE 4910–13–P**

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## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 71

**[Docket No. FAA–2008–0455; Airspace Docket No. 08–AAL–14]**

## Proposed Establishment of Class E Airspace; Umiat, AK

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

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This action proposes to establish Class E airspace at Umiat, AK. Two Standard Instrument Approach Procedures (SIAPs) are being developed for the Umiat Airport at Umiat, AK, along with a textual Obstacle Departure Procedure (ODP). Adoption of this proposal would result in creating Class E airspace upward from 700 feet (ft.) and 1,200 ft. above the surface at the Umiat Airport, Umiat, AK.

**DATES:** Comments must be received on or before January 22, 2009.

**ADDRESSES:** Send comments on the proposal to the Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. You must identify the docket number FAA–2008–0455/Airspace Docket No. 08–AAL–14, at the beginning of your comments. You may also submit comments on the Internet at *http://www.regulations.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527) is on the plaza level of the Department of Transportation NASSIF Building at the above address.

An informal docket may also be examined during normal business hours at the office of the Manager, Safety, Alaska Flight Service Operations, Federal Aviation Administration, 222 West 7th Avenue, Box 14, Anchorage, AK 99513–7587.

**FOR FURTHER INFORMATION CONTACT:** Gary Rolf, Federal Aviation Administration, 222 West 7th Avenue, Box 14, Anchorage, AK 99513–7587; telephone number (907) 271–5898; fax: (907) 271–2850; e-mail: *gary.ctr.rolf@faa.gov.* Internet address: *http://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/systemops/fs/alaskan/rulemaking/.*

**SUPPLEMENTARY INFORMATION:**

**Comments Invited**

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2008–0455/Airspace Docket No. 08–AAL–14.'' The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

**Availability of Notice of Proposed Rulemakings (NPRMs)**

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/.*

Additionally, any person may obtain a copy of this notice by submitting a request to the Federal Aviation Administration, Office of Air Traffic Airspace Management, ATA–400, 800 Independence Avenue, SW., Washington, DC 20591 or by calling (202) 267–8783. Communications must identify both docket numbers for this notice. Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking, (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

**The Proposal**

The FAA is considering an amendment to the Code of Federal Regulations (14 CFR part 71), which would establish Class E airspace at the Umiat Airport, in Umiat, AK. The intended effect of this proposal is to create Class E airspace upward from 700 ft. and 1,200 ft. above the surface to contain Instrument Flight Rules (IFR) operations at the Umiat Airport, Umiat, AK.

The FAA Instrument Flight Procedures Production and

Maintenance Branch has created two new SIAPs for the Umiat Airport. The SIAPs are (1) the Area Navigation (RNAV) Global Positioning System (GPS) Runway (RWY) 06, Original and (2) the RNAV (GPS) RWY 24, Original. The Textual ODP is unnamed and will be published in the front of the U.S. Terminal Procedures for Alaska. Class E controlled airspace extending upward from 700 ft. and 1,200 ft. above the surface in the Umiat Airport area would be established by this action. The proposed airspace is sufficient in size to contain aircraft executing the instrument procedures at the Umiat Airport, Umiat, AK.

The area would be depicted on aeronautical charts for pilot reference. The coordinates for this airspace docket are based on North American Datum 83. The Class E airspace areas designated as 700/1200 foot transition areas are published in paragraph 6005 in FAA Order 7400.9S, *Airspace Designations and Reporting Points,* signed October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document would be published subsequently in the Order.

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

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle 1, section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, part A, subpart 1, section 40103, Sovereignty and use of airspace. Under that section, the FAA is charged with prescribing regulations to ensure the safe and efficient use of the navigable airspace. This regulation is within the scope of that authority because it proposes to create Class E airspace sufficient in size to contain aircraft executing instrument procedures at the Umiat Airport, AK, and represents the FAA's continuing effort to safely and efficiently use the navigable airspace.

**List of Subjects in 14 CFR Part 71**

Airspace, Incorporation by reference, Navigation (air).

**The Proposed Amendment**

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

## PART 71— DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

1. The authority citation for 14 CFR part 71 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

**§ 71.1 [Amended]**

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9S, *Airspace Designations and Reporting Points,* signed October 3, 2008, and effective October 31, 2008, is to be amended as follows:

* * * * *

*Paragraph 6005 Class E Airspace Extending Upward From 700 Feet or More Above the Surface of the Earth.*

* * * * *

**AAL AK E5 Umiat, AK [New]**

Umiat, Umiat Airport, AK

(Lat. 69°22′16″ N., Long. 152°08′08″ W)

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of the Umiat Airport, AK, and within 4 miles either side of the 266°(T)/289°(M) bearing from the Umiat Airport, AK, extending from the 6.5-mile radius to 11.6 miles west of the Umiat Airport, AK, and within 4 miles either side of the 082°(T)/115°(M) bearing from the Umiat Airport, AK, extending from the 6.5-mile radius to 11.6 miles east of the Umiat Airport, AK; and that airspace extending upward from 1,200 feet above the surface within a 73-mile radius of the Umiat Airport, AK.

* * * * *

Issued in Anchorage, AK, on November 21, 2008.

**Marshall G. Severson,**

*Acting Manager, Alaska Flight Services Information Area Group.*

[FR Doc. E8–28977 Filed 12–5–08; 8:45 am]

**BILLING CODE 4910–13–P**

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## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 71

**[Docket No. FAA–2008–1162; Airspace Docket No. 08–AAL–33]**

## Proposed Revision of Class D and E Airspace; King Salmon, AK

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

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This action proposes to revise Class D and E airspace at King Salmon, AK. Nine Standard Instrument Approach Procedures (SIAPs), and a textual Obstacle Departure Procedure (ODP) are being amended for the King Salmon Airport at King Salmon, AK. Adoption of this proposal would result in revision of Class D and E airspace upward from the surface, and from 700 feet (ft.) and 1,200 ft. above the surface at the King Salmon Airport, King Salmon, AK.

**DATES:** Comments must be received on or before January 22, 2009.

**ADDRESSES:** Send comments on the proposal to the Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. You must identify the docket number FAA–2008–1162/ Airspace Docket No. 08-AAL–33, at the beginning of your comments. You may also submit comments on the Internet at *http://www.regulations.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527) is on the plaza level of the Department of Transportation NASSIF Building at the above address.

An informal docket may also be examined during normal business hours at the office of the Manager, Safety, Alaska Flight Service Operations, Federal Aviation Administration, 222 West 7th Avenue, Box 14, Anchorage, AK 99513–7587.

**FOR FURTHER INFORMATION CONTACT:** Gary Rolf, Federal Aviation Administration, 222 West 7th Avenue, Box 14, Anchorage, AK 99513–7587; telephone number (907) 271–5898; fax: (907) 271–2850; e-mail: *gary.ctr.rolf@faa.gov.* Internet address: *http://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/systemops/fs/alaskan/rulemaking/.*

**SUPPLEMENTARY INFORMATION:**

## Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2008–1162/Airspace Docket No. 08–AAL–33.'' The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

## Availability of Notice of Proposed Rulemakings (NPRMs)

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/.*

Additionally, any person may obtain a copy of this notice by submitting a request to the Federal Aviation Administration, Office of Air Traffic Airspace Management, ATA–400, 800 Independence Avenue, SW., Washington, DC 20591 or by calling (202) 267–8783. Communications must identify both docket numbers for this notice. Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking, (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

## The Proposal

The FAA is considering an amendment to the Code of Federal Regulations (14 CFR part 71), which would revise Class D and E airspace at the King Salmon Airport, in King Salmon, AK. The intended effect of this proposal is to revise Class D and E airspace upward from the surface, and from 700 ft. and 1,200 ft. above the surface to contain Instrument Flight Rules (IFR) operations at the King Salmon Airport, King Salmon, AK.

The FAA Instrument Flight Procedures Production and Maintenance Branch has amended nine SIAPs and an ODP for the King Salmon Airport. The approaches are (1) the Area Navigation (RNAV) Global Positioning System (GPS) Runway (RWY) 12, Amendment (Amdt) 1; (2) the RNAV (GPS) RWY 30, Amdt 1; (3) the Localizer (LOC)/Distance Measuring Equipment (DME) Backcourse RWY 30, Amdt 4; (4) the Instrument Landing System (ILS) or LOC/DME RWY 12, Amdt 17; (5) the HI ILS or LOC/DME RWY 12, Amdt 6; (6) the Very High Frequency Omni-directional Range (VOR)/DME or Tactical Air Navigation (TACAN) RWY 30, Amdt 10; (7) the VOR or TACAN RWY 12, Amdt 13; (8) the HI VOR/DME or TACAN RWY 12, Amdt 4; and (9) the HI VOR/DME or TACAN RWY 30, Amdt 4. The Textual ODP is unnamed and will be published in the front of the U.S. Terminal Procedures for Alaska. Class E controlled airspace extending upward from the surface, and from 700 ft. and 1,200 ft. above the surface in the King Salmon Airport area would be revised by this action. The proposed airspace is sufficient in size to contain aircraft executing the instrument procedures at the King Salmon Airport, King Salmon, AK.

The area would be depicted on aeronautical charts for pilot reference. The coordinates for this airspace docket are based on North American Datum 83. The Class D airspace area designations are published in paragraph 5000 in FAA Order 7400.9S, *Airspace Designations and Reporting Points,* signed October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR 71.1. The Class E2 surface areas are published in paragraph 6002 in FAA Order 7400.9S, *Airspace Designations and Reporting Points,* signed October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR 71.1. The Class E4 surface areas designated as extensions to Class D surface areas are published in paragraph 6004 in FAA Order 7400.9S, *Airspace Designations and Reporting Points,* signed October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR 71.1. The Class E airspace areas designated as 700/1200 foot transition areas are published in paragraph 6005 in FAA Order 7400.9S, *Airspace Designations and Reporting Points,* signed October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR 71.1. The Class D and E airspace designations listed in this document would be published subsequently in the Order.

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

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle 1, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart 1, Section 40103, Sovereignty and use of airspace. Under that section, the FAA is charged with prescribing regulations to ensure the safe and efficient use of the navigable airspace. This regulation is within the scope of that authority because it proposes to create Class E airspace sufficient in size to contain aircraft executing instrument procedures at the King Salmon Airport,

AK, and represents the FAA's continuing effort to safely and efficiently use the navigable airspace.

**List of Subjects in 14 CFR Part 71**

Airspace, Incorporation by reference, Navigation (air).

**The Proposed Amendment**

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

## PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

1. The authority citation for 14 CFR part 71 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

**§ 71.1 [Amended]**

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9S, *Airspace Designations and Reporting Points,* signed October 3, 2008, and effective October 31, 2008, is to be amended as follows:

* * * * *

*Paragraph 5000 General.*

* * * * *

**AAL AK D King Salmon, AK [Revised]**

King Salmon, King Salmon Airport, AK
(Lat. 58°40′37″ N., long. 156°38′58″ W.)

That airspace extending upward from the surface to and including 2,500 feet MSL within a 4.4-mile radius of the King Salmon Airport, AK. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.

* * * * *

*Paragraph 6002 Class E Airspace Designated as Surface Areas.*

* * * * *

**AAL AK E2 King Salmon, AK [Revised]**

King Salmon, King Salmon Airport, AK
(Lat. 58°40′37″ N., long. 156°38′58″ W.)

Within a 4.4-mile radius of the King Salmon Airport, AK. This Class E airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.

* * * * *

*Paragraph 6004 Class E Airspace Areas Designated as an Extension to a Class D Surface Area.*

* * * * *

**AAL AK E4 King Salmon, AK [Revised]**

King Salmon, King Salmon Airport, AK
(Lat. 58°40′37″ N., long. 156°38′58″ W.)

That airspace extending upward from the surface within 4 miles either side of the 312°(T)/328°(M) bearing from the King Salmon Airport, AK, to 10.7 miles northwest of the King Salmon Airport, AK.

* * * * *

*Paragraph 6005 Class E Airspace Extending Upward from 700 Feet or More Above the Surface of the Earth.*

* * * * *

**AAL AK E5 King Salmon, AK [Revised]**

King Salmon, King Salmon Airport, AK
(Lat. 58°40′37″ N., long. 156°38′58″ W.)

King Salmon VORTAC
(Lat. 58°43′29″ N., long. 156°45′08″ W.)

That airspace extending upward from 700 feet above the surface within a 6.9-mile radius of the King Salmon Airport, AK, and within 5 miles north and 9 miles south of the 132°(T)/148°(M) radial of the King Salmon VORTAC, AK, extending from the King Salmon VORTAC, AK, to 36 miles southeast of the King Salmon VORTAC, AK, and within 3.9 miles either side of the 312°(T)/328°(M) radial of the King Salmon VORTAC, AK, extending from the 6.9-mile radius to 13.9 miles northwest of the King Salmon VORTAC, AK; and that airspace extending upward from 1,200 feet above the surface within a 73-mile radius of the King Salmon Airport, AK.

* * * * *

Issued in Anchorage, AK, on November 21, 2008.

**Marshall G. Severson,**

*Acting Manager, Alaska Flight Services Information Area Group.*

[FR Doc. E8–28978 Filed 12–5–08; 8:45 am]

BILLING CODE 4910–13–P

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## DEPARTMENT OF THE TREASURY

## Internal Revenue Service

## 26 CFR Part 1

**[REG–148326–05]**

**RIN 1545–BF50**

## Further Guidance on the Application of Section 409A to Nonqualified Deferred Compensation Plans

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice of proposed rulemaking and notice of public hearing.

**SUMMARY:** This document contains proposed regulations on the calculation of amounts includible in income under section 409A(a) and the additional taxes imposed by such section with respect to service providers participating in certain nonqualified deferred compensation plans. The regulations would affect such service providers and the service recipients for whom the service providers provide services. This document also provides a notice of public hearing on these proposed regulations.

**DATES:** Written or electronic comments must be received by March 9, 2009. Outlines of topics to be discussed at the public hearing scheduled for April 2, 2009, must be received by March 9, 2009.

**ADDRESSES:** Send submissions to: CC:PA:LPD:PR (REG–148326–05), room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC, 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–148326–05), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC, or sent electronically, via the Federal eRulemaking Portal at *http://www.Regulations.gov* (IRS REG–148326–05). The public hearing will be held in the auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Concerning the proposed regulations, Stephen Tackney, at (202) 927–9639; concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Funmi Taylor at (202) 622–7190 (not toll-free numbers).

**SUPPLEMENTARY INFORMATION:**

### Background

Section 409A was added to the Internal Revenue Code (Code) by section 885 of the American Jobs Creation Act of 2004, Public Law 108–357 (118 Stat. 1418). Section 409A generally provides that if certain requirements are not met at any time during a taxable year, amounts deferred under a nonqualified deferred compensation plan for that year and all previous taxable years are currently includible in gross income to the extent not subject to a substantial risk of forfeiture and not previously included in gross income. Section 409A also includes rules applicable to certain trusts or similar arrangements associated with nonqualified deferred compensation.

On December 20, 2004, the IRS issued Notice 2005–1 (2005–2 CB 274), setting forth initial guidance on the application of section 409A, and providing transition guidance in accordance with the terms of the statute. On April 10, 2007, the Treasury Department and the IRS issued final regulations under

section 409A. (72 FR 19234, April 17, 2007). The final regulations are applicable for taxable years beginning after December 31, 2008. See Notice 2007–86 (2007–46 IRB 990). Notice 2005–1 and the final regulations do not address the calculation of the amount includible in income under section 409A if a plan fails to meet the requirements of section 409A and the calculation of the additional taxes applicable to such income. On November 30, 2006, the Treasury Department and the IRS issued Notice 2006–100 (2006–51 IRB 1109) providing interim guidance for taxable years beginning in 2005 and 2006 on the calculation of the amount includible in income if the requirements of section 409A were not met, and requesting comments on these issues for use in formulating future guidance. On October 23, 2007, the Treasury Department and the IRS issued Notice 2007–89 (2007–46 IRB 998) providing similar interim guidance for taxable years beginning in 2007. See § 601.601(d)(2)(ii)(*b*).

Commentators submitted a number of comments addressing the topics covered by these proposed regulations in response to Notice 2005–1, Notice 2006–100, Notice 2007–89, and the regulations, all of which were considered by the Treasury Department and the IRS in formulating these proposed regulations.

## Explanation of Provisions

### I. Scope of Proposed Regulations

These proposed regulations address the calculation of amounts includible in income under section 409A(a), and related issues including the calculation of the additional taxes applicable to such income. Section 409A(a) generally provides that amounts deferred under a nonqualified deferred compensation plan in all years are includible in income unless certain requirements are met. The requirements under section 409A(a) generally relate to the time and form of payment of amounts deferred under the plan, including the establishment of the time and form of payment through initial deferral elections and restrictions on the ability to change the time and form of payment through subsequent deferral elections or the acceleration of payment schedules. As provided in the regulations previously issued under section 409A, a nonqualified deferred compensation plan must comply with the requirements of section 409A(a) both in form and in operation.

Taxpayers may also be required to include amounts in income under section 409A(b). Section 409A(b) generally applies to a transfer of assets to a trust or similar arrangement, or to a restriction of assets, for purposes of paying nonqualified deferred compensation, if such trust or assets are located outside the United States, if such assets are transferred during a restricted period with respect to a single-employer defined benefit plan sponsored by the service recipient, or if such assets are restricted to the provision of benefits under a nonqualified deferred compensation plan in connection with a change in the service recipient's financial health. These proposed regulations do not address the application of section 409A(b), including the calculation of amounts includible in income if the requirements of section 409A(b) are not met. For guidance on the calculation of such amounts for taxable years beginning on or before January 1, 2007, including the application of the Federal income tax withholding requirements, see Notice 2007–89. The Treasury Department and the IRS anticipate issuing further interim guidance for later taxable years on the calculation of the amount includible in income under section 409A(b) and the application of the Federal income tax withholding requirements to such an amount.

### II. Effect of a Failure To Comply With Section 409A(a) on Amounts Deferred in Subsequent Years

Commentators asked how section 409A(a) applies if a plan fails to comply with section 409A(a) during a taxable year and the service provider continues to have amounts deferred under the plan in subsequent years during which the plan otherwise complies with section 409A(a) both in form and in operation. The statutory language may be construed to provide that a failure is treated as continuing during taxable years beyond the year in which the initial failure occurred, if the failure continues to affect amounts deferred under the plan. For example, if an amount has been improperly deferred under the plan, the statutory language could be construed to provide that the plan fails to comply with section 409A(a) during all taxable years during which the improperly deferred amounts remain deferred. However, this position could cause harsh results and would add administrative complexity. For example, a service provider could be required to include in income, and pay additional taxes on, amounts deferred over a number of taxable years even if the sole failure to comply with section 409A(a) occurred many years earlier. In addition, even if there were no failure in the current year, to determine a taxpayer's liability for income taxes with respect to nonqualified deferred compensation for a particular year, the taxpayer and the IRS would need to examine the plan's form and operation for every year in which the service provider had an amount deferred under the plan to determine if there was a failure to comply with section 409A(a) during any of those years.

For these reasons, the proposed regulations do not adopt this interpretation and instead generally would apply the adverse tax consequences that result from a failure to comply with section 409A(a) only with respect to amounts deferred under a plan in the year in which such noncompliance occurs and all previous taxable years, to the extent such amounts are not subject to a substantial risk of forfeiture and have not previously been included in income. Therefore, under the proposed regulations, a failure to meet the requirements of section 409A(a) during a service provider's taxable year generally would not affect the taxation of amounts deferred under the plan for a subsequent taxable year during which the plan complies with section 409A(a) in form and in operation with respect to all amounts deferred under the plan. This would apply even though the amount deferred under the plan as of the end of such subsequent taxable year includes amounts deferred in earlier years during which the plan failed to comply with section 409A(a) (including, for example, amounts deferred pursuant to an untimely deferral election in the earlier year), as long as there was no failure under the plan in a later year. Because there would be no continuing or permanent failure with respect to a plan that fails to comply with section 409A(a) during an earlier year, each taxable year would be analyzed independently to determine if there was a failure. As a result, assessment of tax liabilities due to a plan's failure to comply with the requirements of section 409A(a) in a closed year would be time-barred. But, if a service provider fails to properly include amounts in income under section 409A(a) for a taxable year during which there was a failure to comply with section 409A(a), and assessment of taxes with respect to such year becomes barred by the statute of limitations, then the taxpayer's duty of consistency would prevent the service provider from claiming a tax benefit in a later year with respect to such amount (such as, for example, by claiming any type of ''basis'' or ''investment in the contract'' in the year the service

recipient paid such amount to the service provider pursuant to the plan's terms).

Under the general rule in the proposed regulations, if all of a taxpayer's deferred amounts under a plan are nonvested and the taxpayer makes an impermissible deferral election or accelerates the time of payment with respect to some or all of the nonvested deferred amount, the nonvested deferred amount generally would not be includible in income under section 409A(a) in the year of the impermissible change in time and form of payment (although if there were vested amounts deferred under the plan, such amounts would be includible in income under section 409A(a)). In the subsequent taxable year in which the service provider becomes vested in the deferred amount, the plan might comply with section 409A(a) in form and in operation, so that under the general rule no income inclusion would be required and no additional taxes would be due for that year as a result of the late deferral election or acceleration of payment. In proposing to adopt this interpretation of the statute, the Treasury Department and the IRS do not intend to create an opportunity for taxpayers who ignore the requirements of section 409A(a) with respect to nonvested amounts to avoid the payment of taxes that would otherwise be due as a result of such a failure to comply. To ensure that this rule does not become a means for taxpayers to disregard the requirements of the statute, the proposed regulations would disregard a substantial risk of forfeiture for purposes of determining the amount includible in income under section 409A[1] with respect to certain nonvested deferred amounts, if the facts and circumstances indicate that the service recipient has a pattern or practice of permitting such impermissible changes in the time and form of payment with respect to nonvested deferred amounts (regardless of whether such changes also apply to vested deferred amounts). If such a pattern or practice exists, an amount deferred under a plan that is otherwise subject to a substantial risk of forfeiture is not treated as subject to a substantial risk of forfeiture if an impermissible change in the time and form of payment (including an impermissible initial deferral election) applies to the amount deferred or if the facts and circumstances indicate that the amount deferred would be affected by such pattern or practice.

## III. Calculation of the Amount Deferred Under a Plan for the Taxable Year in Which the Plan Fails To Meet the Requirements of Section 409A(a) and all Preceding Taxable Years

### *A. In General*

Section 409A(a)(1)(A) generally provides that if at any time during a taxable year a nonqualified deferred compensation plan fails to meet the requirements of section 409A(a)(2) (payments), section 409A(a)(3) (the acceleration of payments), or section 409A(a)(4) (deferral elections), or is not operated in accordance with such requirements, all compensation deferred under the plan for the taxable year and all preceding taxable years is includible in gross income for the taxable year to the extent not subject to a substantial risk of forfeiture and not previously included in gross income. Accordingly, to calculate the amount includible in income upon a failure to meet the requirements of section 409A(a), the first step is to determine the total amount deferred under the plan for the service provider's taxable year and all preceding taxable years. The second step is to calculate the portion of the total amount deferred for the taxable year, if any, that is either subject to a substantial risk of forfeiture (nonvested) or has been included in income in a previous taxable year. The last step is to subtract the amount determined in step two from the amount determined in step one. The excess of the amount determined in step one over the amount determined in step two is the amount includible in income and subject to additional income taxes for the year as a result of the plan's failure to comply with section 409A(a). Sections III.B through III.D of this preamble explain how the proposed regulations would address the first step in the process of determining the amount includible in income under section 409A, calculating the total amount deferred for the taxable year.

### *B. Total Amount Deferred*

#### 1. In General

In general, under the proposed regulations, the amount deferred under a plan[2] for a taxable year and all preceding taxable years would be referred to as the total amount deferred for a taxable year and would be determined as of the last day of the taxable year. Therefore, for calendar year taxpayers, such as most individuals, the relevant calculation date would be December 31. Determining the total amount deferred for the taxable year as of the last day of the taxable year during which a plan fails to comply with section 409A(a) would allow taxpayers to avoid the administrative burden of tracking amounts deferred under a plan on a daily basis, because adjustments would not be made to reflect notional earnings or losses or other fluctuations in the amount payable under the plan as they occur during the taxable year, but would be applied only on a net basis as of the last day of the taxable year. For example, if a service provider has a calendar year taxable year, and if the service provider's account balance under a plan is $105,000 as of July 1, but is only $100,000 as of December 31 of the same year, due solely to deemed investment losses (with no payments made under the plan during the year), the total amount deferred under the plan for that taxable year would be $100,000.

Similarly, the total amount deferred for a taxable year would not necessarily be the greatest total amount deferred for any previous year, even if no amount has been paid under the plan. For example, if a service provider has a calendar year taxable year, and if the service provider's account balance under a plan as of December 31, 2010 is $105,000, as of December 31, 2011 is $100,000, and as of December 31, 2012 is $95,000, and if those decreases are due solely to deemed investment losses (and no payments were made under the plan in 2011 or 2012), then the total amount deferred for 2011 would be $100,000 and the total amount deferred for 2012 would be $95,000.

#### 2. Treatment of Payments

If a service recipient pays an amount deferred under a plan during a taxable year, the amount remaining to be paid to (or on behalf of) the service provider under the plan as of the last day of the taxable year will have been reduced as a result of such payment. To reasonably reflect the effect of payments made during a taxable year, the proposed regulations provide that the sum of all payments of amounts deferred under a plan during a taxable year, including all payments that are substitutes for an amount deferred, would be added to the amounts deferred outstanding as of the last day of the taxable year (determined in accordance with the regulations) to calculate the total amount deferred for such taxable year. To lower the administrative burden of the

[1] Under section 409A(e)(5), the Treasury Department and the IRS have the authority to disregard a substantial risk of forfeiture where necessary to carry out the purposes of section 409A.

[2] For this purpose, the term plan refers to a plan as defined under § 1.409A–1(c), including any applicable plan aggregation rules.

calculation, the proposed regulations provide that the addition of such payments to the total amount deferred for the taxable year would not be increased by any interest or other amount to reflect the time value of money. The total amount deferred for a taxable year would include all payments, regardless of whether the service recipient made some or all of the payments in accordance with the requirements of section 409A(a). For example, if during a taxable year an employee receives a single sum payment of the entire amount deferred under a plan, the employee would have a total amount deferred under the plan for the taxable year equal to the amount paid.

3. Treatment of Deemed Losses

Because the total amount deferred would be determined as of the last day of the taxable year, losses that occur during a taxable year (due to losses on deemed investments, actuarial losses, and other similar reductions in the amount payable under a plan) generally would be netted with any gains that occur during the same taxable year (due to deemed investment or actuarial gains, additional deferrals, or other additions to the amount payable under the plan). To that extent, deemed investment losses, actuarial losses, or other similar reductions could offset deemed investment or actuarial gains, additional deferrals, or other increases in the amount deferred under the plan for purposes of determining the total amount deferred for the taxable year. This would apply regardless of whether a deemed loss occurs before or after the date of any specific failure to comply with section 409A(a). For example, assume a service provider begins a taxable year with a $10,000 balance under an account balance plan. During the year, the service provider has an additional deferral to the plan of $5,000 and incurs net deemed investment losses of $2,000. No payments are made pursuant to the plan during the year, the employee has no vested legally binding right to further deferrals to the plan, and there are no other changes to the account balance. The total amount deferred for the taxable year would equal the $13,000 account balance ($10,000 + $5,000 − $2,000) as of the last day of the taxable year.

4. Treatment of Rights to Deemed Earnings on Amounts Deferred

Under section 409A(d)(5), income (whether actual or notional) attributable to deferred compensation constitutes deferred compensation for purposes of section 409A. See § 1.409A–1(b)(2). For example, if a service provider must include a deferred amount in income because an account balance plan in which the service provider participates fails to satisfy the requirements of section 409A(a), notional earnings credited with respect to such amount constitute deferred compensation and are subject to section 409A. If the plan also fails to comply with the requirements of section 409A(a) during a subsequent taxable year, the notional earnings must be included in income and are subject to the additional taxes under section 409A(a), notwithstanding that the ''principal'' amount of deferred compensation has already been included in income under section 409A(a) for a previous year.

In this respect, the treatment of earnings on nonqualified deferred compensation for purposes of section 409A is significantly different from the treatment of such earnings for purposes of section 3121(v)(2) (application of Federal Insurance Contributions Act (FICA) tax to nonqualified deferred compensation). As a result, notional earnings ordinarily are deferred compensation that is subject to section 409A even if such earnings would not constitute wages for purposes of the FICA tax when paid to the service provider because of the special timing rule under section 3121(v)(2) and § 31.3121(v)(2)–1(a)(2). Accordingly, the proposed regulations provide that earnings that are credited with respect to deferred compensation during a taxable year or that were credited in previous taxable years, and earnings with respect to deferred compensation that are paid during such taxable year, must be included in determining the total amount deferred for the taxable year.

5. Total Amount Deferred for a Taxable Year Relates to the Entire Taxable Year, Regardless of Date or Period of Failure

Section 409A(a)(1)(A)(i) states that if at any time during a taxable year a nonqualified deferred compensation plan fails to meet the requirements of section 409A(a), all compensation deferred under the plan for the taxable year and all preceding years shall be includible in gross income for the taxable year to the extent not subject to a substantial risk of forfeiture (vested) and not previously included in gross income. The statutory reference to the deferred compensation required to be included in income under section 409A(a) does not distinguish between amounts deferred in a taxable year before a failure to meet the requirements of section 409A(a), and amounts deferred in the same taxable year after such failure. Accordingly, under the proposed regulations the total amount deferred under a plan for a taxable year would refer to the total amount deferred as of the last day of the taxable year, regardless of the date upon which a failure occurs. For example, if a plan is amended during a service provider's taxable year to add a provision that fails to meet the requirements of section 409A(a), the total amount deferred as of the last day of the taxable year would be includible in income under section 409A(a). This would include all payments under the plan during the taxable year, including payments made before the amendment (regardless of whether such payments are made in accordance with the requirements of section 409A(a)). Similarly, if the plan in operation fails to meet the requirements of section 409A(a) during the taxable year, the total amount deferred for the taxable year would include all payments under the plan during the taxable year, including payments made before and after the date the failure occurred.

The proposed regulations provide that amounts deferred under a plan during a taxable year in which a failure occurs must be included in income under section 409A(a) even if such deferrals occur after the failure and are otherwise made in compliance with section 409A(a). For example, salary deferrals for periods during a taxable year after an impermissible accelerated payment under the same plan during the same taxable year would be required to be included in the total amount deferred for the taxable year and included in income under section 409A(a), regardless of whether the salary deferrals are made in accordance with an otherwise compliant deferral election.

6. Treatment of Short-Term Deferrals

Under § 1.409A–1(b)(4), an arrangement may not provide for deferred compensation if the amount is payable, and is paid, during a limited period of time following the later of the date the service provider obtains a legally binding right to the payment or the date such right is no longer subject to a substantial risk of forfeiture (generally referred to as the applicable 2½ month period). Whether an amount will be treated as a short-term deferral or as deferred compensation may not be determinable as of the last day of the service provider's taxable year, because it may depend upon whether the amount is paid on or before the end of the applicable 2½ month period. For purposes of calculating the total amount deferred for a taxable year, the proposed

regulations provide that the right to a payment that, under the terms of the arrangement and the facts and circumstances as of the last day of the taxable year, may or may not be a short-term deferral, is not included in the total amount deferred. In addition, even if such amount is not paid by the end of the applicable 2½ month period so that the amount would be deferred compensation, the amount would not be includible in the total amount deferred until the service provider's taxable year in which the applicable 2½ month period expired. For example, assume that as of December 31, 2010, an employee whose taxable year is the calendar year is entitled to an annual bonus that is scheduled to be paid on March 15, 2011, and that the bonus would qualify as a short-term deferral if paid on or before the end of the applicable 2½ month period, which ends on March 15, 2011. The bonus would not be included in the total amount deferred for 2010. This would be true regardless of whether the bonus is paid on or before March 15, 2011. However, the bonus would be includible in the total amount deferred for 2011 if the bonus is not paid on or before March 15, 2011.

*C. Calculation of Total Amount Deferred—General Principles*

1. General Rule

Generally, the proposed regulations provide that the total amount deferred under a plan for a taxable year is the present value as of the close of the last day of a service provider's taxable year of all amounts payable to the service provider under the plan, plus amounts paid to the service provider during the taxable year. For this purpose, present value generally would mean the value as of the close of the last day of the service provider's relevant taxable year of the amount or series of amounts due thereafter, where each such amount is multiplied by the probability that the condition or conditions on which payment of the amount is contingent would be satisfied (subject to special treatment for certain contingencies), discounted according to an assumed rate of interest to reflect the time value of money. A discount for the probability that the service provider will die before commencement of payments under the plan would be permitted to the extent that the payments would be forfeited upon the service provider's death. The proposed regulations provide that the present value cannot be discounted for the probability that payments will not be made (or will be reduced) because of the unfunded status of the plan, the risk associated with any deemed investment of amounts deferred under the plan, the risk that the service recipient or another party will be unwilling or unable to pay amounts deferred under the plan when due, the possibility of future plan amendments, the possibility of a future change in the law, or similar risks or contingencies. The proposed regulations further provide that restrictions on payment that will or may lapse with the passage of time, such as a temporary risk of forfeiture that is not a substantial risk of forfeiture, are not taken into account in determining present value. However, any potential additional deferrals contingent upon a bona fide requirement that the service provider perform services after the taxable year, such as potential salary deferrals, service credits or additions due to increases in compensation, would not be taken into account in determining the total amount deferred for the taxable year.

For purposes of calculating the present value of the benefit, the proposed regulations require the use of reasonable actuarial assumptions and methods. Whether assumptions and methods are reasonable for this purpose would be determined as of each date the benefit is valued for purposes of determining the total amount deferred.

The proposed regulations also provide certain rules relating to the crediting of earnings, generally providing that the schedule for crediting earnings will be respected if the earnings are credited at least once a year. In general, if the rules with respect to the crediting of earnings are met, any additional earnings that would be credited after the end of the taxable year only if the service provider continued performing services after the end of the year would not be includible in the total amount deferred for the year. If the right to earnings is based on an unreasonably high interest rate, the proposed regulations generally would characterize the unreasonable portion of earnings as a current right to additional deferred compensation. In addition, if earnings are based on a rate of return that does not qualify as a predetermined actual investment or a reasonable interest rate, the proposed regulations provide that the general calculation rules as applied to formula amounts would apply.

The proposed regulations provide other general rules that address issues such as plan terms under which amounts may be payable when a triggering event occurs, rather than on a fixed date, or plan terms under which the amount payable is determined in accordance with a formula, rather than being set at a fixed amount. In addition, the proposed regulations provide specific rules under which the total amounts deferred under certain types of nonqualified deferred compensation plans would be determined. The rules applicable to specific types of plans would apply in conjunction with the general rules. As a result, under the proposed regulations, an amount of deferred compensation may be includible in income under section 409A(a) even if the same amount would not yet be includible in wages under section 3121(v)(2).

2. Rules Regarding Alternative Times and Forms of Payment

To calculate the total amount deferred under a nonqualified deferred compensation plan, it is necessary to determine the time and form of payment pursuant to which the amount will be paid. Under the proposed regulations, if an amount deferred under a plan could be payable pursuant to more than one time and form of payment under the plan, the amount would be treated as payable in the available time and form of payment that has the highest present value. For this purpose, a time and form of payment generally would be an available time and form of payment to the extent a deferred amount under the plan could be payable pursuant to such time and form of payment under the plan's terms, provided that if there is a bona fide requirement that the service provider continue to perform services after the end of the taxable year to be eligible for the time and form of payment, the time and form of payment would not be treated as available. If an alternative time and form of payment is available only at the service recipient's discretion, the time and form of payment would not be treated as available unless the service provider has a legally binding right under the principles of § 1.409A–1(b)(1) to any additional value that would be generated by the service recipient's exercise of such discretion. If a service provider has begun receiving payments of an amount deferred under a plan and neither the service provider nor the service recipient can change the time and form of payment of such deferred amount without the other party's approval, then no other time and form of payment under the plan would be treated as available if such approval requirement has substantive significance.

In certain instances, a service provider will be eligible for an alternative time and form of payment only if the service provider has a certain status as of a future date. For example, a time and form of payment may be

available only if the service provider is married at the time the payment commences. The proposed regulations generally provide that for purposes of determining whether the service provider will meet the eligibility requirements so that an alternative time and form of payment is available, the service provider is assumed to continue in the service provider's status as of the last day of the taxable year. However, if the eligibility requirement is not bona fide and does not serve a bona fide business purpose, the eligibility requirement would be disregarded and the service provider would be treated as eligible for the alternative time and form of payment. For this purpose, an eligibility condition based upon the service provider's marital status, parental status, or status as a U.S. citizen or lawful permanent resident would be presumed to be bona fide and to serve a bona fide business purpose.

If the calculation of the present value of the amount payable to a service provider under a plan requires assumptions relating to the timing of the payment because the payment date is, or could be, a triggering event rather than a specified date, the proposed regulations specify certain assumptions that must be applied to make such calculation. First, the possibility that a particular payment trigger would occur generally would not be taken into account if the right to the payment would be subject to a substantial risk of forfeiture if that payment trigger were the only specified payment trigger. For example, if an amount is payable upon the earlier of the attainment of a specified age or an involuntary separation from service (as defined in the § 1.409A–1(n)), the present value of the amount payable upon involuntary separation from service would not be taken into account if the payment would be subject to a substantial risk of forfeiture if that were the only payment trigger. However, if multiple triggers with respect to the same payment would, applied individually, constitute substantial risks of forfeiture, such triggers would not be disregarded under this rule unless all such triggers, applied in the aggregate, would also constitute a substantial risk of forfeiture. Second, the possibility that an unforeseeable emergency, as defined in § 1.409A–3(i)(3), would occur and result in a payment also would not be taken into account for purposes of calculating the amount deferred.

If an amount is payable upon a service provider's death, it generally would not be necessary to make assumptions concerning when the service provider would die because any additional value due to the amount becoming payable upon the service provider's death generally would be treated as an amount payable under a death benefit plan, and amounts payable under a death benefit plan are not deferred compensation for purposes of section 409A(a). Similarly, such assumptions generally would not be necessary for an amount payable upon a service provider's disability, because any additional value due to the amount becoming payable upon the service provider's disability generally would be payable under a disability plan, and amounts payable under a disability plan are not deferred compensation for purposes of section 409A. See § 1.409A–1(a)(5).

In other cases where it is necessary to make assumptions concerning when a payment trigger would occur to determine the amount deferred under a plan, taxpayers generally would be required to assume that the payment trigger would occur at the earliest possible time that the conditions under which the amount would become payable reasonably could occur, based on the facts and circumstances as of the last day of the taxable year. However, the proposed regulations provide a special rule for amounts payable due to the service provider's separation from service, termination of employment, or other event requiring the service provider's reduction or cessation of services for the service recipient. In such a case, the total amount deferred would be calculated as if the service provider had met the required reduction or cessation of services as of the close of the last day of the service provider's taxable year for which such calculation was being made. These rules would apply regardless of whether the payment trigger has or has not occurred as of any future date upon which the amount deferred for a prior taxable year was being determined.

The Treasury Department and the IRS recognize that for some service providers, the earliest possible time that a payment trigger reasonably could occur will not be the most likely time the trigger will occur. Similarly, the Treasury Department and the IRS recognize that for many service providers, the assumption that the service provider ceases providing services as of the end of the taxable year may not be realistic. The Treasury Department and the IRS request comments on alternative standards that could be utilized for these payment triggers.

An alternative approach might presume a date upon which the service provider will separate from service such as, for example, 100 months after the last day of the service provider's taxable year for which the amount deferred is being calculated. Cf. § 1.280G–1 Q&A 24(c)(4). Such a standard, however, would not reflect the value of additional deferred compensation that would be paid only if the service provider separates from service before the end of the 100-month period, such as an early retirement subsidy or a window benefit, unless special rules were developed to address such situations. Another issue that arises is whether such a standard should apply if the service provider is likely to retire during the next 100 months, such as if a service provider has attained a certain age, number of years of service, or level of financial independence. However, the Treasury Department and the IRS are concerned whether an approach involving the application of individualized standards to determine the probability that a particular service provider will separate from service will be administrable in practice.

3. Treatment of Rights to Formula Amounts

Once the date that a payment will occur has been fixed (either as a specified date under the plan's terms or through application of the rules in the proposed regulations), it is necessary to quantify the amount of the payment to which the service provider will be entitled to calculate the total amount deferred under a nonqualified deferred compensation plan. However, certain plans may define the amount payable by a formula or other method that is based on factors that may vary in future years. In general, if, at the end of the service provider's taxable year, the amount to be paid in a future year is a formula amount, the proposed regulations provide that the amount payable in the future year for purposes of calculating the total amount deferred must be determined using reasonable assumptions.

A deferred amount generally would be a formula amount subject to the reasonable assumptions standard if calculating the payment amount is dependent upon factors that are not determinable after taking into consideration all of the assumptions and other calculation rules provided in the proposed regulations. For example, a future payment equal to one percent of a corporation's net profits over five calendar years generally would be a formula amount until the last day of the fifth year, because the corporation's net profits over the five calendar years could not be determined by applying the assumptions and rules set out in the

proposed regulations until the end of the fifth calendar year.

A deferred amount would not be a formula amount at the end of the taxable year merely because the information necessary to determine the amount is not readily available, if such information exists at the end of such taxable year. For example, if a deferred amount is based upon the service recipient's profits for its taxable year that coincides with the service provider's taxable year, the amount would be considered a non-formula amount at the end of the taxable year because the information necessary to determine the service recipient's profits exists, although such information may not be immediately accessible.

The right to have a deferred amount credited with reasonable earnings that may vary, for example because the earnings are based on the value of a deemed investment, would not affect whether the right to the underlying deferred amount is a formula amount. In addition, the amount of earnings to which the service provider has become entitled at the end of a particular taxable year would not be treated as a formula amount, regardless of whether such earnings could subsequently be reduced by future losses. For example, assume a service provider has a $10,000 account under an account balance plan, to be paid out in three years subject to earnings based on a mutual fund designed to replicate the performance of the S&P 500 index. At the end of Year 1, the account balance is $10,500. For Year 1, the service provider would have a total amount deferred equal to $10,500, notwithstanding that the amount could be reduced by future losses based on losses in the mutual fund.

*D. Calculation of Total Amounts Deferred—Specific Types of Plans*

1. Account Balance Plans

Under the proposed regulations, the amount deferred under an account balance plan for a taxable year generally equals the aggregate balance of all accounts under the plan as of the close of the last day of the taxable year, plus any amounts paid from such plan during the taxable year, so long as the aggregate account balance is determined using not more than a reasonable interest rate or the return on a predetermined actual investment. This rule would apply regardless of whether the applicable interest rate used to determine the earnings was higher or lower than the applicable Federal rate (AFR) under section 1274(d), provided that the interest rate was no more than a reasonable rate of interest. For a description of the proposed rules on how to calculate the total amount deferred if the right to earnings is based on an unreasonably high interest rate, see section III.C.1 of this preamble.

2. Nonaccount Balance Plans

Under the proposed regulations, the total amount deferred for a taxable year under a nonaccount balance plan generally is calculated under the general calculation rule. See section III.C of this preamble. For example, if a service provider has the right to be paid on a specified future date a fixed amount that is not credited with earnings, the total amount deferred for a year generally would be the present value as of the last day of the service provider's taxable year of the amount to which the service provider has a right to be paid in the future year (assuming no payments were made under the plan during the year). Increases in the present value of the payment in subsequent years due to the passage of time would be treated as earnings in the years in which such increases occur. For example, a right to a payment of $10,000 in Year 3 may have a present value in Year 1 equal to $8,900, and a present value in Year 2 equal to $9,434, so that the total amount deferred in Year 1 would be $8,900, the total amount deferred in Year 2 would be $9,434, and the total amount deferred in Year 3 would be $10,000 (assuming no payments were made during any year except Year 3). Any potential additional service credits or increases in compensation after the end of the taxable year for which the calculation is being made would not be taken into account in determining the total amount deferred for the taxable year.

3. Stock Rights

In general, the proposed regulations provide that the total amount deferred under an outstanding stock right is the amount of money and the fair market value of the property that the service provider would receive by exercising the right on the last day of the taxable year, reduced by the amount (if any) the service provider must pay to exercise the right and any amount the service provider paid for the right, which is commonly referred to as the spread. Accordingly, for an outstanding stock option, the total amount deferred generally would equal the underlying stock's fair market value on the last day of the taxable year, less the sum of the exercise price and any amount paid for the stock option. For an outstanding stock appreciation right, the total amount deferred generally would equal the underlying stock's fair market value on the last day of the taxable year, less the sum of the exercise price and any amount paid for the stock appreciation right. For this purpose, the stock's fair market value would be determined applying the principles set forth in § 1.409A–1(b)(5).

The Treasury Department and the IRS recognize that the spread generally is less than the fair market value of the stock right, which is used for purposes of determining the amount taxable under other Code provisions such as section 83 (if a stock option has a readily ascertainable fair market value), section 4999, and section 457(f). However, because these types of stock rights typically will fail to comply with section 409A(a) in multiple years, a taxpayer who holds such a stock right generally will be required to include amounts in income under section 409A in more than one taxable year. Therefore, the Treasury Department and the IRS believe that it is more appropriate to use the spread for purposes of applying section 409A(a) to stock rights.

4. Separation Pay Arrangements

A deferred amount that is payable only upon an involuntary separation from service generally will be treated as subject to a substantial risk of forfeiture until the service provider involuntarily separates from service. Accordingly, under the proposed regulations the amount of deferred compensation generally would not be required to be calculated until the service provider has involuntarily separated from service. In addition, if the amount were payable upon either an involuntary separation from service or some other trigger, such as a fixed date, the possibility of payment upon an involuntary separation from service generally would be ignored for purposes of determining the total amount deferred under the arrangement. See section III.C.2 of this preamble. Once an involuntary separation from service has occurred, the amount deferred under the plan would be determined using the rules that would apply to the schedule of payments if the right to payment were not contingent upon an involuntary separation from service. For example, if the amounts payable are installment payments and the remaining installment payments include interest credited at a reasonable rate, the total amount deferred under the plan would be determined under the rules governing account balance plans. If more than one type of deferred compensation arrangement were provided under the separation pay agreement, the amount deferred under each arrangement would

be determined using the rules applicable to that type of arrangement. The total amount deferred for the taxable year would be the sum of all of the amounts deferred under the various arrangements constituting the plan.

5. Reimbursement Arrangements

The proposed regulations provide a method of calculating the amount deferred under a reimbursement arrangement, including an arrangement where the benefit is provided as an in-kind benefit from the service recipient or the service recipient will pay directly the third-party provider of the goods or services to the service provider. For example, the amount deferred under an arrangement providing a specified number of hours of financial planning services after a service provider's separation from service would be determined using the rules applicable to reimbursement arrangements, regardless of whether the service recipient reimburses the service provider for the service provider's expenses in purchasing such services, provides the financial planning services directly to the service provider, or pays a third-party financial planner to provide such services. The rules for reimbursement arrangements would apply to all such types of arrangements, including arrangements that would not be disaggregated from a nonaccount balance plan under § 1.409A–1(c)(2)(i)(E) because the amounts subject to reimbursement exceed the applicable limits.

The proposed calculation rules provide that if a service provider has a right to reimbursements but only up to a specified maximum amount, it is presumed that the taxpayer will incur the maximum amount of expenses eligible for reimbursement, at the earliest possible time such expenses may be incurred and payable at the earliest possible time the amount may be reimbursed under the plan's terms. The service provider could rebut the presumption if the service provider demonstrates by clear and convincing evidence that it is unreasonable to assume that the service provider would expend (or would have expended) the maximum amount of expenses eligible for reimbursement. For example, if a service provider is entitled to the reimbursement of country club dues the service provider incurs in the next taxable year, not to exceed $30,000, if the service provider can demonstrate that the most expensive country club within reasonable geographic proximity of the service provider's residence and work location will cost $20,000 per year, and that the service provider's level of compensation and financial resources make it unreasonable to assume that the service provider would travel periodically to the locales of other, more expensive country clubs, the service provider can calculate the amount deferred based upon the $20,000 being eligible for reimbursement. The presumption of maximum utilization of expenses eligible for reimbursement generally would not apply if the expenses subject to reimbursement are medical expenses.

If a right to reimbursement is not subject to a maximum amount, the taxpayer would be treated as having deferred a formula amount, provided that the taxpayer would be required to calculate the amount based on the maximum amount that reasonably could be expended and reimbursed. The amount would be considered a nonformula amount as soon as the taxpayer incurs the expense that is subject to reimbursement, in an amount equal to the reimbursement to which the taxpayer is entitled. For example, a right to the reimbursement of half of the expenses the service provider incurs to purchase a boat without any limitation with respect to the cost would be treated as a deferral of a formula amount, until such time as the service provider purchases the boat.

6. Split-Dollar Life Insurance Arrangements

The amount deferred under a split-dollar life insurance arrangement would be determined based upon the amount that would be required to be included in income in a future year under the applicable split-dollar life insurance rules. Determination of the amount includible in income would depend upon the Federal tax regime and guidance applicable to such arrangement. If the split-dollar life insurance arrangement is not subject to § 1.61–22 or § 1.7872–15 due to application of the effective date provisions under § 1.61–22(j), the amount payable would be determined by reference to Notice 2002–8 (2002–1 CB 398) and any other applicable guidance. If the split-dollar life insurance arrangement is subject to § 1.61–22 or § 1.7872–15, the amount payable would be determined by reference to such regulations, based upon the type of arrangement. For this purpose, the amount includible in income generally would be determined by applying the split-dollar life insurance rules to the arrangement in conjunction with the general rules providing assumptions on payment dates of deferred amounts. However, in the case of an arrangement subject to § 1.7872–15, to the extent the rules regarding time and form of payment and other payment assumptions under these proposed regulations conflict with the provisions of § 1.7872–15, the provisions of § 1.7872–15 would apply instead of the conflicting rules under these proposed regulations. As provided in Notice 2007–34 (2007–17 IRB 996), the portion of the benefit provided under the split-dollar life insurance arrangement consisting of the cost of current life insurance protection is not treated as deferred compensation for this purpose. See § 601.601(d)(2)(ii)(*b*).

7. Foreign Arrangements

Although certain foreign arrangements are a separate category under the plan aggregation rules (§ 1.409A–1(c)(2)(i)(G)), the amounts deferred under such arrangements would be determined using the same rules that would apply if the arrangements were not foreign arrangements. For example, the total amount deferred by a United States citizen participating in a salary deferral arrangement in France that meets the requirements of § 1.409A–1(c)(2)(i)(G), but that otherwise would constitute an elective account balance plan under § 1.409A–1(c)(2)(i)(A), would be determined using the rules applicable to account balance plans.

8. Other Plans

The calculation of the total amount deferred under a plan that does not fall into any of the enunciated categories (and accordingly is treated as a separate plan under § 1.409A–1(c)(2)(i)(I)), would be determined by applying the general calculation rules.

*E. Calculation of Amounts Includible in Income*

This section III.E of the preamble addresses the second step in determining the amount includible in income under section 409A for a taxable year—the determination of the portion of the total amount deferred for a taxable year that was either subject to a substantial risk of forfeiture or had previously been included in income. That portion of the total amount deferred for the taxable year would not be includible in income under section 409A.

1. Determination of the Portion of the Total Amount Deferred for a Taxable Year That Is Subject to a Substantial Risk of Forfeiture

In general, the proposed regulations provide that the portion of the total amount deferred for a taxable year that is subject to a substantial risk of

forfeiture (nonvested) is determined as of the last day of the service provider's taxable year. Accordingly, all amounts that vest during the taxable year in which a failure occurs would be treated as vested for purposes of section 409A(a), regardless of whether the vesting event occurs before or after the failure to meet the requirements of section 409A(a). For example, if a plan fails to comply with section 409A(a) due to an operational failure on July 1 of a taxable year, and the substantial risk of forfeiture applicable to an amount deferred under the plan lapses as of October 1 of the same taxable year, that amount would be treated as a vested amount for purposes of determining the amount includible in income for the taxable year.

2. Determination of the Portion of the Total Amount Deferred for a Taxable Year That Has Been Previously Included in Income

For a deferred amount to be treated as previously included in income, the proposed regulations would require that the service provider actually and properly have included the amount in income in accordance with a provision of the Internal Revenue Code. This would include amounts reflected on an original or amended return filed before expiration of the applicable statute of limitations on assessment and amounts included in income as part of an audit or closing agreement process. In addition, a deferred amount would be treated as an amount previously included in income only until the amount is paid. Accordingly, if a deferred amount is paid in the same taxable year in which an amount is included in income under section 409A, or all or a portion of an amount previously included in income is allocable to a payment made under the plan (see section VI.A of this preamble), in subsequent taxable years that amount would not be treated as an amount previously included in income. For example, if an employee includes $100,000 in income under section 409A(a), and $10,000 of the amount includible in income consists of a payment under the plan during the taxable year, only $90,000 would remain to be treated as a deferred amount previously included in income. Similarly, if in the next year the employee receives a payment, to the extent any or all of that $90,000 amount previously included in income is allocated to that payment so that all or a portion of the payment is not includible in gross income, the amount allocated would no longer be treated as an amount previously included in income.

*F. Treatment of Failures Continuing During More Than One Taxable Year*

A plan term that fails to meet the requirements of section 409A(a) may be retained in the plan over multiple taxable years. In addition, operational failures may occur in multiple years. This section III.F of the preamble discusses how section 409A(a) applies in such cases.

Each of the service provider's taxable years would be analyzed independently to determine if amounts were includible in income under section 409A(a). See section II of this preamble. Thus, for any taxable year during which a failure occurs, all amounts deferred under the plan would be includible in income unless the amount has previously been included in income or is subject to a substantial risk of forfeiture. Generally, this means that a service provider who includes in income under section 409A(a) all amounts deferred under a plan for a taxable year would not be relieved of the requirement to include amounts in income for an earlier taxable year in which a failure also occurred. It would undermine the statutory purpose to allow a service provider to include an amount in income under section 409A(a) (or otherwise) on a current basis with respect to a failure that occurred in a prior taxable year and thereby eliminate the taxes owed for the earlier year, especially if intervening payments of deferred amounts have reduced the total amount deferred as of the end of such current year. In addition, this rule generally would prohibit a service provider from selecting from among several previous taxable years the most favorable year in which to include income. However, if an amount was actually and properly included in income under section 409A(a) in a previous year, the amount would be treated as an amount previously in income for purposes of all subsequent years. Accordingly, this rule would never make the same amount includible in income twice under section 409A(a).

For example, assume an employee participates in a nonqualified deferred compensation plan and defers $10,000 each year, credited annually with interest at 5 percent (assumed to be reasonable for purposes of this example), and receives no payments under the plan. The employee's total amount deferred would be $10,500 for Year 1, $21,525 for Year 2, and $33,101 for Year 3. If the nonqualified deferred compensation plan fails to meet the requirements of section 409A(a) in each year, the employee would be required to include $10,500 in income under section 409A(a) for Year 1, $11,025 in income for Year 2, and $11,576 in income for Year 3. If the employee includes $33,101 in income under section 409A(a) for Year 3, the employee would not have properly reported income for Year 1 and Year 2. However, an amount included in income for Year 3 would be treated as previously included in income for purposes of any further failures in subsequent years. In addition, if the employee subsequently properly includes amounts in income for Year 1 and Year 2 on amended returns, the employee could claim a refund of the tax paid on the excess amounts included in income for Year 3. Similar consequences apply to the employer. If the employer fails to report and withhold on amounts includible in income under section 409A(a) in Year 1 and Year 2, the employer could not avoid liability for the failure to withhold in Year 1 and Year 2 by reporting the full amount and withholding in Year 3.

Because each taxable year would be analyzed independently, the IRS could elect to audit and assess with respect to a single taxable year, and require inclusion of all amounts deferred under the plan through that taxable year (even if failures also occurred in prior taxable years). Under those circumstances, the taxpayer could simply include amounts in income under section 409A(a) for that taxable year. However, before expiration of the applicable statute of limitations, the taxpayer could amend returns for previous taxable years and include in income amounts required to be included under section 409A(a), lowering the amount includible in income under section 409A(a) for the audited taxable year because, for purposes of that taxable year, those amounts would have been included in income in previous years. For example, an audit of Year 3 in the example above could result in an adjustment requiring $33,101 to be included in income under section 409A(a). However, before expiration of the applicable statute of limitations, the employee could amend the employee's Year 1 and Year 2 Federal tax returns to include $10,500 in income under section 409A(a) for Year 1, and $11,025 in income under section 409A(a) for Year 2, and accordingly include only $11,576 in income under section 409A(a) for Year 3. However, the employee would be required to pay the additional section 409A(a) taxes for Year 1 and Year 2, including the premium interest tax. In addition, if amounts deferred under the plan had been paid in Year 1 or Year 2, the employee would be required to include

those additional amounts in income under section 409A(a) for the year paid (meaning, if the payment had been included in income for the year in which it was paid, the employee would be required to amend the previously filed tax returns to pay the additional section 409A(a) taxes on such income).

## IV. Application of Additional 20 Percent Tax

Section 409A(a)(1)(B)(i)(II) provides that if compensation is required to be included in gross income under section 409A(a)(1)(A) for a taxable year, the income tax imposed is increased by an amount equal to 20 percent of the compensation that is required to be included in gross income. This amount is an additional income tax, subject to the rules governing the assessment, collection, and payment of income tax, and is not an excise tax.

## V. Application of Premium Interest Tax

### *A. In General*

Section 409A(a)(1)(B)(i)(I) provides that if compensation is required to be included in gross income under section 409A(a)(1)(A) for a taxable year, the income tax imposed is increased by an amount equal to the amount of interest determined under section 409A(a)(1)(B)(ii). This amount is an additional income tax, subject to the rules governing assessment, collection, and payment of income tax, and is not an excise tax or interest on an underpayment. Section 409A(a)(1)(B)(ii) provides that this premium interest tax is determined as the amount of interest at the underpayment rate (established under section 6621) plus one percentage point on the underpayments that would have occurred had the deferred compensation been includible in gross income for the taxable year in which first deferred or, if later, the first taxable year in which such deferred compensation is not subject to a substantial risk of forfeiture (vested). Thus, section 409A(a)(1)(B) requires that the premium interest tax be applied to hypothetical underpayments where the hypothetical underpayments are determined by first allocating the amounts deferred under the plan required to be included in income under section 409A(a) to the initial year (or years) the amount was deferred or vested, then determining the hypothetical underpayment that would have resulted had such amounts been includible in income at that time, and then determining the interest that would be due upon that hypothetical underpayment based upon a premium interest rate equal to the underpayment rate plus one percentage point.

### *B. Amounts to Which the Premium Interest Tax Applies*

Section 409A(a)(1)(B)(ii) provides for an additional tax based upon the interest that would be applied to the resulting underpayments of tax if the deferred compensation includible in income under section 409A(a) had been includible in income in previous years. Because the total amount deferred for the taxable year in which a failure occurs (the current year) may be less than the amounts deferred under the same plan in a previous year due to payments or deemed investment or other losses in the previous year, so that a portion of the amount deferred in the previous year would not be includible in income under section 409A(a) for the current year, commentators have asked what amounts deferred under the plan must be taken into account in determining the premium interest tax. Section 409A(a)(1)(B)(i) refers first to the compensation required to be included in gross income under section 409A(a)(1)(A). Accordingly, under the proposed regulations the amount required to be included in income under section 409A(a) for the taxable year is the only deferred amount required to be allocated to previous taxable years for purposes of determining the premium interest tax under section 409A(a)(1)(B)(i)(I).

For example, assume an employee who participates in a plan has a total amount deferred in Year 1 of $100,000 and a total amount deferred in Year 2 of $80,000 due to deemed investment losses in Year 2. If the plan fails to meet the requirements of section 409A(a) in Year 2 (and not Year 1), the employee is required to include $80,000 in income under section 409A(a). In calculating the premium interest tax, the employee must allocate only the $80,000 required to be included in income under section 409A(a) to the year or years the amount was first deferred or vested, even though additional amounts were deferred under the plan in previous taxable years.

### *C. Identification of Initial Years of Deferral for Includible Amounts*

#### 1. Identification of Amounts Deferred in a Particular Taxable Year—General Principles

To calculate the premium underpayment interest tax, the taxable year or years during which the amount required to be included in income was first deferred or first vested must be determined. The proposed regulations provide that the amount deferred during a particular taxable year generally is the excess (if any) of the vested total amount deferred for that taxable year over the vested total amount deferred for the immediately preceding taxable year. For example, if a service provider first participated in a plan in the taxable year 2010 and has a vested total amount deferred under the plan for 2010 of $10,000, a vested total amount deferred for 2011 of $15,000, and a vested total amount deferred for 2012 of $25,000, then the service provider would be treated as having first deferred $10,000 during 2010, $5,000 during 2011, and $10,000 during 2012.

#### 2. Identification of Initial Years of Deferral—Treatment of Amounts Previously Included in Income, Payments, and Investment Losses

The general rule would apply in cases where during previous taxable years there have been no payments under the plan, no net deemed investment or other losses, and no amounts otherwise included in income. If a service provider has received a payment, incurred net deemed losses, or included an amount in income, the general rule would need to be modified. For example, assume that the vested total amount deferred for Year 1 is $100,000, for Year 2 is $200,000 (including a $50,000 payment), and for Year 3 is $250,000. If there is a failure to meet the requirements of section 409A(a) in Year 3, the service provider would be required to include $250,000 in income. The service provider would also need to determine the year or years during which the $250,000 was first deferred and vested for purposes of calculating the premium interest tax. The issue then arises whether the $50,000 payment in Year 2 was a payment of an amount first deferred and vested in Year 1 or Year 2. If the $50,000 payment is treated as a payment of an amount first deferred and vested in Year 1, then only $50,000 of the $100,000 deferred in Year 1 would remain to be treated as part of the $250,000 includible in income in Year 3. In contrast, if the $50,000 payment is treated as a payment of an amount first deferred in Year 2, then the entire $100,000 deferred in Year 1 would remain to be treated as part of the $250,000. Similar issues arise with respect to the treatment of deemed investment losses and amounts previously included in income.

Under the calculation method set forth in the proposed regulations, payments, deemed investment or other losses, and amounts included in income during taxable years before the year in which the failure occurs, generally are attributed to amounts deferred and

vested in the earliest year or years in which there are amounts deferred. The proposed calculation method generally achieves this result by reducing the amount deferred for each year preceding the payment or deemed investment or other loss, and treating only the remaining deferred amounts as the source of the outstanding deferrals and payments includible in income under section 409A for the year in which the failure occurs. This proposed rule generally should result in the lowest possible amount of premium interest tax, because deferred amounts includible in income under section 409A would be treated as first deferred and vested in the latest possible years, resulting in less premium interest on the hypothetical underpayments.

*D. Calculation of the Hypothetical Underpayment*

The hypothetical underpayment would be calculated as if the amount were paid to the service provider as a cash payment of compensation during the taxable year. Further, the hypothetical underpayment would be calculated based on the taxpayer's taxable income, credits, filing status, and other tax information for the year, based on the original return the taxpayer filed for such year, as adjusted as a result of any examination for such year or any amended return the taxpayer filed for such year that was accepted by the IRS. The hypothetical underpayment would reflect the effect that such additional compensation would have had on the amount of Federal income tax owed by the taxpayer for such year, including the continued availability of any deductions taken, and the use of any carryovers such as carryover losses. For purposes of calculating a hypothetical underpayment in a subsequent year (whether or not a portion of the deferred amount was first deferred and vested in the subsequent year), any changes to the taxpayer's Federal income tax liability for the subsequent year that would have occurred if the portion of the deferred amount that was first deferred and vested during the previous taxable year had been included in the taxpayer's income for the previous year would be taken into account. For example, if in calculating the hypothetical underpayment for one year, an additional amount of unused charitable contribution deductions is absorbed, the use of the additional charitable contributions would be reflected in determining the hypothetical underpayment for a subsequent year (meaning that the same portion of the charitable contribution could not be deducted twice in determining the hypothetical underpayments for more than one year).

Calculation of the premium interest tax would take into account only the consequences the additional income would have had on the Federal income tax due based on items of income and deduction, credits, filing status and similar information existing as of the end of the taxable year at issue. Other potential effects of the additional compensation payment on service provider or service recipient actions or elections would not be taken into account, including how such additional compensation could have affected participation in an employee benefit plan or other arrangement. For example, the impact such additional compensation would have had on contributions to a qualified plan, even if the additional compensation would have affected the amount the service provider would have been permitted or required to contribute, would be disregarded.

*E. Potential Safe Harbor Calculation Methods*

The Treasury Department and the IRS recognize that calculation of the premium underpayment interest tax may be cumbersome, potentially involving the recalculation of several years' tax returns. In response, the Treasury Department and the IRS are considering whether safe harbor calculation methods could be devised that would reduce the calculation burden but still result in an appropriate amount of tax applicable to the amount includible in income under section 409A(a). Specifically, the Treasury Department and the IRS request comments on calculation methods that would more easily identify the taxable year or years during which an amount includible in income under section 409A(a) was first deferred and vested, and that would more easily determine the hypothetical underpayments applicable to such year or years. Comments should consider both how the safe harbor method would be applied by taxpayers, and the extent to which such methods could be applied by the IRS in the examination context.

**VI. Treatment of Payments, Forfeitures, or Permanent Losses of Deferred Amounts in Taxable Years After the Amount Is Included in Income Under Section 409A(a)**

*A. Payments of Deferred Compensation in Taxable Years After the Inclusion of Such Amounts in Income Under Section 409A(a)*

Section 409A(c) provides that any amount included in gross income under section 409A is not required to be included in gross income under any other provision of the Code or any other rule of law later than the time provided in section 409A. Accordingly, if a service provider includes an amount in income under section 409A, the proposed regulations provide for a type of deemed ''basis'' or ''investment in the contract'' such that the amount would not be required to be included in income again (for example, when the amount was actually paid). For this purpose, the amount previously included in income would be treated as the inclusion in income of an amount deferred under the plan, but would not be allocated to any specific amount deferred under the plan. Accordingly, if an amount under the plan would be includible in income if section 409A were disregarded (for example, because an amount is paid under the plan), the amount previously included in income would be immediately applied to the amount paid under the plan such that the amount paid would not be required to be included in gross income a second time.

For example, assume that in Year 1 an employee defers $10,000 under a salary deferral elective account balance plan and is required to include that amount in income under section 409A. Assume that in Year 2 the employee defers $15,000 under the same salary deferral elective account balance plan, and an additional $5,000 under a bonus deferral elective account balance plan, both of which are compliant with section 409A. Assume that in Year 3 the employee receives a payment of $5,000 under the bonus deferral elective account balance plan. Because the payment would be treated for purposes of section 409A as made from a single elective account balance plan in which the employee participated, and because the employee has already included $10,000 in income under section 409A due to participation in the plan, the employee would apply $5,000 of the $10,000 that was previously included in income to the $5,000 payment and not include the $5,000 payment in gross income in Year 3 (or any subsequent

year). The remaining amount previously included in income would be $5,000.

The employee could not elect the extent to which the amount previously included in income would be applied in this context. Rather, the amount previously included in income would be required to be applied immediately to the extent an amount deferred under the same plan would otherwise become includible in income under a Code section other than section 409A. The inclusion of any amount in income and the resulting amount previously included in income for subsequent years would not affect the potential for earnings related to such amounts to be subject to section 409A or to be required to be included in income under section 409A.

*B. Permanent Forfeiture or Loss of a Deferred Amount Previously Included in Income Under Section 409A(a)*

The application of section 409A(a) may require inclusion in income of amounts that the service provider ultimately never receives. This result may occur under four different circumstances. First, because a nonqualified deferred compensation plan generally involves an unfunded, unsecured promise of a service recipient to pay compensation in a future year, the funds to pay the deferred amount may not be available in the future year. For example, the service recipient may be insolvent, bankrupt or have ceased to exist at the time the payment is due.

Second, some amounts of deferred compensation may be included in income under section 409A(a) if the amounts are subject to a risk of forfeiture, but the risk of forfeiture does not qualify as a substantial risk of forfeiture. For example, a deferred amount payable only if the service provider does not compete with the service recipient for a defined period is not subject to a substantial risk of forfeiture. However, if the service provider actually competes with the service recipient, the service provider may forfeit the right to the amount.

Third, the deferred amount may be subject to deemed investment losses. If losses occur after the deferred amount has been included in income under section 409A(a), the amount paid to the service provider may be less than the amount included in income.

Fourth, in the case of a formula amount, the calculation of the deferred amount may result in the inclusion in income under section 409A(a) of an amount that is greater than the amount ultimately paid. For example, if a service provider receives a right to a certain percentage of the service recipient's profits payable at separation from service, and determines that the total amount deferred under the plan is $100,000, once the profits are calculated the service provider may be entitled to a lesser amount.

1. Effect on Service Provider

The proposed regulations provide that a service provider who is required to include an amount in income under section 409A(a) with respect to a deferred amount under a nonqualified deferred compensation plan is entitled to a deduction at the time the service provider's legally binding right to all deferred compensation under the plan (including all arrangements treated as a single plan under the aggregation rules) is permanently forfeited under the plan's terms, or the right to such compensation is otherwise permanently lost. The available deduction would equal the excess of the amount included in income under section 409A(a) in a previous year over any amount actually or constructively received by the service provider. A right to an amount would not be treated as permanently lost merely because the deferred amount had decreased, for example due to deemed investment losses, if the service provider retains a right to an amount deferred under the plan. In addition, a right to an amount would not be treated as permanently forfeited or otherwise lost if the obligation to make such payment is substituted for another deferred amount or obligation to make a payment in a future year. However, the right to an amount would be treated as permanently lost if the right to the payment of the amount becomes wholly worthless. A service provider would not be entitled to a deduction with respect to an amount previously included in income under section 409A(a) if the service provider retains a right to any amount deferred under all arrangements treated as a single plan under § 1.409A–1(c)(2). However, if the entire deferred amount payable under the plan has been paid out and the service recipient has no remaining liability to the service provider under the plan, any remaining unpaid deferred amount that had previously been included in income would be treated as permanently lost.

For example, if at the end of Year 1 an employee has an account balance of $100,000 which is required to be included in income under section 409A, and at the end of Year 2 an employee has an account balance of $90,000 due to notional investment losses, the employee would not be entitled to a deduction for Year 2. However, if in Year 3 the entire account balance of $95,000 is paid to the employee, so there no longer are any amounts deferred under the plan (determined after applying applicable aggregation rules) and nothing remains to be paid to the employee, the employee would be entitled to a $5,000 deduction for Year 3.

In the case of a service provider that is an employee, the available deduction generally would be treated as a miscellaneous itemized deduction, subject to the deduction limitations applicable to such expenses. Section 1341 would not be applicable to such deduction because inclusion of an amount in income as a result of noncompliance with section 409A(a) would not constitute receipt of an amount to which it appeared that the taxpayer had an unrestricted right in the taxable year of inclusion. In the first circumstance listed above, a service provider that does not receive payment of deferred compensation because of the bankruptcy or insolvency of the service recipient retains the legal right to the income even though the income is not collectible. In each of the three other circumstances in which such a deduction becomes available, the deferred compensation is not paid because of an event that occurred after the taxable year in which the amount deferred was included in income under section 409A, rather than from the absence of a right to the deferred compensation in the year in which it was includible in gross income. Finally, certain of such circumstances, such as the actual amount received differing from the amount included in income because the amount deferred was a formula amount, result from the inherent uncertainties in valuing rights to such amounts, rather than from a lack of a claim of right to income.

2. Effect on Service Recipient

If a service provider is entitled to a deduction with respect to a deferred amount included in income under section 409A(a) that is subsequently permanently forfeited or otherwise lost, to the extent the service recipient has benefited from a deduction or increased the basis of an asset because the deferred amount was included in the service provider's gross income, or such inclusion by the service provider has otherwise reduced or could otherwise reduce the service recipient's gross income, the service recipient may be required to recognize income under the tax benefit rule and section 111, or make other appropriate adjustments to reflect that the deferred amount included in income by the service provider under section 409A(a) has been permanently

forfeited or otherwise lost, and thus will not be paid by the service recipient.

## VII. Service Provider Income Inclusion and Additional Taxes and Service Recipient Reporting and Withholding Obligations

### *A. Service Provider Income Inclusion*

The Treasury Department and the IRS anticipate issuing interim guidance during 2008 addressing the extent to which taxpayers may rely on the proposed regulations with respect to the calculation of the amounts includible in income under section 409A(a) and the calculation of the additional taxes under section 409A(a). The interim guidance is also expected to address the calculation of the amounts includible in income and additional taxes under section 409A(b) and service recipient reporting and withholding obligations with respect to amounts includible in income under section 409A(a) or (b) for taxable years beginning before the final regulations become applicable. The Treasury Department and the IRS anticipate that such interim guidance will provide that taxpayers may rely upon the proposed regulations in their entirety (but that taxpayers may not rely on part, but not all, of the proposed regulations).

### *B. Annual Deferral Reporting*

Section 885(b) of the Act amended sections 6041 and 6051 to require that an employer or payer report all deferrals for the year under a nonqualified deferred compensation plan on a Form W–2, ''Wage and Tax Statement'' or a Form 1099–MISC, ''Miscellaneous Income'', regardless of whether such deferred compensation is includible in gross income under section 409A(a) (annual deferral reporting). Notice 2007–89 permanently waives this requirement for 2007 Forms W–2 and Forms 1099. Notice 2006–100 permanently waives this requirement for 2005 and 2006 Forms W–2 and Forms 1099. The Treasury Department and the IRS anticipate that this reporting will be implemented beginning with the first taxable year for which these proposed regulations are finalized and effective. The Treasury Department and the IRS further anticipate that the annual deferral reporting rules will be based upon the principles set forth in these regulations as finalized, except that taxpayers will not be required to report deferred amounts that are not reasonably ascertainable (as defined in § 31.3121(v)(2)–1(e)(4)(i)(B)) until such amounts become reasonably ascertainable. The Treasury Department and the IRS anticipate that the deferred amounts required to be reported will reflect earnings on the amounts deferred in previous years, if the amount of such earnings is reasonably ascertainable, because section 409A specifically treats earnings on deferred amounts as additional deferred amounts. The Treasury Department and the IRS request comments on the potential application of the standards set forth in these regulations to this reporting requirement, including suggestions for possible adaptations or modifications that may decrease the administrative burden of compliance while maintaining the integrity of the information reported.

### *C. Income Inclusion Reporting and Income Tax Withholding*

Section 885(b) of the Act also amended section 3401(a) to provide that the term ''wages'' includes any amount includible in the gross income of an employee under section 409A, and amended section 6041 to require that a payer report amounts includible in gross income under section 409A that are not treated as wages under section 3401(a) (income inclusion reporting). Notice 2005–1 provides that an employer should report amounts includible in gross income under section 409A and in wages under section 3401(a) in box 1 of Form W–2 as wages paid to the employee during the year and subject to income tax withholding, and that the employer should also report such amounts in box 12 of Form W–2 using code Z. Notice 2005–1 also provides that a payer should report amounts includible in gross income under section 409A and not treated as wages under section 3401(a) as nonemployee compensation in box 7 of Form 1099–MISC, and should also report such amounts in box 15b of Form 1099–MISC. Notice 2006–100 provided guidance on income inclusion reporting for the 2005 and 2006 Forms W–2 and Forms 1099. Notice 2007–89 provided guidance on income inclusion reporting for the 2007 Forms W–2 and Forms 1099. The Treasury Department and the IRS anticipate issuing further interim guidance during 2008 on income inclusion reporting for 2008 Forms W–2 and Forms 1099 for taxable years beginning before the final regulations become applicable. The Treasury Department and the IRS anticipate that such interim guidance will provide that taxpayers may rely upon the proposed regulations in their entirety (but that taxpayers may not rely on part, but not all, of the proposed regulations).

Amounts includible in an employee's income under section 409A also are treated as wages for purposes of section 3401. Notice 2007–89 provides guidance on a service recipient's income tax withholding obligations for 2007. The Treasury Department and the IRS anticipate issuing further interim guidance during 2008 on a service recipient's income tax withholding obligations for calendar years beginning before the final regulations become applicable. The Treasury Department and the IRS anticipate that such interim guidance will provide that taxpayers may rely upon the proposed regulations in their entirety (but that taxpayers may not rely on part, but not all, of the proposed regulations).

## Proposed Effective Date

These regulations are proposed to be generally applicable for taxable years beginning on or after the issuance of final regulations. Before the applicability date of the final regulations, taxpayers may rely on these proposed regulations only to the extent provided in further guidance.

## Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

## Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and Treasury Department request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for April 2, 2009 at 10 a.m., in the auditorium. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building.

Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written or electronic comments and an outline of the topics to be discussed and the time to be devoted to each topic (a signed original and eight (8) copies) by March 9, 2009. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

**Drafting Information**

The principal author of these regulations is Stephen Tackney of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and the Treasury Department participated in their development.

**List of Subjects 26 CFR Part 1**

Income taxes, Reporting and recordkeeping requirements.

**Proposed Amendments to the Regulations**

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

## PART 1—INCOME TAXES

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

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

**Par. 2.** Section 1.409A–0 is amended by adding entries for § 1.409A–4 to read as follows:

**§ 1.409A–0 Table of contents.**

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*§ 1.409A–4 Calculation of amount includible in income and additional income taxes.*

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(4) Reimbursement and in-kind benefit arrangements.
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(6) Stock rights.
(7) Anti-abuse provision.
(c) Additional 20 percent tax under section 409A(a)(1)(B)(i)(II).
(d) Premium interest tax under section 409A(a)(1)(B)(i)(I).
(1) In general.
(2) Identification of taxable year deferred amount was first deferred or vested.
(i) Method of identification.
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(3) Calculation of hypothetical underpayment for the taxable year during which a deferred amount was first deferred and vested.
(i) Calculation method.
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(e) Amounts includible in income under section 409A(b) [Reserved].
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(1) In general.
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(g) Forfeiture or other permanent loss of right to deferred compensation.
(1) Availability of deduction to the service provider.
(2) Application of the plan aggregation rules.
(3) Examples.
(h) Effective/applicability date.

* * * * *

**Par. 3.** Section 1.409A–4 is added to read as follows:

**§ 1.409A–4 Calculation of amount includible in income and additional income taxes.**

(a) *Amount includible in income due to failure to meet the requirements of section 409A(a)*—(1) In general—(i) Calculation formula. The amount includible in income for a service provider's taxable year due to a failure to meet the requirements of section 409A(a) with respect to a plan is the excess (if any) of—

(A) The service provider's total amount deferred under the plan for the taxable year, including the amount of any payments of amounts deferred under the plan to (or on behalf of) the service provider during such taxable year; over

(B) The portion of such amount, if any, that is either subject to a substantial risk of forfeiture (as defined in § 1.409A–1(d) and applying paragraph (a)(1)(ii)(B) of this section) or has been previously included in income (as defined in § 1.409A–4(a)(3)).

(ii) *Each taxable year analyzed independently*—(A) In general. An amount is includible in income under section 409A(a) for a taxable year only if a plan fails to meet the requirements of section 409A(a) during such taxable year. Whether an amount is includible in income for a taxable year due to a failure to meet the requirements of section 409A(a) during such taxable year is determined independently of whether such amounts are also includible in income due to a failure to meet the requirements of section 409A(a) in a previous or subsequent taxable year. Accordingly, an amount may be includible in income for a taxable year during which a plan fails to meet the requirements of section 409A(a), even if the same amount was includible in income in a previous taxable year, except to the extent provided in § 1.409A–4(a)(3) (identification of amount previously included in income).

(B) *Treatment of certain deferred amounts otherwise subject to a substantial risk of forfeiture.* For

purposes of determining the amount includible in income under section 409A(a) and paragraph (a)(1)(i) of this section, if the facts and circumstances indicate that a service recipient has a pattern or practice of permitting impermissible changes in the time and form of payment with respect to nonvested deferred amounts under one or more plans, an amount deferred under a plan that is otherwise subject to a substantial risk of forfeiture is not treated as subject to a substantial risk of forfeiture if an impermissible change in the time and form of payment (including an impermissible initial deferral election) applies to the amount deferred or if the facts and circumstances indicate that the amount deferred would be affected by such pattern or practice.

(iii) *Examples.* The following examples illustrate the provisions of this paragraph (a)(1). For each of the examples, Employee A is an individual taxpayer with a calendar year taxable year. Employee A has a total amount deferred under a nonqualified deferred compensation plan of $0 in 2010, $100,000 in 2011, and $250,000 in 2012. No payments are made under the plan. The plan under which the amounts are deferred fails to meet the requirements of section 409A(a) during 2011 and 2012. The examples read as follows:

*Example 1.* With respect to Employee A, at no time is any deferred amount subject to a substantial risk of forfeiture. Employee A has $100,000 includible in income under section 409A(a) for 2011, because no portion of the total deferred amount for 2011 is subject to a substantial risk of forfeiture or has previously been included in income. If that $100,000 is included in income for 2011, Employee A has $150,000 includible in income under section 409A(a) for 2012 because for the taxable year 2012 the $100,000 is previously included in income (see paragraphs (a)(1)(i)(B) and (a)(3) of this section). If that $100,000 is not included in income for 2011, Employee A has $250,000 includible in income under section 409A(a) for 2012. Employee A does not avoid the requirement to include $100,000 in income under section 409A(a) for 2011 by including $250,000 in income under section 409A(a) for 2012.

*Example 2.* The same facts as *Example 1*, except that, with respect to Employee A, the statute of limitations on assessments has expired for 2011, but has not expired for 2012. Employee A has $250,000 includible in income under section 409A(a) for 2012, because no portion of the total deferred amount for 2012 is subject to a substantial risk of forfeiture or has previously been included in income.

(2) *Identification of the portion of the total amount deferred for a taxable year that is subject to a substantial risk of forfeiture*—(i) *In general.* The portion of the total amount deferred for a taxable year that is subject to a substantial risk of forfeiture (as defined in § 1.409A–1(d)) is determined as of the last day of the service provider's taxable year. Accordingly, an amount may be includible in income under section 409A(a) for a taxable year even if such amount is subject to a substantial risk of forfeiture during the taxable year if the substantial risk of forfeiture lapses during such taxable year, including if the substantial risk of forfeiture lapses after the date the nonqualified deferred compensation plan under which the amount is deferred first fails to meet the requirements of section 409A(a).

(ii) *Example.* The following example illustrates the provisions of this paragraph (a)(2): Employee B is an individual taxpayer with a calendar year taxable year. Employee B has a total amount deferred under a nonqualified deferred compensation plan of $0 for 2010, $100,000 for 2011, and $250,000 for 2012. No payments are made under the plan. Under the terms of the plan, if Employee B voluntarily separates from service before July 1, 2012, Employee B will forfeit 50 percent of the Employee B's total amount deferred under the plan. If Employee B voluntarily separates from service after June 30, 2012 but before July 1, 2013, Employee B will forfeit 20 percent of the total amount deferred under the plan. If Employee B voluntarily separates from service after June 30, 2013, Employee B will not forfeit any amount deferred under the plan. As of December 31, 2011, 50 percent of the total amount deferred under the plan ($50,000) is subject to a substantial risk of forfeiture, and the remaining amount deferred under the plan ($50,000) is not subject to a substantial risk of forfeiture. As of December 31, 2012, 20 percent of the total amount deferred under the plan ($50,000) is subject to a substantial risk of forfeiture, and the remaining amount deferred under the plan ($200,000) is not subject to a substantial risk of forfeiture. At all times the terms of the plan meet the requirements of section 409A(a) and the applicable regulations, and through May 31, 2012, the plan is operated in a manner that complies with the terms of the plan. On June 1, 2012, the plan is operated in a manner that fails to meet the requirements of section 409A(a). For purposes of determining the amount includible in income under section 409A(a), except as provided in paragraph (a)(1)(ii)(B) of this section, the portion of the total amount deferred for 2012 that is subject to a substantial risk of forfeiture is $50,000 (20 percent of $250,000).

(3) *Identification of amount previously included in income*—(i) *In general.* For purposes of this section, an amount is previously included in income only if the service provider has included the amount in income under an applicable provision of the Internal Revenue Code for a previous taxable year. An amount is treated as included in income for a taxable year only to the extent that the amount was properly includible in income and the service provider actually included the amount in income (including on an original or amended return or as a result of an IRS examination or a final decision of a court of competent jurisdiction). For future taxable years, the amount previously included in income is reduced to reflect any amount that was paid during the taxable year for which the amount was included in income, any amount allocated to a payment made under the plan under paragraph (f) of this section, and any amount deductible under paragraph (g) of this section.

(ii) *Examples.* The following examples illustrate the provisions of this paragraph (a)(3). For all of the examples, Employee C is an individual taxpayer with a calendar year taxable year. Employee C has a total amount deferred under a nonqualified deferred compensation plan of $0 in 2010, $100,000 in 2011, and $250,000 in 2012. With respect to Employee C, the statute of limitations on assessments has not expired for 2011 or 2012. Except as otherwise explicitly provided in the following examples, Employee C has not included in income for 2011 on any original or amended tax return any amount deferred under the plan, none of the $250,000 total amount deferred for 2012 has previously been included in income, no payments are made under the plan, and at no time is any deferred amount subject to a substantial risk of forfeiture. The plan under which the amounts are deferred fails to meet the requirements of section 409A(a) during 2011 and 2012. The examples read as follows:

*Example 1.* After filing an original Federal income tax return for 2011 that did not include any amount in income under section 409A(a), on April 1, 2013, Employee C files an amended Federal income tax return for 2011 and properly includes $100,000 in income under section 409A(a) for 2011. For purposes of determining the amount includible in income under section 409A(a) for 2012, $100,000 of the $250,000 total amount deferred for 2012 has previously been included in income with respect to the plan. For 2012, Employee C includes in income $150,000 under section 409A(a) on Employee C's original Federal income tax return. As of January 1, 2013, the amount that

Employee C has previously included in income under section 409A(a) with respect to the plan is $250,000.

*Example 2.* The facts are the same as in *Example 1,* except that Employee C receives a $10,000 payment in 2011 so that the total amount deferred for 2012 is $240,000. For purposes of determining the amount includible in income under section 409A(a) for 2012, the $100,000 amount previously included in income is reduced by the $10,000 payment so that $90,000 of the $240,000 total amount deferred for 2012 has previously been included in income. For 2012, Employee C includes in income $150,000 under section 409A(a) on Employee C's original Federal income tax return. As of January 1, 2013, the amount that Employee C has previously included in income under section 409A(a) with respect to the plan is $240,000.

*Example 3.* The facts are the same as in *Example 2.* Due to deemed investment losses during 2013, Employee C has an $80,000 total amount deferred under the plan for 2013. On December 31, 2013, Employee C's total amount deferred ($80,000) is paid to Employee C as a single sum payment. Pursuant to paragraph (f) of this section, $80,000 of the $240,000 amount previously included in income is allocated to the $80,000 payment so that none of the $80,000 is includible in income. In addition, pursuant to paragraph (g) of this section, Employee C is entitled to deduct $160,000 for 2013 equal to the remaining amount previously included in income the right to which is permanently lost. Because the entire $240,000 amount previously included in income has been allocated to a payment under paragraph (f) of this section or was deductible under paragraph (g) of this section, no portion of such amount is treated as previously included in income for 2014 or any subsequent taxable year. As of January 1, 2014, the amount that Employee C has previously included in income under section 409A(a) with respect to the plan is $0.

(b) *The total amount deferred under a plan for a taxable year*—(1) Application of general rules and specific rules for specific types of plans.Paragraph (b)(2) of this section provides general rules governing the determination of the total amount deferred under a plan for a taxable year, including the treatment of plans providing for alternative times and forms of payment and plans providing for certain payments the amount of which is determined by a formula that includes one or more variables dependent upon future events (formula amounts). Paragraphs (b)(3) through (b)(6) of this section provide specific rules governing the determination of the total amount deferred under certain types of plans. Except as otherwise provided, any applicable rules of paragraphs (b)(3) through (b)(6) of this section are applied in conjunction with the general rules provided in paragraph (b)(2) of this section.

(2) *General definition of total amount deferred*—(i) *General calculation rules.* Except as otherwise provided, the total amount deferred for a taxable year equals the present value of the future payments to which the service provider has a legally binding right under the plan as of the last day of the taxable year, plus the amount of any payments of amounts deferred under the plan to (or on behalf of) the service provider during such taxable year. For purposes of this section, present value means the value, as of a specified date, of an amount or series of amounts due thereafter, determined in accordance with the rules and assumptions of this paragraph (b)(2), as applicable, where each amount is multiplied by the probability that the condition or conditions on which payment of the amount is contingent will be satisfied, also determined in accordance with the rules and assumptions set forth in this paragraph (b)(2), as applicable, discounted according to an assumed rate of interest to reflect the time value of money. For this purpose, a discount for the probability that an employee will die before commencement of benefit payments is permitted, but only to the extent that benefits will be forfeited upon death. In addition, the present value cannot be discounted for the probability that payments will not be made (or will be reduced) because of the unfunded status of the plan, the risk associated with any deemed or actual investment of amounts deferred under the plan, the risk that the service recipient, the trustee, or another party will be unwilling or unable to pay, the possibility of future plan amendments, the possibility of a future change in the law, or similar risks or contingencies. If the amount payable under a plan or the value of a benefit under a plan is expressed in a currency other than the U.S. dollar, the total amount deferred is translated from foreign currency into U.S. dollars at the spot exchange rate on the last day of the service provider's taxable year. No adjustment is made to the total amount deferred to reflect the risk that the currency in which the amount payable or the value of the benefit is expressed may in the future increase or decrease in value with respect to the U.S. dollar or any other currency.

(ii) *Actuarial assumptions and methods*—(A) *Requirement of reasonable actuarial assumptions and methods.* For purposes of this section, the present value must be determined as of the last day of the service provider's taxable year using actuarial assumptions and methods that are reasonable as of that date, including an interest rate for purposes of discounting for present value that is reasonable as of that date.

(B) *Use of an unreasonable actuarial assumption or method.* If any actuarial assumption or method used to determine the total amount deferred for a taxable year under a plan is not reasonable, as determined by the Commissioner, then the total amount deferred is determined by the application of the AFR and, if applicable, the applicable mortality table under section 417(e)(3)(A)(ii)(I) (the 417(e) mortality table), both determined as of the last month of the taxable year for which the amount deferred is being determined. For purposes of this section, *AFR* means the appropriate applicable Federal rate (as defined pursuant to section 1274(d)) based on annual compounding, for the last month of the taxable year for which the amount includible in income is being determined. The period for which excess interest will be credited, beginning with the last day of the taxable year and ending with the date the excess interest will no longer be credited (determined in accordance with the payment timing assumptions set forth in paragraph (b)(2)(vi) and (vii) of this section) is used to determine the appropriate AFR (short-term, mid-term, or long-term).

(iii) *Crediting of earnings and losses.* The earnings and losses credited under a plan as of the last day of the service provider's taxable year pursuant to the plan are given effect only to the extent the plan's terms reasonably reflect the value of the service provider's rights under the plan. For example, a plan's method of determining the amount of such earnings or losses generally will be respected for purposes of determining the total amount deferred for the taxable year, provided that the earnings and losses are credited at least once per taxable year. If earnings and losses are not credited at least annually, the total amount deferred is calculated as if the earnings or losses were credited as of the last day of the taxable year. In addition, any change in the schedule for crediting earnings during the taxable year for which the total amount deferred is calculated that would reduce the earnings credited for a taxable year in which an amount is required to be included in income under section 409A(a) is disregarded for such taxable year. For example, if a plan is amended during a taxable year that is a calendar year to change the date for crediting earnings from December 31 to July 1 of that year and the plan fails to meet the requirements of section 409A(a) during that year, the amendment is disregarded

for purposes of determining the total amount deferred for the year and December 31 is treated as the date for crediting earnings and losses. If no further changes are made to the plan with respect to the crediting of earnings and losses, for subsequent taxable years, July 1 is treated as the date for crediting earnings and losses.

(iv) *Application of the general calculation rules to formula amounts*—(A) *In general.* With respect to a right to a payment to which this paragraph applies, the amount payable for purposes of determining the total amount deferred for the taxable year must be determined based on all of the facts and circumstances existing as of the close of the last day of the taxable year. Such determination must reflect reasonable, good faith assumptions with respect to any contingencies as to the amount of the payment, both with respect to each contingency and with respect to all contingencies in the aggregate. An assumption based on the facts and circumstances as of the close of the last day of a taxable year may be reasonable even if the facts and circumstances change in a subsequent year so that if the amount payable were determined for such subsequent year, the amount payable would be a greater (or lesser) amount. In such a case, the increase (or decrease) due to the change in the facts and circumstances is treated as earnings (or losses). This paragraph (b)(2)(iv) applies to the extent that the amount payable in a future taxable year is a formula amount to the extent that the amount payable in a future taxable year is dependent upon factors that, after applying the assumptions and other rules set out in this section, are not determinable as of the end of the taxable year for which the total amount deferred is being calculated, so that the amount payable may not readily be determined as of the end of such taxable year under the other provisions of this section. If a portion of a deferred amount is determinable under the other rules of this paragraph (b)(2), the determination of the amount deferred with respect to such portion must be determined under the rules applicable to amounts that are not formula amounts, and only the balance of the deferred amount is determined under this paragraph.

(B) *Examples.* The following examples illustrate the provisions of this paragraph (b)(2)(iv):

*Example 1.* On January 1, 2020, a service provider receives a legally binding right to a payment of one percent of the service recipient's net profits for the calendar years 2020, 2021, and 2022, payable on the later of January 1, 2024 or the service provider's separation from service. The amount payable is a formula amount and this paragraph (b)(2)(iv) applies.

*Example 2.* On January 1, 2020, a service provider receives a legally binding right to a payment of the greater of one percent of the service recipient's net profits for the calendar years 2020, 2021, and 2022 or $10,000, payable on the later of January 1, 2024 or the service provider's separation from service. The portion of the amount payable that is a $10,000 payment, payable at the later of January 1, 2024 or the service provider's separation from service, is not a formula amount. The portion of the amount payable that is the excess, if any, of one percent of the service recipient's net profits for the calendar years 2020, 2021, and 2022 over $10,000 is a formula amount and this paragraph (b)(2)(iv) applies.

*Example 3.* On January 1, 2020, a service provider receives a legally binding right to payment equal to the value of 10,000 shares of service recipient stock, payable on the later of January 1, 2024 or the service provider's separation from service. Because the amount payable may increase or decrease only due to a change in value of a predetermined actual investment (10,000 shares of service recipient stock), the amount payable is not treated as a formula amount and this paragraph (b)(2)(iv) does not apply.

(v) *Treatment of payment restrictions.* Except as specifically provided, a restriction on the payment of all or part of a deferred amount that will or may lapse under the terms of the plan, including a risk of forfeiture that is not a substantial risk of forfeiture as defined in § 1.409A–1(d) or is disregarded under § 1.409A–4(a)(1)(ii)(B), is ignored for purposes of determining the total amount deferred under the plan. Accordingly, in calculating the total amount deferred, there is no reduction to account for a risk that the amount may be forfeited if the risk of forfeiture is not a substantial risk of forfeiture. For example, if an amount deferred is subject to forfeiture under a noncompetition provision applicable for a prescribed period, the forfeiture provision is disregarded for purposes of determining the total amount deferred for the taxable year.

(vi) *Treatment of alternative times and forms of a future payment*—(A) *In general.* For purposes of determining the total amount deferred for a taxable year, if payment of a deferred amount may be made at alternative times or in alternative forms, each amount deferred under the plan is treated as payable at the time and under the form of payment for which the present value is highest. A time and form of payment is available to the extent a deferred amount under the plan may be payable in such time and form of payment under the plan's terms. If the service recipient has commenced payment of a deferred amount in a time and form of payment under the plan, or the service provider or service recipient has elected a time and form of payment under the plan, and under the plan's terms neither party can change such time and form of payment without the consent of the other party (and such consent requirement has substantive significance), the time and form of payment elected or the time and form of payment in which payments have commenced is treated as the sole available time and form of payment for such amount. If an alternative time and form of payment is available only at the service recipient's discretion, the time and form of payment is not available unless the service provider has a legally binding right under the principles of § 1.409A–1(b)(1) to any additional value that would be generated by the service recipient's exercise of such discretion. For purposes of determining the value of each available time and form of payment, the assumptions and methods described in this paragraph (b)(2)(vi) are applied, and then the value of each available time and form of payment is determined in accordance with the other applicable rules provided in paragraph (b) of this section.

(B) *Effect of status of service provider on available times and forms of payment.* For purposes of determining whether a time and form of payment is available, if eligibility for a time and form of payment depends upon the service provider's status as of a future date, the service provider is assumed to continue in the service provider's status as of the last day of the taxable year. However, if the eligibility requirement is not bona fide and does not serve a bona fide business purpose, the eligibility requirement will be disregarded and the service provider will be treated as eligible for the alternative time and form of payment. For this purpose, an eligibility condition based upon the service provider's marital status (including status as a registered domestic partner or similar requirement), parental status, or status as a U.S. citizen or lawful permanent resident under section 7701(b)(6) is presumed to be bona fide and serve a bona fide business purpose. Notwithstanding the foregoing, if eligibility for a certain time or form of payment includes a bona fide requirement that the service provider provide additional services after the end of the taxable year, the time and form of payment is not treated as an available time and form of payment. The rules of this paragraph (b)(2)(vi)(B) apply regardless of whether the service

provider's status changes during a subsequent taxable year.

(vii) *Treatment of payment triggers based upon events*—(A) *In general.* For purposes of determining the total amount deferred for a taxable year, if a payment trigger has occurred on or before the last day of the taxable year, a deferred amount payable upon such trigger is treated as payable at the time the payment is scheduled to be made under the terms of the plan. If the payment trigger has not occurred on or before the last day of the taxable year, the trigger is treated as occurring on the earliest possible date the trigger reasonably could occur based on the facts and circumstances as of the last day of the taxable year, and the deferred amount is treated as payable based upon the schedule of payments that would be triggered by such occurrence. Notwithstanding the foregoing, if the payment trigger requires a separation from service, a termination of employment, or other similar reduction or cessation of services, the service provider is treated as meeting such requirement as of the last day of the taxable year. For purposes of determining the earliest date the payment trigger reasonably could occur, whether the payment trigger actually occurs in a subsequent taxable year is disregarded. For purposes of this paragraph (b)(2)(vii), a payment trigger means an event (not including the mere passage of time) upon which an amount may become payable. Generally if an amount would be payable in a different time and form of payment depending upon some characteristic of an event, each type of event upon which an amount would become payable is treated as a separate payment trigger. For example, if an amount would be payable as a single sum payment if one subsidiary corporation of a service recipient that consists of multiple corporations is sold, but as an installment payment if another subsidiary corporation of the same service recipient is sold, then the sale of the one subsidiary corporation is treated as a separate payment trigger from the sale of the other subsidiary corporation.

(B) *Certain payment triggers disregarded.* The possibility that the following payment triggers will occur in the future is disregarded for purposes of determining the total amount deferred (but not for purposes of determining whether the plan otherwise complies with the requirements of section 409A(a)):

(*1*) A payment trigger that, if the trigger were the sole trigger determining when the amount would become payable, would cause the amount to be subject to a substantial risk of forfeiture, provided that if there is more than one payment trigger applicable to an amount that otherwise would be disregarded under this paragraph (b)(2)(vii)(B)(*1*), none of such payment triggers will be disregarded unless all such payment triggers, if applied in combination as the only payment triggers, would also cause the amount to be subject to a substantial risk of forfeiture.

(*2*) An unforeseeable emergency (as defined in § 1.409A–3(i)(3)).

(viii) *Treatment of amounts that may qualify as short-term deferrals.* For purposes of calculating the total amount deferred for a taxable year, the right to a payment that, under the terms of the arrangement and the facts and circumstances as of the last day of the taxable year, may be a short-term deferral as defined under § 1.409A–1(b)(4), is not included in the total amount deferred. In addition, even if such amount is not paid by the end of the applicable 2½ month period so that the amount is deferred compensation, the amount is not includible in the total amount deferred until the service provider's taxable year in which the applicable 2½ month period expires.

(ix) *Examples.* The following examples illustrate the provisions of paragraphs (b)(2)(vi) through (viii) of this section. For all of the examples, the service provider is an individual taxpayer who is an employee of the service recipient, the service provider has a calendar year taxable year, and the total amount deferred is being calculated for the taxable year ending December 31, 2010. In each case, the service provider is not entitled to earnings on the amount deferred. The examples read as follows:

*Example 1.* Employee D, who is employed by Employer Z, is entitled to commence receiving payments at age 65. The plan provides that Employee D will receive a single sum payment, except that, after Employee D attains age 62 but before Employee D attains age 64 (whether or not Employee D is then employed by Employer Z), Employee D can elect to receive payments as a single life annuity. Employee D is age 54 as of December 31, 2010. For purposes of determining the available times and forms of payment, Employee D is assumed to survive to age 62 and be eligible to elect a single life annuity. Accordingly, for purposes of determining the total amount deferred for 2010, the amount is treated as payable as either a single sum payment or a single life annuity, whichever is more valuable.

*Example 2.* Employee E is entitled to a single life annuity commencing on January 1, 2020 if Employee E is not married as of January 1, 2020. Employee E is entitled to either a single life annuity or a subsidized joint and survivor annuity commencing on January 1, 2020 if Employee E is married as of January 1, 2020. Employee E is not married as of December 31, 2010. For purposes of determining the total amount deferred for 2010, Employee E is assumed to remain unmarried indefinitely, so that the subsidized joint and survivor annuity is not an available form of payment. Accordingly, for purposes of determining the total amount deferred for 2010, the amount is treated as payable as a single life annuity commencing January 1, 2020.

*Example 3.* Employee F is entitled to a series of three payments of $1,000 due on January 1, 2020, January 1, 2021, and January 1, 2022. Under the plan's terms, Employer X has the discretion to accelerate one or more of the payments, provided that no payment may be made before January 1, 2020. Because there is no reduction in the amount payable if a payment is accelerated, an accelerated payment is more valuable than a payment made in accordance with the three-year schedule of payments. If Employee F does not have a legally binding right to a single sum payment on January 1, 2020 (or any other form of accelerated payment), then an accelerated payment is not an available time and form of payment and, for purposes of determining the total amount deferred for 2010, the amount is treated as payable as a series of three payments of $1,000 on January 1, 2020, January 1, 2021, and January 1, 2022.

*Example 4.* The facts are the same as in *Example 3*, except that Employer X has no discretion to accelerate one or more of the payments. Rather, Employee F has the right to accelerate one or more of the payments provided that a payment may not be paid at any date before the later of January 1, 2020 or the date 12 months after the date of such election. As of December 31, 2010, the earliest date upon which Employee F may elect to have a payment made is January 1, 2020. Because there is no reduction in the amount payable if a payment is accelerated, the earliest possible date of payment is the most valuable time and form of payment. Accordingly, for purposes of determining the total amount deferred for 2010, the amount is treated as payable as a single sum payment of $3,000 on January 1, 2020.

*Example 5.* Employee G is entitled to a single sum payment upon separation from service if Employee G separates from service before January 1, 2020 and a single life annuity if Employee G separates from service after December 31, 2019. As of December 31, 2010, Employee G has not separated from service. Under paragraph (b)(2)(vi)(A) of this section, the total amount deferred is determined based upon the amount that would be payable if Employee G separated from service on December 31, 2010. Accordingly, the single life annuity is not treated as an available time and form of payment, so that the amount is treated as payable as a single sum payment upon separation from service.

*Example 6.* Employee H is entitled to a single sum payment of deferred compensation upon the earlier of January 1, 2020 or an unforeseeable emergency. Because the payment upon an unforeseeable emergency is disregarded, for purposes of determining the total amount deferred, the deferred amount is treated as payable only on January 1, 2020.

*Example 7.* Employee I is entitled to a single sum payment of deferred compensation upon the earlier of January 1, 2020 or Employee I's involuntary separation from service. Under the facts and circumstances existing at the time the right to the payment was granted, if the deferred amount had been payable only upon Employee I's involuntary separation from service, the amount would have been subject to a substantial risk of forfeiture. Under paragraph (b)(2)(iv)(B) of this section, the right to a payment upon the Employee I's involuntary separation from service is disregarded, and the amount is treated as payable only on January 1, 2020.

*Example 8.* Employee J is entitled to a single sum payment of deferred compensation upon the earlier of January 1, 2020 or Employee J's separation from service. As of December 31, 2010, Employee J has not separated from service. Under paragraph (b)(2)(vi)(A) of this section, the total amount deferred is determined based upon the amount that would be payable if Employee J separated from service on December 31, 2010 and therefore had the right to receive the payment on December 31, 2010. The total amount deferred for 2010 is the greater of the amount that would be payable on December 31, 2010 or the present value of the amount that would be payable on January 1, 2020.

*Example 9.* Employee K is entitled to a single sum payment of deferred compensation upon the earlier of January 1, 2020 or the first day of the third month following Employee K's separation from service. As of December 31, 2010, Employee K has not separated from service. Under paragraph (b)(2)(vi)(A) of this section, the total amount deferred is determined based upon the amount that would be payable if Employee K separated from service on December 31, 2010, and therefore had a right to a payment on March 1, 2011. The total amount deferred for 2010 is the greater of the present value as of December 31, 2010 of the amount that would be payable on March 1, 2011 or the present value as of December 31, 2010 of the amount that would be payable on January 1, 2020.

*Example 10.* Employee L is entitled to a single sum payment of deferred compensation upon the earlier of January 1, 2020 or a separation from service that occurs on or before July 1, 2010. As of December 31, 2010, Employee L has not separated from service. For purposes of determining the total amount deferred, the right to be paid upon a separation from service on or before July 1, 2010 is ignored because it is no longer a possible payment trigger, and the amount is treated as payable only on January 1, 2020.

*Example 11.* Employee M is entitled to a single sum payment of deferred compensation upon the earliest of the date Employee M dies, Employee M attains age 65, or a child of Employee M becomes a full-time student at an accredited college or university (whether or not Employee M continues to be employed on such date). As of December 31, 2010, Employee M has a 10-year-old child who is in the fifth grade. For purposes of determining the total amount deferred, the earliest time that the payment reasonably could be due upon Employee M's child entering a college or university is August 1, 2018. Thus, the total amount deferred for 2010 is the more valuable of the amount that would be payable on the Employee M's 65th birthday and the amount that would be payable on August 1, 2018. Because any additional value that would be payable upon Employee M's death is a death benefit excluded from the definition of deferred compensation under section 409A(d)(1)(B) and § 1.409A–1(a)(5), that additional value, if any, is not required to be calculated.

(3) *Account balance plans*—(i) *In general.* For purposes of this section, if benefits are provided under a nonqualified deferred compensation plan that is described in § 1.409A–1(c)(2)(i)(A) or (B) (an account balance plan), the present value of the amount payable equals the amount credited to the service provider's account as of the last day of the taxable year, including both the principal amount credited to the account, and any earnings or losses attributable to the principal amounts credited to the account through the last day of the taxable year. For purposes of this section, earnings or losses means any increase or decrease in the amount credited to a service provider's account that is attributable to amounts previously credited to the service provider's account, regardless of whether the plan denominates that increase or decrease as earnings or losses. For rules related to the crediting of earnings, see paragraph (b)(2)(iii) of this section. For rules relating to earnings based on an unreasonable interest rate or a rate of return based on an investment other than a single predetermined actual investment or a single reasonable interest rate, see paragraph (b)(3)(ii) of this section.

(ii) *Unreasonable rate of return*—(A) *Application.* This paragraph (b)(3)(ii) applies to an account balance plan under which the amount of earnings or losses credited is not based on either a predetermined actual investment, within the meaning of § 31.3121(v)(2)–1(d)(2)(i)(B) of this chapter, or a rate of interest that is not higher than a reasonable rate of interest, within the meaning of § 31.3121(v)(2)–1(d)(2)(i)(C) of this chapter, as determined by the Commissioner.

(B) *Unreasonably high interest rate.* If the earnings or losses to be credited under a plan are based on an unreasonably high rate of interest, the amount deferred under the plan is equal to the present value as of the end of the taxable year (using a reasonable interest rate) of the amount that will be credited to the service recipient's account using the unreasonably high rate for the entire period for which the unreasonably high interest will be credited under the plan, beginning with the last day of such taxable year and ending with the date the unreasonably high interest will no longer be credited (determined in accordance with the payment timing assumptions set forth in paragraph (b)(2)(vi) and (vii) of this section). If the service recipient fails to use a reasonable interest rate to determine the amount includible in income, AFR will be used. For purposes of this section, *AFR* means the appropriate applicable Federal rate (as defined pursuant to section 1274(d)) based on annual compounding, for the last month of the taxable year for which the amount includible in income is being determined. The period described in the first sentence of this paragraph (b)(3)(ii)(B) is used to determine the appropriate AFR (short-term, mid-term, or long-term). For purposes of this paragraph (b)(3)(ii)(B), an unreasonably high interest rate includes a fixed interest rate that exceeds an interest rate that is reasonable, within the meaning of § 31.3121(v)(2)–1(d)(2)(i)(C) of this chapter.

(C) *Other rates of return.* If the amount of earnings or losses credited is based on a rate of return that is not an unreasonably high interest rate, within the meaning of paragraph (b)(3)(ii)(B) of this section, but is also not a predetermined actual investment, within the meaning of § 31.3121(v)(2)–1(d)(2)(i)(B) of this chapter or a rate of interest that is no more than a reasonable rate of interest, within the meaning of § 31.3121(v)(2)–1(d)(2)(i)(C) of this chapter , the amount payable is a formula amount.

(4) *Reimbursement and in-kind benefit arrangements.* For purposes of this section, if benefits for a service provider are provided under a nonqualified deferred compensation plan described in § 1.409A–1(c)(2)(i)(E) (a reimbursement arrangement), or under a nonqualified deferred compensation plan that would be described in § 1.409A–1(c)(2)(i)(E) except that the amounts, separately or in the aggregate, constitute a substantial portion of either the overall compensation earned by the service provider for performing services for the service recipient or the overall compensation received due to a separation from service, the arrangement is treated as providing for a formula amount to the extent that the expenses to be reimbursed are not explicitly identified to be a specific amount. Notwithstanding the foregoing, if the expenses eligible for reimbursement are limited, it is presumed that the limit reflects the reasonable amount of eligible expenses

that the service provider will incur at the earliest possible date during the time period to which the limit applies, and for which the service provider will request reimbursement at the earliest possible date that the service provider may request reimbursement. This presumption may be rebutted only by demonstrating by clear and convincing evidence that it is unreasonable to assume that a service provider would incur such amount of expenses during the applicable time period. This presumption is not applicable to any reimbursement arrangement to which § 1.409A–3(i)(1)(iv)(B) applies (certain medical reimbursement arrangements). In addition, this paragraph (b)(4) also applies to an arrangement providing a service provider a right to in-kind benefits from the service recipient, or a payment by the service recipient directly to the person providing the goods or services to the service provider.

(5) *Split-dollar life insurance arrangements.* For purposes of this section, if benefits for a service provider are provided under a nonqualified deferred compensation plan described in § 1.409A–1(c)(2)(i)(F) (a split-dollar life insurance arrangement), the amount of the future payment to which the service provider is entitled is treated as the amount that would be includible in income under § 1.61–22 or § 1.7872–15 (as applicable) or, if those regulations are not applicable, the amount that would be includible in income under any other applicable guidance. For this purpose, the payment timing assumptions set forth in paragraph (b)(2)(vi) and (vii) of this section generally apply. However, in the case of an arrangement subject to § 1.7872–15, to the extent the assumptions set forth in paragraph (b)(2)(vi) and (vii) of this section conflict with the provisions of § 1.7872–15, the provisions of § 1.7872–15 apply, and the conflicting assumptions set forth in paragraph (b)(2)(vi) and (vii) of this section do not apply. In either case, for purposes of determining the total amount deferred under the plan for the taxable year, the benefits under the split-dollar life insurance arrangement are included only to the extent that the right to such benefits constitutes a right to deferred compensation under § 1.409A–1(b).

(6) *Stock rights.* If a stock right has not been exercised during the service recipient's taxable year, and remains outstanding as of the last day of the service provider's taxable year for which the total amount deferred is being calculated, the total amount deferred under the stock right for such taxable year is the excess of the fair market value of the underlying stock on the last day of the service provider's taxable year (determined in accordance with § 1.409A–1(b)(5)(iv)) over the sum of the stock right's exercise price plus any amount paid for the stock right. If a stock right has been exercised during the service provider's taxable year, the payment amount for purposes of calculating the total amount deferred for the taxable year under the stock right is the excess of the fair market value of the underlying stock (as determined in accordance with § 1.409A–1(b)(5)(iv)) on the date of exercise over the sum of the exercise price of the stock right and any amount paid for the stock right.

(7) *Anti-abuse provision.* The Commissioner may disregard all or part of the rules of paragraphs (b)(2) through (b)(6) of this section or all or part of the plan's terms if the Commissioner determines based on all of the facts and circumstances that the plan terms have been established to eliminate or minimize the total amount deferred under the plan determined in accordance with the rules of paragraphs (b)(2) through (b)(6) of this section and if the rules of paragraphs (b)(2) through (b)(6) of this section were applied or such plan terms were given effect, the total amount deferred would not reasonably reflect the present value of the right. For example, if a plan provides that a deferred amount is payable upon a separation from service but also contains a provision that the amount will be forfeited upon a separation from service occurring on the last day of the service provider's taxable year (so that the application of paragraph (b)(2)(vii)(A) of this section treating the service provider as separating from service on the last day of the taxable year for purposes of determining the timing of the payment in calculating the total amount deferred would result in a zero amount deferred), the latter provision will be disregarded.

(c) *Additional 20 percent tax under section 409A(a)(1)(B)(i)(II).* With respect to an amount required to be included in income under section 409A(a) for a taxable year, the amount is subject to an additional income tax equal to 20 percent of the amount required to be included in income under section 409A(a).

(d) *Premium interest tax under section 409A(a)(1)(B)(i)(I)*—(1) *In general.* With respect to an amount required to be included in income under section 409A(a) for a taxable year, the amount is subject to an additional income tax equal to the amount of interest at the underpayment rate plus one percentage point on the underpayments that would have occurred had the deferred compensation been includible in the service provider's gross income for the taxable year in which first deferred or, if later, the first taxable year in which such deferred compensation is not subject to a substantial risk of forfeiture. The amount required to be allocated to determine the additional tax described in this paragraph (d) is the amount required to be included in income under section 409A(a) for the taxable year, regardless of whether additional amounts were deferred under the plan in previous years.

(2) *Identification of taxable year deferred amount was first deferred or vested—(i) Method of identification.* The following method is applied for purposes of determining the taxable year or years in which an amount required to be included in income under section 409A(a) was first deferred and not subject to a substantial risk of forfeiture.

(A) For each taxable year preceding the taxable year for which the deferred amount is includible in income (the current taxable year) in which the service provider had an amount deferred under the plan that was not subject to a substantial risk of forfeiture (vested), ending with the later of the first taxable year in which the service provider had no vested amount deferred or the first taxable year beginning after December 31, 2004, calculate the vested total amount deferred for such year. For each year, include any deferred amount that was previously included in income under paragraph (a)(3) of this section but has not been paid, but exclude any amount paid to (or on behalf of) the service provider during such taxable year.

(B) Identify any payments made under the plan to (or on behalf of) the service provider for each taxable year identified in paragraph (d)(2)(i)(A) of this section.

(C) Identify any deemed net investment losses or other net decreases in the amount deferred (other than as a result of a payment) applicable to amounts that are vested for the current taxable year and each preceding taxable year identified in paragraph (d)(2)(i)(A) of this section.

(D) Starting with the first taxable year during which there was a payment identified under paragraph (d)(2)(i)(B) of this section or a loss identified under paragraph (d)(2)(i)(C) of this section (or both), subtract the total payments and loss for such taxable year from the amount determined under paragraph (d)(2)(i)(A) of this section for the earliest taxable year before such year in which there is such an amount, and from the amount determined under paragraph

(d)(2)(i)(A) of this section for each subsequent taxable year ending before the taxable year in which the payment was made or the loss incurred. Do not reduce any taxable year-end balance below zero.

(E) Repeat this process for each subsequent taxable year during which there was a payment identified under paragraph (d)(2)(i)(B) of this section or a loss identified under paragraph (d)(2)(i)(C) of this section (or both).

(F) For each taxable year identified in paragraph (d)(2)(i)(A) of this section, determine the excess (if any) of the remaining amount deferred for the taxable year over the remaining amount deferred for the previous taxable year. Treat the amount deferred in taxable years beginning before January 1, 2005 as zero.

(G) Determine how much of the total amount deferred for the current taxable year was previously included in income in accordance with paragraph (a)(3) of this section.

(H) Subtract the amount determined in paragraph (d)(2)(i)(G) of this section from the excess amount determined in paragraph (d)(2)(i)(F) of this section for the earliest taxable year in which there is any such excess amount, but do not reduce the balance below zero. If the amount determined in paragraph (d)(2)(i)(G) of this section exceeds the amount determined in paragraph (d)(2)(i)(F) of this section for that earliest taxable year, subtract the excess from the amount determined in paragraph (d)(2)(i)(F) of this section for the next succeeding taxable year, but do not reduce the balance below zero. Repeat this process until the excess has been reduced to zero. The balance remaining with respect to each taxable year identified in paragraph (d)(2)(i)(A) of this section is the portion of the amount includible in income under section 409A(a) in the current taxable year that was first deferred and vested in that taxable year.

(ii) *Examples.* The following examples illustrate the provisions of paragraph (d)(2) of this section. In all of the following examples, the service provider is an individual taxpayer with a calendar year taxable year who elects to defer a portion of the bonus that would otherwise be payable to the service provider in each of Year 1 through Year 4. All amounts deferred are deferred under the same plan, and no amount deferred under the plan is ever subject to a substantial risk of forfeiture. The plan does not fail to meet the requirements of section 409A(a) in any year prior to Year 4, and no amounts deferred under the plan are otherwise includible in income until Year 4, except for payments actually made to the service provider. The service provider had no amount deferred under the plan prior to Year 1. The plan fails to meet the requirements of section 409A(a) in Year 4. The examples read as follows:

*Example 1.*

| | Year 1 | Year 2 | Year 3 | Year 4 |
|---|---|---|---|---|
| Opening Total Amount | 0 | 110 | 275 | 495 |
| Bonus Deferral | 100 | 150 | 200 | 250 |
| Net Gains (Losses) | 10 | 15 | 20 | 25 |
| Payments | 0 | 0 | 0 | 0 |
| Closing Total Amount | 110 | 275 | 495 | 770 |

(i) The amount required to be included in income under section 409A is 770. To calculate the premium interest tax, the 770 must be allocated to the year or years in which the amount was first deferred and vested.

(ii) *Step A.* Identification of vested total amount deferred excluding payments and including deferred amounts previously included in income.

| Year 1 | Year 2 | Year 3 |
|---|---|---|
| 110 | 275 | 495 |

(iii) *Step B.* Identification of any payments for each year other than Year 4.

| Year 1 | Year 2 | Year 3 |
|---|---|---|
| 0 | 0 | 0 |

(iv) *Step C.* Identification of any other decreases attributable to vested amounts.

| Year 1 | Year 2 | Year 3 | Year 4 |
|---|---|---|---|
| 0 | 0 | 0 | 0 |

(v) *Steps D and E.* Subtraction of payments and decreases from amounts deferred.

| Year 1 | Year 2 | Year 3 |
|---|---|---|
| 110<br>−0 | 275<br>−0 | 495<br>−0 |
| 110 | 275 | 495 |

(vi) *Step F.* Subtraction of previous year total from each year's total.

| Year 1 | Year 2 | Year 3 |
|---|---|---|
| 110<br>−0 | 275<br>−110 | 495<br>−275 |
| 110 | 165 | 220 |

(vii) Because no amount was previously included in income, Step G does not apply. Accordingly, the 770 is allocated such that 110 is treated as first deferred and vested in Year 1, 165 in Year 2, 220 in Year 3. The remainder (275) is treated as first deferred in Year 4, but is not required to be allocated for purposes of the premium interest tax because there is no hypothetical underpayment for such year.

*Example 2.*

| | Year 1 | Year 2 | Year 3 | Year 4 |
|---|---|---|---|---|
| Opening Total Amount | 0 | 110 | 235 | 365 |
| Bonus Deferral | 100 | 150 | 200 | 250 |
| Net Gains (Losses) | 10 | (25) | (30) | 25 |
| Payments | 0 | 0 | (40) | (50) |
| Closing Total Amount | 110 | 235 | 365 | 590 |

(i) The amount that is includible in income under section 409A(a) for Year 4 is the closing total amount (590), plus the amounts paid during Year 4 that were includible in income (50) or 640. To calculate the premium interest tax, the 640 must be allocated to the year or years in which the amount was first deferred and vested.

(ii) *Step A.* Identification of vested total amount deferred excluding payments and including deferred amounts previously included in income.

| Year 1 | Year 2 | Year 3 |
|---|---|---|
| 110 | 235 | 365 |

(iii) *Step B.* Identification of any payments for each year other than Year 4.

| Year 1 | Year 2 | Year 3 |
|---|---|---|
| 0 | 0 | (40) |

(iv) *Step C.* Identification of any other decreases attributable to vested amounts.

| Year 1 | Year 2 | Year 3 | Year 4 |
|---|---|---|---|
| 0 | (25) | (30) | 0 |

(v) *Steps D and E.* Subtraction of payments and decreases from amounts deferred.

| Year 1 | Year 2 | Year 3 |
|---|---|---|
| 110<br>−25 (Year 2)<br>−40 (Year 3)<br>−30 (Year 3) | 235<br>−40 (Year 3)<br>−30 (Year 3)<br>..... | 365<br>.....<br>.....<br>..... |
| 15 | 165 | 365 |

(vi) *Step F.* Subtraction of previous year total from each year's total.

| Year 1 | Year 2 | Year 3 |
|---|---|---|
| 15<br>−0 | 165<br>−15 | 365<br>−165 |
| 15 | 150 | 200 |

(vii) Because no amount was previously included in income, Step G does not apply. Accordingly, the 640 is allocated such that 15 is treated as first deferred and vested in Year 1, 150 in Year 2, and 200 in Year 3. The remaining amount includible in income under section 409A for Year 4 (275) is treated as first deferred in Year 4, but is not required to be allocated for purposes of the premium interest tax because there is no hypothetical underpayment for Year 4.

*Example 3.* (i) The facts are the same as in *Example 2* except 125 was previously included in income under paragraph (a)(3) of this section. Accordingly, of the 590 closing total amount for Year 4 plus the 50 payment during Year 4, or 640, only 515 (640 − 125) must be included in income under section 409A(a). To calculate the premium interest tax, the 125 must be allocated to the year or years in which such amount was first deferred.

(ii) *Step G.* Allocation of amounts previously included in income.

| Year 1 | Year 2 | Year 3 |
|---|---|---|
| 15<br>−15 | 150<br>−110 | 200<br>−0 |
| 0 | 40 | 200 |

(iii) Accordingly, for purposes of calculating the premium interest tax, the 125 previously included in income is allocated so that of the 515 includible in income under section 409A(a), 0 is treated as first deferred and vested in Year 1, 40 in Year 2, and 200 in Year 3.

(3) *Calculation of hypothetical underpayment for the taxable year during which a deferred amount was first deferred and vested*—(i) *Calculation method.* The hypothetical underpayment for a taxable year is determined by treating as an additional cash payment of compensation to the service provider for such taxable year, the amount determined pursuant to paragraph (d)(2) of this section to be the portion of the amount includible in income under section 409A(a) that was first deferred and vested during such taxable year. The hypothetical underpayment is calculated based on the service provider's taxable income, credits, filing status, and other tax information for the year, based on the service provider's original return filed for such year, as adjusted by any examination for such year or any amended return the service provider filed for such year that was accepted by the Commissioner. The hypothetical underpayment must reflect the effect that such additional compensation would have had on the service provider's Federal income tax liability for such year, including the continued availability of any deductions taken, and the use of any carryovers such as carryover losses. For purposes of calculating a hypothetical underpayment in a subsequent year (whether or not a portion of the amount includible in income under section 409A(a) was first deferred and vested in the subsequent year), any changes to the service provider's Federal income tax liability for the subsequent year that would have occurred if the portion of the amount that was first deferred and vested during the previous taxable year had been included in the service provider's income for the previous year must be taken into account. Assumptions not based on the service provider's taxable income, credits, filing status, and other tax information for the year, based on the service provider's original return for such year, as adjusted by any examination for such year or any amended return the service provider filed for such year that was accepted by the Commissioner, may not be applied. For example, the service provider may not assume that some of the additional compensation would have been deferred under the terms of a qualified plan. If the service provider's Federal income tax liability for the taxable year in which an amount required to be included in income under section 409A(a) was first deferred and vested is adjusted (for example, by an amended return or IRS examination), and the adjustment affects the amount of the hypothetical underpayment, the service provider must recalculate the hypothetical underpayment and adjust the amount of premium interest tax due with respect to such inclusion in income under section 409A(a), as appropriate.

(ii) *Examples.* The following examples illustrate the provisions of paragraph (d)(3)(i) of this section. In all of the following examples, Employee N is an individual taxpayer with a calendar year taxable year. For the year 2020, Employee N has a total amount deferred of $100,000 which is includible in income under section 409A(a). For purposes of determining the premium interest tax, assume that $30,000 was first deferred and vested in 2018, $35,000 was first deferred and vested in 2019, and $35,000 was first deferred and vested in 2020. The first year that Employee N had a vested deferred amount under the plan was 2018. The examples read as follows:

*Example 1.* For the taxable years 2018 and 2019, Employee N has no carryover losses or other items a change in which could affect the adjusted gross income for a subsequent taxable year. Employee N determines the hypothetical underpayment for 2018 by assuming an additional cash compensation payment of $30,000 for 2018, and determining the hypothetical underpayment of Federal income tax that would result. Employee N determines the hypothetical underpayment for 2019 by assuming an additional cash compensation payment of $35,000 in 2019, and determining the hypothetical underpayment of Federal income tax for 2019 that would result. There is no hypothetical underpayment with respect to hypothetical income in 2020 because the tax payment would not have been due until 2021. Therefore, Employee N is not required to determine a hypothetical underpayment for 2020.

*Example 2.* The facts are the same as in *Example 1*, except that in 2018, Employee N had an excess charitable contribution the deduction of which was not permitted under section 170(b), and which was carried over to subsequent taxable years under section 170(d). For purposes of determining the hypothetical underpayment for 2018, Employee N uses the charitable contribution deduction that otherwise would have been available if the $30,000 compensation payment had actually been made. Employee N must then calculate the hypothetical underpayment for all subsequent years in a manner that eliminates the portion of any carryovers of excess contributions under section 170(d) related to the charitable contribution in 2018 that would not have been available in such subsequent years as a result of having been deducted in 2018.

*Example 3.* The facts are the same as in *Example 2*, except that in 2021 the IRS

examines Employee N's 2018 return and determines that Employee N had $20,000 in unreported income for that year. In addition to paying the tax deficiency owed for 2018, Employee N must redetermine the hypothetical underpayment for 2018 and recalculate the premium interest tax owed for 2020.

(4) *Calculation of hypothetical premium underpayment interest*—(i) *Calculation method.* The amount of hypothetical premium underpayment interest is determined for any taxable year by applying the applicable rate of interest under section 6621 plus one percentage point to determine the underpayment interest under section 6601 that would be due for such underpayment as of the last day of the taxable year for which the amount deferred is includible in income under section 409A(a). The amount of additional income tax under paragraph (d)(2) of this section with respect to an amount required to be included in income under section 409A(a) is the sum of all of the hypothetical premium underpayment interest for all years in which there was determined a hypothetical underpayment.

(ii) *Examples.* The following examples illustrate the provisions of this paragraph (d)(4). In each of these examples, the service provider is an individual taxpayer with a calendar year taxable year. At all times the total amount deferred under the nonqualified deferred compensation plan is not subject to a substantial risk of forfeiture. The examples read as follows:

*Example 1.* Employee O has a total amount deferred under a nonqualified deferred compensation plan for 2010 of $100,000. The entire deferred amount was first deferred in 2006. For purposes of calculating the hypothetical premium underpayment interest tax, Employee O first must determine the hypothetical underpayment for taxable years 2006 through 2009 under the rules of paragraph (d)(3) of this section. Then Employee O must determine the underpayment interest under section 6601 that would have accrued, calculated using the applicable underpayment interest rate under section 6621 increased by one percentage point, applied through December 31, 2010. That amount is the premium interest tax that is due for 2010.

*Example 2.* Employee P has a total amount deferred under a nonqualified deferred compensation plan for 2010 of $100,000. $60,000 of that deferred amount was first deferred in 2006. $30,000 of that amount was first deferred in 2008. $10,000 of that amount was first deferred in 2010. For purposes of calculating the hypothetical premium underpayment interest tax, Employee P first must determine the hypothetical underpayment for taxable years 2006 through 2009 under the rules of paragraph (d)(3) of this section applying $60,000 of hypothetical additional compensation for 2006, and applying $30,000 of hypothetical additional compensation for 2008. The $10,000 of hypothetical additional compensation in 2010 would not result in a hypothetical underpayment because the Federal income tax applicable to that hypothetical additional compensation would not yet be due. Second, Employee P must determine the underpayment interest under section 6601 that would have accrued, calculated using the applicable underpayment interest rate under section 6621 increased by one percentage point, applied through December 31, 2010, for both the hypothetical underpayment occurring in 2006 and the hypothetical underpayment occurring in 2008. The sum of those two amounts is the premium interest tax that is due for 2010.

(e) *Amounts includible in income under section 409A(b)* [Reserved].

(f) *Application of amounts included in income under section 409A to payments of amounts deferred*—(1) *In general.* Section 409A(c) provides that any amount included in gross income under section 409A is not required to be included in gross income under any other provision of this chapter or any other rule of law later than the time provided in this section. An amount included in income under section 409A that has neither been paid in the taxable year the amount was included in income under section 409A nor served as the basis for a deduction under paragraph (g) of this section is allocated to the first payment of an amount deferred under the plan in any year subsequent to the year the amount was included in income under section 409A. To the extent the amount included in income under section 409A exceeds such payment, the excess is allocated to the next payment of an amount deferred under the plan. This process is repeated until the entire amount included in income under section 409A has been paid or the service provider has become entitled to a deduction under paragraph (g) of this section.

(2) *Application of the plan aggregation rules.* The plan aggregation rules of § 1.409A–1(c)(2) apply to the allocation of amounts previously included in income under section 409A to payments made under the plan. Accordingly, references to an amount deferred under a plan, or a payment of an amount deferred under a plan, refer to an amount deferred or a payment made under all arrangements in which a service provider participates that together are treated as a single plan under § 1.409A–1(c)(2).

(3) *Examples.* The following examples illustrate the provisions of this section. In each of these examples, the service provider is an individual taxpayer with a calendar year taxable year. Each service provider has a total amount deferred under a nonqualified deferred compensation plan of $0 for 2010, a total amount deferred under the plan of $100,000 for 2011, a total amount deferred under the plan of $250,000 for 2012, and a total amount deferred under the plan of $400,000 for 2013. At all times the total amount deferred under the plan is not subject to a substantial risk of forfeiture. During 2011, the plan fails to comply with section 409A(a) and each service provider includes $100,000 in income under section 409A. Except as otherwise provided in the following examples, the service provider does not receive any payments of amounts deferred under the plan. The examples read as follows:

*Example 1.* During 2012, Employee Q receives a $10,000 payment under the plan. During 2013, Employee Q receives a $150,000 payment under the plan. For 2012, $10,000 of the $100,000 included in income under section 409A(a) is allocated under paragraph (f)(1) of this section to the $10,000 payment, so that no amount is includible in gross income as a result of such payment and Employee Q retains $90,000 of amounts previously included in income under the plan to allocate to future plan payments. For 2013, the remaining $90,000 included in income under section 409A(a) is allocated to the $150,000 payment, so that only $60,000 is includible in income as a result of such payment.

*Example 2.* During 2012, Employee R receives a $10,000 payment under the plan. During 2014, Employee R receives a $50,000 payment, equaling the entire amount deferred under the plan. For 2012, $10,000 of the $100,000 previously included in income is allocated pursuant to paragraph (f)(1) of this section to the $10,000 payment, so that no amount is includible in gross income as a result of such payment. For 2014, $50,000 of the $90,000 remaining amount previously included in income is allocated pursuant to paragraph (f)(1) of this section to the $50,000 payment, so that no amount is includible in gross income as a result of such payment. Provided that the requirements of paragraph (g) of this section are otherwise met, Employee R is entitled to a deduction for 2014 equal to the remaining amount ($40,000) that was previously included in income under section 409A(a) that has not been allocated to a payment under the plan.

(g) *Forfeiture or other permanent loss of right to deferred compensation*—(1) *Availability of deduction to the service provider.* If a service provider has included a deferred amount in income under section 409A, but has not actually received payment of such deferred amount or otherwise allocated the amount included in income under paragraph (f) of this section, the service provider is entitled to a deduction for the taxable year in which the right to that amount of deferred compensation is permanently forfeited under the plan's terms or the right to the payment of the

amount is otherwise permanently lost. The deduction to which the service provider is entitled equals the deferred amount included in income under section 409A in a previous year, less any portion of such deferred amount previously included in income under section 409A that was allocated under paragraph (f) of this section to amounts paid under the plan, including any deferred amount paid in the year the right to any remaining deferred compensation is permanently forfeited or otherwise lost. For this purpose, a mere diminution in the deferred amount under the plan due to deemed investment loss, actuarial reduction, or other decrease in the amount deferred is not treated as a permanent forfeiture or loss of the right if the service provider retains the right to an amount deferred under the plan (whether or not such right is subject to a substantial risk of forfeiture as defined in § 1.409A–1(d)). In addition, a deferred amount is not treated as permanently forfeited or otherwise lost if the obligation to make the payment of such deferred amount is substituted for another deferred amount or obligation to make a payment in a future year. However, a deferred amount is treated as permanently lost if the service provider's right to receive the payment of the deferred amount becomes wholly worthless during the taxable year. Whether the right to the payment of a deferred amount has become wholly worthless is determined based on all the facts and circumstances existing as of the last day of the relevant service provider taxable year.

(2) *Application of the plan aggregation rules.* For purposes of determining whether the right to a deferred amount is permanently forfeited or otherwise lost, the plan aggregation rules of § 1.409A–1(c) apply. Accordingly, if the right to an identified deferred amount under a plan is permanently forfeited or otherwise lost, but an additional amount remains deferred under the plan, the service provider is not entitled to a deduction.

(3) *Examples.* The following examples illustrate the provisions of this paragraph (g). In each example, the service provider is an individual taxpayer who has a calendar year taxable year and the service recipient does not experience bankruptcy at any time or otherwise discharge any obligation to make a payment of a deferred amount, except as expressly provided in the example. The examples read as follows:

*Example 1.* For 2010, Employee S has a total amount deferred under an elective account balance plan of $1,000,000. The plan fails to meet the requirements of section 409A(a) during 2010 and Employee S includes $1,000,000 in income under section 409A(a) for the year 2010. In 2011, Employee S experiences investment losses but no payments before July 1, 2011, such that Employee S's account balance under the plan is $500,000. On July 1, 2011, Employee S separates from service and receives a $500,000 payment equal to the entire amount deferred under the plan, and retains no other right to deferred compensation under the plan (including all arrangements aggregated with the arrangement under which the payment was made). For 2011, Employee S is entitled to deduct $500,000 (which is the amount Employee S previously included in income under section 409A(a) ($1,000,000) less the amount actually received by Employee S ($500,000)).

*Example 2.* For 2010, Employee T has a total amount deferred under an elective account balance plan of $1,000,000. The plan fails to meet the requirements of section 409A(a) for 2010 and Employee T includes $1,000,000 in income under section 409A(a) for 2010. For 2011, Employee T has a total amount deferred under the plan of $500,000, due solely to the deemed investment losses attributable to Employee T's account balance (with no payments being made during 2011). Because Employee T retains the right to an amount deferred under the plan, Employee T is not entitled to a deduction for 2011 as a result of the deemed investment losses.

*Example 3.* For 2010, Employee U has a total amount deferred under an elective account balance plan of $1,000,000. The elective account balance plan consists of one arrangement providing for salary deferrals with an amount deferred for 2010 of $600,000, and another arrangement providing for bonus deferrals with an amount deferred for 2010 of $400,000. The plan fails to meet the requirements of section 409A(a) during 2010 and Employee U includes $1,000,000 in income under section 409A(a) for 2010. On July 1, 2011, Employee U's account balance attributable to the salary deferral arrangement is $500,000, the reduction of which is due solely to deemed investment losses in 2011 and not any payments. On July 1, 2011, Employee U is paid the $500,000 equaling the entire account balance attributable to the salary deferral arrangement. On December 31, 2011, Employee U has an account balance attributable to the bonus deferral arrangement equal to $300,000. Because Employee U retains an amount deferred under the elective account balance plan, Employee U is not entitled to a deduction for 2011 as a result of the deemed investment losses.

(h) *Effective/applicability date.* The rules of this section apply to taxable years ending on or after the date of publication of the Treasury decision adopting these rules as final regulation in the **Federal Register**.

**Linda E. Stiff,**

*Deputy Commissioner for Services and Enforcement.*

[FR Doc. E8–28894 Filed 12–5–08; 8:45 am]

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 80

[EPA–HQ–OAR–2008–0558; FRL–8742–7]

RIN 2060–AP17

## Regulation of Fuel and Fuel Additives: Gasoline and Diesel Fuel Test Methods

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

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to allow refiners and laboratories to use more current and improved fuel testing procedures with twelve American Society for Testing and Materials (ASTM) analytical test methods. Once these test method changes are adopted, they will supersede the corresponding earlier versions of these test methods in EPA's motor vehicle fuel regulations. EPA is also proposing to take action to allow an alternative test method for olefins in gasoline.

**DATES:** Comments or a request for a public hearing must be received on or before January 7, 2009.

**ADDRESSES:** Submit your comments, identified by Docket ID Number EPA–HQ–OAR–2008–0558, 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.*
- *Fax:* (202) 566–9744.
- *Mail:* ''EPA–HQ–OAR–2008–0558, Environmental Protection Agency, Mailcode: 2822T, 1301 Constitution Ave., NW., Washington, DC 20460.''
- *Hand delivery:* EPA Headquarters Library, Room 3334, EPA West Building, 1301 Constitution Ave., NW., Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID Number EPA–HQ–OAR–2008–0558. EPA's policy is that all comments 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. For additional instructions on submitting comments, go to Unit 1.B of the **SUPPLEMENTARY INFORMATION** section of this document: *http://www.epa.gov/epahome/dockets.htm*.

*Docket:* All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Air Docket, EPA Headquarters Library, Mail Code: 2822T, EPA West Building, 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 holidays. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding holidays. The telephone number for the Public Reading Room is (202) 566–1742, and the facsimile number for the Air Docket is (202) 566–9744.

**FOR FURTHER INFORMATION CONTACT:** Joe Sopata, Chemist, Environmental Protection Agency, 1200 Pennsylvania Ave. (6406J), NW., Washington, DC 20460; telephone number: (202) 343–9034; fax number: (202) 343–2801; e-mail address: *sopata.joe@epa.gov*.

**SUPPLEMENTARY INFORMATION:** In the Rules and Regulations section of this **Federal Register**, we are taking direct final rule action on the proposed amendments because we view these amendments as non-controversial and anticipate no adverse comments. We have explained our reasons for the amendments in the preamble to the direct final rule.

The contents of today's preamble are listed in the following outline.

**Outline**

I. General Information
A. Does This Action Apply to Me?
B. What Should I Consider as I Prepare My Comments for EPA?
II. Proposed Rule Changes
A. Updating ASTM Test Methods to Their Most Recent Version
B. Alternative Test Method for Olefins in Gasoline
III. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act of 1995 (UMRA)
E. Executive Order 13123: Federalism
F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
G. Executive Order 13045: Protection of Children From Environmental Health & Safety Risks
H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer Advancement Act
J. Executive Order 12898: Federal Actions To Address Environmental Justice and Minority Populations and Low-Income Populations
IV. Statutory Provisions and Legal Authority

## I. General Information

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

Regulated categories and entities potentially affected by this proposed action include those involved with the production, importation, distribution, sale and storage of gasoline motor fuel and diesel motor fuel.

The table below is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this proposed action. This table lists the types of entities that EPA is now aware could be potentially regulated by this proposed action. Other types of entities not listed in the table could also be regulated. To determine whether an entity is regulated by this proposed action, one should carefully examine the existing regulations in 40 CFR part 80. If you have questions regarding the applicability of this proposed action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

| Category | NAICS codes [a] | SIC codes [b] | Examples of potentially regulated parties |
|---|---|---|---|
| Industry | 324110 | 2911 | Petroleum refiners. |
| Industry | 54138 | 8734 | Testing Laboratories. |
| Industry | 422710<br>422720 | 5171<br>5172 | Gasoline Marketers and Distributors. |

[a] North American Industry Classification System (NAICS).
[b] Standard Industrial Classification (SIC) system code.

### *B. What Should I Consider as I Prepare My Comments for EPA?*

1. *Submitting CBI.* Do not submit this information to EPA through EDOCKET, regulations.gov or e-mail. Clearly mark the part of 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 rulemaking by docket 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 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. Proposed Rule Changes

### *A. Updating ASTM Test Methods to Their Most Recent Version*

Refiners, importers and oxygenate blenders producing gasoline and diesel motor vehicle fuel are required to test reformulated gasoline (RFG), conventional gasoline (CG) and diesel fuel for various fuel parameters including aromatics, benzene, distillation, olefins, Reid Vapor Pressure, oxygenate content and sulfur. American Society for Testing and Materials (ASTM) test method D2622 is currently the designated test method for measuring sulfur [1, 2] in gasoline and diesel fuel at the 500 ppm sulfur standard. ASTM test methods D5453, D6920, D3120 and D7039 are currently alternative test methods for measuring sulfur [3, 4, 5, 6] in gasoline. ASTM test methods D5453 and D6920 are also alternative test methods for measuring sulfur [7] in diesel fuel at the 500 ppm sulfur standard. ASTM D1319 is currently the designated test method for measuring olefins [8] in gasoline and aromatics [9] in diesel fuel and is also allowed as an alternative test method for measuring aromatics [10] in gasoline. ASTM test method D5599 is currently the designated test method for measuring oxygenates [11] in gasoline. ASTM test method D4815 is currently an alternative test method for measuring oxygenates [12] in gasoline. ASTM test method D5769 is currently the designated test method for measuring aromatics [13] in gasoline. ASTM test method D3606 is currently the designated test method for measuring benzene [14] in gasoline. ASTM test method D86 is currently the designated test method for measuring the distillation [15] of gasoline. ASTM test method D5191 is currently the designated test method for measuring the Reid Vapor Pressure [16] of gasoline.

Table 1 lists the designated analytical test methods and alternative analytical test methods which are being proposed to be updated for parameters measured under RFG, CG, and diesel fuels program in today's action. The Agency has reviewed these updated ASTM test methods and we are in agreement with the revisions contained in them which will result in improvements in the utilization of these test methods for the regulated industry. We believe that the revisions in the test method changes in today's proposed action are not significant changes that would cause a user of an older version of the same method to incur significant costs. All of the revisions were deemed necessary by ASTM so that improvements in the test method's procedures would ensure better operation for the user of the test method. Thus, EPA is proposing today to update the regulations for the following ASTM test methods: (1) ASTM D2622–05, the designated test method for measuring sulfur in RFG, CG, and alternative test method for diesel fuel at the 500 ppm sulfur standard, (2) ASTM D3120–06 $^{\varepsilon 1}$, alternative test method for sulfur in gasoline, (3) ASTM D5453–08a, alternative test method for sulfur in gasoline and diesel fuel at the 500 ppm sulfur standard, (4) ASTM D6920–07, alternative test method for sulfur in gasoline and diesel fuel at the 500 ppm sulfur standard, (5) ASTM D7039–07, alternative test method for sulfur in gasoline, (6) ASTM D1319–03 $^{\varepsilon 1}$, designated test method for measuring olefins in gasoline and aromatics in diesel fuel, as well as the alternative test method for measuring aromatics in gasoline, (7) ASTM D4815–04, alternative test method for measuring oxygenate content in gasoline, (8) ASTM D5599–00 (2005), the designated test method for measuring oxygen content in gasoline, (9) ASTM D5769–04, the designated test method for measuring aromatics in gasoline, (10) ASTM D3606–07, the designated test method for measuring benzene in gasoline, (11) ASTM D86–07b, the designated test method for measuring distillation properties of gasoline, and (12) ASTM D5191–07, the designated test method for measuring the Reid Vapor Pressure of gasoline.

TABLE 1—DESIGNATED AND ALTERNATIVE ASTM ANALYTICAL TEST METHODS UNDER RFG, CG & DIESEL MOTOR VEHICLE FUEL PROGRAMS

| Fuel parameter | ASTM analytical test method |
|---|---|
| Sulfur (gasoline) | ASTM D2622–05, entitled "Standard Test Method for Sulfur in Petroleum Products by Wavelength Dispersive X-Ray Fluorescence Spectrometry". |
| Sulfur (500 ppm diesel) | ASTM D2622–05, entitled "Standard Test Method for Sulfur in Petroleum Products by Wavelength Dispersive X-Ray Fluorescence Spectrometry". |
| Sulfur (gasoline) | ASTM D5453–08a, entitled, "Standard Test Method for Determination of Total Sulfur in Light Hydrocarbons, Spark Ignition Engine Fuel, Diesel Engine Fuel, and Engine Oil by Ultraviolet Fluorescence". |
| Sulfur (500 ppm sulfur diesel) | ASTM D5453–08a, entitled, "Standard Test Method for Determination of Total Sulfur in Light Hydrocarbons, Spark Ignition Engine Fuel, Diesel Engine Fuel, and Engine Oil by Ultraviolet Fluorescence". |
| Sulfur (gasoline) | ASTM D6920–07, entitled, "Standard Test Method for Total Sulfur in Naphthas, Distillates, Reformulated Gasolines, Diesels, Biodiesels, and Motor Fuels by Oxidative Combustion and Electrochemical Detection". |

[1] 40 CFR 80.46(a)(1).
[2] 40 CFR 80.580(b)(2).
[3] 40 CFR 80.46(a)(3)(i).
[4] 40 CFR 80.46(a)(3)(ii).
[5] 40 CFR 80.46(a)(3)(iii).
[6] 40 CFR 80.46(a)(3)(iv).
[7] 40 CFR 80.580(c)(2).
[8] 40 CFR 80.46(b).
[9] 40 CFR 80.2(z).
[10] 40 CFR 80.46(f)(3).
[11] 40 CFR 80.46(g)(1).
[12] 40 CFR 80.46(g)(2).
[13] 40 CFR 80.46(f)(1).
[14] 40 CFR 80.46(e).
[15] 40 CFR 80.46(d).
[16] 40 CFR 80.46(c).

TABLE 1—DESIGNATED AND ALTERNATIVE ASTM ANALYTICAL TEST METHODS UNDER RFG, CG & DIESEL MOTOR VEHICLE FUEL PROGRAMS—Continued

| Fuel parameter | ASTM analytical test method |
|---|---|
| Sulfur (500 ppm sulfur diesel) | ASTM D6920–07, entitled, ''Standard Test Method for Total Sulfur in Naphthas, Distillates, Reformulated Gasolines, Diesels, Biodiesels, and Motor Fuels by Oxidative Combustion and Electrochemical Detection''. |
| Sulfur (gasoline) | ASTM D3120–06 $^{\varepsilon 1}$, entitled, ''Standard Test Method for Trace Quantities of Sulfur in Light Petroleum Hydrocarbons by Oxidative Microcoulometry''. |
| Sulfur (gasoline) | ASTM D7039–07, entitled, ''Standard Test Method for Sulfur in Gasoline and Diesel Fuel by Monochromatic Wavelength Dispersive X-ray Fluorescence Spectrometry''. |
| Oxygen content (gasoline) | ASTM D5599–00 (2005), entitled, ''Standard Test Method for Determination of Oxygenates in Gasoline by Gas Chromatography and Oxygen Selective Flame Ionization Detection''. |
| Oxygen content (gasoline) | ASTM D4815–04, entitled ''Standard Test Method for Determination of MTBE, ETBE, TAME, DIPE, tertiary-Amyl Alcohol and $C_1$ to $C_4$ Alcohols in Gasoline by Gas Chromatography''. |
| Olefins (gasoline) | ASTM D1319–03 $^{\varepsilon 1}$, entitled ''Standard Test Method for Hydrocarbon Types in Liquid Petroleum Products by Fluorescent Indicator Adsorption''. |
| Aromatics (gasoline and diesel) | ASTM D1319–03 $^{\varepsilon 1}$, entitled, ''Standard Test Method for Hydrocarbon Types in Liquid Petroleum Products by Fluorescent Indicator Absorption'', for diesel fuel, this method is the designated test method, for gasoline, this method is an alternative test method and if used as an alternative method, its results, must be correlated to ASTM D5769–04. |
| Aromatics (gasoline) | ASTM D5769–04, entitled, ''Standard Test Method for Determination of Benzene, Toluene, and Total Aromatics in Finished Gasolines by Gas Chromatography/Mass Spectrometry''. |
| Benzene (gasoline) | ASTM D3606–07, entitled, ''Standard Test Method for Determination of Benzene and Toluene in Finished Motor and Aviation Gasoline by Gas Chromatography''. |
| Distillation (gasoline) | ASTM D86–07b, entitled, ''Standard Test Method for Distillation of Petroleum Products at Atmospheric Pressure''. |
| Reid Vapor Pressure (gasoline) | ASTM D5191–07, entitled, ''Standard Test Method for Vapor Pressure of Petroleum Products (Mini-Method)''. |

*B. Alternative Test Method for Olefins in Gasoline*

Refiners, importers and oxygenate blenders producing gasoline are required to test RFG, and CG for various fuel parameters including olefins. The test method for determining olefin content is specified in the regulation.

Recently, the American Petroleum Institute (API) requested in a letter to EPA that ASTM D 6550–05 be designated by EPA as an alternative test method in the regulations for olefins [15] in gasoline. EPA has evaluated API's request on this test method issue and agrees. Thus, EPA is proposing to allow ASTM D6550–05 as an alternative test method in the regulations for olefins in gasoline, provided that its results are correlated to ASTM D1319. The allowance of this additional alternative test method for olefins in gasoline will provide the regulated community additional flexibility in meeting their testing requirements.

In the ''Final Rules'' section of today's **Federal Register**, we are publishing a direct final rule that matches the substance of this proposed rule. If the Agency receives adverse comment or a request for public hearing by January 7, 2009, we will withdraw the direct final rule by publishing a timely withdrawal notice in the **Federal Register**. If the Agency receives no adverse comment or a request for public hearing by January 7, 2009, these test method changes will be effective sixty (60) days after publication of the final rule in the **Federal Register**. We are confident that sixty (60) days is sufficient lead time for industry to become familiar and implement these ASTM standard test methods for the applications mentioned above.

[15] See Air Docket # EPA–HQ–OAR–2008–0558–0001.

## III. Statutory and Executive Order Reviews

*A. Executive Order 12866: Regulatory Planning and Review*

This action is not a ''significant regulatory action'' under the terms of Executive Order (EO)12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the EO.

*B. Paperwork Reduction Act*

This proposed rule does not impose any new information collection burden. However, the Office of Management and Budget (OMB), under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, has approved the information collection requirements contained in the final RFG and anti-dumping rulemaking and gasoline sulfur control rulemaking, and has assigned OMB control number 2060–0277. OMB, under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, has also approved the information collection requirements contained in the final Tax Exempt (Dyed) Highway Diesel Fuel rulemaking, and has assigned OMB control number 2060–0308. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

*C. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's proposed rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administrations' regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. The impact of concern is any significant *adverse* economic impact on small entities since the primary purpose of the regulatory flexibility analysis is to identify and address regulatory alternatives ''which minimize any significant economic

impact of the rule on small entities.'' 5 U.S.C. 603 and 604.

After considering the economic impacts of today's proposed final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant *adverse* economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the rule on small entities.'' 5 U.S.C. 603 and 604. Thus an Agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

All of the test method updates in this proposed rule will improve the performance and/or utilization by industry of ASTM standard test methods. This proposed rule does not impose a regulatory burden on anyone, including small businesses. Instead, this proposed rule will have a positive impact by improving performance of the industry, including small businesses, by enabling them to use more current voluntary consensus-based standard test methods. In addition, the allowance of ASTM D6550–05 will provide additional flexibility to the regulated community, including small businesses, in meeting olefins in gasoline testing requirements. We have therefore concluded that today's proposed rule will relieve regulatory burden for all effected small entities. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

*D. Unfunded Mandates Reform Act of 1995 (UMRA)*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538, requires Federal agencies, unless otherwise prohibited by law, to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Federal agencies must also develop a plan to provide notice to small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates and must inform, educate, and advise small governments on compliance with the regulatory requirements.

This proposed rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. All of the test method updates in today's action will improve the performance and/or utilization by industry of the test methods already allowed by our regulations. The allowance of ASTM D6550–05 will provide additional flexibility to the regulated community in meeting olefins in gasoline testing requirements. Thus, this proposed rule is not subject to the requirements of sections 202 and 205 of the UMRA. This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments.

*E. Executive Order 13132: Federalism*

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), 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 does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. All of the test method updates in today's action will improve the performance and/or utilization by industry of ASTM standard test methods. The allowance of ASTM D6550–05 will provide additional flexibility to the regulated community in meeting olefins in gasoline testing requirements. Thus, Executive Order 13132 does not apply to this proposed rule.

*F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 6, 2000). This action applies to gasoline refiners, blenders and importers that supply gasoline or diesel fuel. All of the test method updates in today's action will improve the performance and/or utilization by industry of the test methods. The allowance of ASTM D6500–05 will provide additional flexibility to the regulated community in meeting olefins in gasoline testing requirements. Thus, Executive Order 13175 does not apply to this action.

*G. Executive Order 13045: Protection of Children From Environmental Health & Safety Risk*

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

*H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This action is not subject to Executive Order 13211 (66 FR 18355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866.

*I. National Technology Transfer Advancement Act*

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) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rule involves technical standards. EPA will adopt ASTM standards as described in Units II.A, and II.B of the **SUPPLEMENTARY INFORMATION** section of this document. All technical standards included in today's rule are standards developed by ASTM, a voluntary consensus standards body, and thus raises no issues under the NTTAA. The ASTM standards in today's action may be obtained from

ASTM International at 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA 19428–2959, 610–832–9585 (phone), 610–832–9555 (fax), or *service@astm.org* (e-mail); or through the ASTM Web site (*http://www.astm.org*).

*J. Executive Order 12898: Federal Actions To Address Environmental Justice and Minority Populations and Low-Income Populations*

Executive Order (EO) 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. All of the test method updates in this direct final rule will improve the performance and/or utilization by industry of the test methods. The allowance of ASTM D6500–05 will provide additional flexibility to the regulated community in meeting olefins in gasoline testing requirements. This proposed rule amendment does not relax control measures on sources regulated by the rule and therefore will not cause emission increases from these sources.

## IV. Statutory Provisions and Legal Authority

Statutory authority for today's proposed rule comes from sections 211(c), 211(i) and 211(k) of the CAA (42 U.S.C. 7545(c) and (k)). Section 211(c) and 211(i) allow EPA to regulate fuels that contribute to air pollution which endangers public health or welfare, or which impairs emission control equipment. Section 211(k) prescribes requirements for RFG and CG and requires EPA to promulgate regulations establishing these requirements. Additional support for the fuels controls in today's proposed rule comes from sections 114(a) and 301(a) of the CAA.

## List of Subjects in 40 CFR Part 80

Environmental protection, Air pollution control, Fuel additives, Gasoline, Diesel, Imports, Incorporation by reference, Motor vehicle pollution, Reporting and recordkeeping requirements.

Dated: November 13, 2008.

**Stephen L. Johnson,**

*Administrator.*

[FR Doc. E8–28372 Filed 12–5–08; 8:45 am]

**BILLING CODE 6560–50–P**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

## Administration for Children and Families

## 45 CFR Parts 301, 302, 303, 305, and 308

**RIN 0970–AC–37**

## Child Support Enforcement Program; Intergovernmental Child Support

**AGENCY:** Administration for Children and Families, Office of Child Support Enforcement (OCSE).

**ACTION:** Notice of Proposed Rulemaking (NPRM).

**SUMMARY:** These proposed regulations would revise Federal requirements for establishing and enforcing intergovernmental support obligations in Child Support Enforcement (IV–D) program cases receiving services under title IV–D of the Social Security Act (the Act). The proposed changes would: Revise current interstate requirements to apply to case processing in all intergovernmental cases; require the responding State IV–D agency to pay the cost of genetic testing; clarify responsibility for determining in which State tribunal a controlling order determination is made where multiple support orders exist; recognize and incorporate electronic communication advancements; and make conforming changes to the Federal substantial-compliance audit and State self-assessment requirements.

**DATES:** Consideration will be given to written comments received by February 6, 2009.

**ADDRESSES:** Send comments to: Office of Child Support Enforcement, Administration for Children and Families, Department of Health and Human Services, 370 L'Enfant Promenade, SW., 4th Floor, Washington, DC 20447, Attention: Director, Division of Policy, Mail Stop: OCSE/DP. Comments will be available for public inspection Monday through Friday, 8:30 a.m. to 5 p.m. on the 4th floor of the Department's offices at the above address. You may also transmit written comments electronically via the Internet at: *http://www.regulations.gov*. To download an electronic version of the rule, you may access *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** Yvette Hilderson Riddick, OCSE Division of Policy, 202–401–4885, e-mail: *Yvette.Riddick@acf.hhs.gov*. Deaf and hearing impaired individuals may call the Federal Dual Party Relay Service at 1–800–877–8339 between 8 a.m. and 7 p.m. eastern time.

**SUPPLEMENTARY INFORMATION:**

## I. Statutory Authority

Section 454(9) of the Act addresses interstate cooperation. This notice of proposed rulemaking is published under the authority granted to the Secretary of the U.S. Department of Health and Human Services (the Secretary) by section 1102 of the Act, 42 U.S.C. 1302. Section 1102 authorizes the Secretary to publish regulations, not inconsistent with the Act, which may be necessary for the efficient administration of the functions for which he is responsible under the Act. The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996 amended the Act by adding section 466(f), which mandated that all States have in effect by January 1, 1998, the Uniform Interstate Family Support Act (UIFSA) as approved by the American Bar Association on February 9, 1993, and as in effect on August 22, 1996, including any amendments officially adopted as of such date by the National Conference of Commissioners on Uniform State Laws (NCCUSL). PRWORA also added sections 454(32) and 459A of the Act, requiring State IV–D agencies to provide services in international cases and authorizing the Secretary of the Department of State (DOS) with the concurrence of the Secretary, to enter into bilateral arrangements with foreign countries for child support enforcement, respectively. Further, section 455(f) of the Act, which authorized direct funding of Tribal Child Support Enforcement (IV–D) programs, was added by PRWORA and amended by the Balanced Budget Act of 1997 (Pub. L. 105–33).

## II. Background

*A. Nature of the Problem*

The Child Support Enforcement program was created over 30 years ago in response to the rise in welfare costs resulting from increasing nonmarital birth rates and parental desertion of families, and to the growing demand to relieve taxpayers of the financial burden of supporting these families. Child support is no longer primarily a welfare

reimbursement, revenue-producing device for the Federal and State governments; it is a family-first program, intended to ensure families' self-sufficiency by making child support a more reliable source of income. In addition to serving those parents and children with child support cases in which divorced or never married parents live in the same State, IV–D agencies are also responsible for cases where one of the parents resides outside its borders.

The problems of support enforcement are compounded when parents reside in different jurisdictions and the interjurisdictional caseload is substantial. In FY 2006, over a million cases were sent from one State to another. *See, Child Support Enforcement FY 2006 Preliminary Report (March 2007), Figure 10 http://www.acf.hhs.gov/programs/cse/pubs/2007/preliminary_report/*. This number does not include cases where a single State established or enforced a support obligation against a nonresident using long-arm jurisdiction or direct enforcement remedies without involving another IV–D agency. Additionally, interstate collections showed a 19 percent increase over those obtained in FY 2002.

The universal enactment by States of UIFSA and close to a decade of State experience under this uniform law has served to harmonize the interjurisdictional legal framework. Use of long-arm jurisdiction, administrative processes, and direct income withholding has gone a long way to break down barriers. Nevertheless, many still exist.

We believe that interstate case processing still can and must be improved. This has been and remains one of OCSE's top priorities. Current regulations governing interstate cases are outdated. While they broadly address UIFSA, they do not fully reflect the legal tools available under that Act, other Federal mandates and remedies, improved technology, or IV–D obligations in Tribal and international cases. Therefore, this regulation proposes changes and clarifies responsibilities for State IV–D agencies and emphasizes the need for States to be responsive to working intergovernmental IV–D cases to ensure that all children receive the support they deserve. We have received support from our State partners in focusing on this effort.

Although our regulatory authority extends only to States and to Tribes operating a Tribal IV–D program, the IV–D caseload includes IV–D cases received from or initiated by other States, Tribes, and countries. The creation of the Tribal IV–D program pursuant to section 455(f) of the Act and implementing regulations at 45 CFR Part 309, and the central role of OCSE and State IV–D agencies in international cases under section 459A of the Act, highlight the need to refocus interstate regulations to address requirements for State IV–D programs' processing of intergovernmental IV–D cases.

*B. Current Law on Interstate Case Processing*

1. Uniform Interstate Family Support Act (UIFSA)

UIFSA is a comprehensive model Act focusing on the interstate establishment, modification, and enforcement of child support obligations. It was first passed by the NCCUSL in 1992, amended in 1996 and again in 2001. Section 466(f) of the Act requires all States to enact UIFSA as approved by the American Bar Association on February 9, 1993, as in effect on August 22, 1996, including any amendments officially adopted as of such date by the NCCUSL. There is as yet no requirement that all States enact the 2001 version of UIFSA (UIFSA 2001), although States may request an exemption under section 466(d) of the Act should they choose to enact UIFSA 2001. (See OCSE–AT–02–02) *http://www.acf.dhhs.gov/programs/cse/pol/AT/2002/at-02-02.htm*).

Accordingly, unless otherwise specified, as used in this preamble, ''UIFSA'' means the 1996 version of UIFSA (UIFSA 1996). Section 101(19) of UIFSA defines ''State'' to include States, Indian Tribes, and ''a foreign jurisdiction that has enacted a law or established procedures for issuance and enforcement of support orders which are substantially similar to the procedures under UIFSA, the Uniform Reciprocal Enforcement of Support Act (URESA) or the Revised Uniform Reciprocal Enforcement of Support Act (RURESA).''

Many of UIFSA's provisions represent solutions to the problems inherent with the interstate establishment and enforcement of child support obligations. For example, UIFSA covers all cases where the custodial and noncustodial parents reside in different States. In addition to traditional state-to-state legal actions, it provides for long-arm jurisdiction to establish paternity or child support, continuing exclusive jurisdiction by a State to modify an order where a support order already exists, and one-state enforcement remedies such as direct income withholding. UIFSA contains enhanced evidentiary provisions, including use of teleconferencing, electronic transmission, and use of federally-mandated forms. It precludes the entry of a new (*de novo*) support order where a valid order exists, ending the longstanding practice of multiple support orders, and strictly proscribes when a State has the authority to modify the child support order of another State, Tribe, or country.

UIFSA introduced the principle of continuing, exclusive jurisdiction (CEJ) to child support. Only one valid current support order may be in effect at any one time. This is UIFSA's keystone. As long as one of the individual parties or the child continues to reside in the issuing State, and as long as the parties do not agree to the contrary, the issuing tribunal's authority to modify its order is continuing and exclusive. UIFSA attempts to be even-handed—the identity of the party residing in the State (whether the obligor or obligee) does not matter. Jurisdiction to modify an order may be lost only if all the relevant persons have permanently left the issuing State. This is logical because the issuing State would no longer have an appropriate nexus with the parties or child to justify exercise of jurisdiction to modify the order. However, it is important to note that the original order of the issuing State remains in effect, until modified, not only in the issuing State and those States in which the order has been registered, but also in additional States following registration, even after the issuing State has lost its power to modify its order. By this means, UIFSA allows the one order to remain in effect as the family or its individual members move from one State to another.

UIFSA includes a transitional procedure for the eventual elimination of existing multiple support orders in an expeditious and efficient manner. To begin the process toward a one-order system, UIFSA provides a relatively straight-forward procedure designed to identify a single viable order that will be entitled to prospective enforcement in every State. This process is referred to as the determination of controlling order (DCO). UIFSA specifies in detail how the DCO should be made. If only one child support order exists, it is the controlling order irrespective of when and where it was issued and whether any of the individual parties or the child continues to reside in the issuing State.

UIFSA is currently State law in all 54 States and jurisdictions. Twenty States have adopted the 2001 amendments passed by the NCCUSL and received a State Plan exemption under section 466(d) of the Act from OCSE allowing use of the 2001 provisions.

2. One-State Interstate

Historically, IV–D agencies have sought to resolve cases involving nonresident noncustodial parents by using the State's statutory authority to obtain or retain personal jurisdiction over the out-of-state party. Current regulations explicitly encourage the assertion of long-arm jurisdiction to establish paternity [*see*, 45 CFR 303.7(b)(1)]. The authority of a State to subject a nonresident to its laws is set out in State statutes, subject to the due process provisions of the U.S. Constitution. As described earlier, UIFSA is a State statute, containing both an expansive long-arm provision (section 201), and continuing, exclusive jurisdiction to both enforce and modify an existing support order (*see, e.g.*, sections 205 and 206). Since 1984, States have been required to adopt procedures for enforcing the income withholding orders of another States [section 466(b)(9) of the Act)]. Article 5 of UIFSA authorizes direct income withholding, allowing a State to serve directly the obligor's employer in the other State with the income withholding order/notice. The employer must honor the out-of-state withholding order/notice to the same extent it would an in-state order/notice. These provisions afford IV–D agencies a greater opportunity to use one-state interstate remedies in factually-appropriate cases, rather than involving a second State. As discussed later, cooperation among States in requesting and providing limited services, such as locate assistance, coordination of genetic testing, and facilitation of gathering and transmitting evidence, makes the use of one-state remedies more robust and equitable.

3. Tribal IV–D and International Child Support Enforcement

UIFSA recognizes the importance and sovereignty of the Tribal organization to provide for its children and provides specifically by definition that the term ''State'' includes an Indian tribe in section 101(19) [renumbered by the 2001 amendments as section 102(21)(A)]. As described earlier in this preamble, foreign countries may also be ''States'' for UIFSA purposes. While UIFSA directs State child support activities, it does not govern child support activities in other countries or Tribes.

States generally have referred to cross-border child support cases as interstate matters. However, the IV–D program is committed to establishing and enforcing child support for children in Tribal IV–D and international cases as well. Recognizing the broadened range of cases, and for reasons detailed in this preamble, we have changed the scope of these regulations from interstate to intergovernmental.

Essential to the Federal-State-Tribal effort to ensure that noncustodial parents support their children is coordination and partnership, especially in the processing of intergovernmental cases. For the first time in the history of the IV–D program, PRWORA authorized direct funding of Tribes and Tribal organizations for operating child support enforcement programs under section 455 of the Act. The Department recognizes the unique relationship between the Federal government and federally-recognized Indian Tribes and acknowledges this special government-to-government relationship in the implementation of the Tribal provisions of PRWORA. The direct Federal funding provisions provide Tribes with an opportunity to administer their own IV–D programs to meet the needs of children and their families. Also, as stated in 45 CFR 302.36(a)(2), the State will extend the full range of services available under its IV–D plan to all Tribal IV–D programs.

Likewise, a Tribal IV–D agency must specify in its Tribal IV–D plan that the Tribal IV–D agency will:

- Extend the full range of services available under its IV–D plan to respond to all requests from, and cooperate with, State and other Tribal IV–D agencies; and
- Recognize child support orders issued by other Tribes and Tribal organizations, and by States, in accordance with the requirements under the Full Faith and Credit for Child Support Orders Act, 28 U.S.C. 1738B. See 45 CFR 309.120.

As to international cases, section 459A of the Act authorizes the Department of State (DOS), with the concurrence of the Secretary, to enter into bilateral arrangements with foreign countries for child support enforcement. To date, the U.S. has federal-level arrangements with Australia, Czech Republic, El Salvador, Finland, Hungary, Ireland, Netherlands, Norway, Poland, Portugal, Slovak Republic, Switzerland, the United Kingdom and the Canadian provinces/territories of Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland/Labrador, Northwest Territories, Nova Scotia, Nunavut, Ontario, Saskatchewan, and Yukon. On November 23, 2007 the United States signed a Hague Convention that addresses the International Recovery of Child Support and other Forms of Family Maintenance. For those States that sign the Hague Convention, ratification of the Convention is projected to take 2–3 years.

*C. Need for and Purpose of This Regulation*

In accordance with current title IV–D regulations at 45 CFR 303.7(c)(7), when a State receives a request to take action on an interstate case from another State, it must take all appropriate action, treating it just as if the case were an intrastate case. Because families may move and receive Temporary Assistance for Needy Families (TANF) or other public assistance benefits in multiple States, more than one State may have an interest in the child support arrearages because the custodial parent assigned support rights to more than one State as a condition of receiving public assistance.

The interstate regulations that currently appear in 45 CFR 303.7 were originally effective February 22, 1988. Many changes have taken place in child support since 1988 when these regulations were published, including the passage of UIFSA, PRWORA, and the Federal Full Faith and Credit for Child Support Orders Act of 1994 (FFCCSOA). FFCCSOA, as amended by PRWORA, requires each State to enforce, according to its terms, a child support order issued by a court or administrative authority of another State. See 28 U.S.C. 1738B. FFCSOA rules are consistent with UIFSA on which State has jurisdiction to prospectively modify a support order and which of multiple valid support orders controls current support.

State IV–D agencies have authority to take actions directly across State lines, bypassing IV–D agencies in other States. That ability, coupled with the powerful new tools at the disposal of IV–D agencies, such as the National Directory of New Hires and expanded Federal Parent Locator Service, could lead States to taking direct action to collect on arrearages owed under multiple orders in different States. This could lead, in turn, to confusion on the part of custodial and noncustodial parents, employers, and State IV–D workers about correct arrearage balances and how to account for collections. It is to address these issues and otherwise update the outdated interstate regulations that we are revising 45 CFR 303.7.

OCSE realized several years ago that it was necessary to revise the regulations to recognize UIFSA requirements to the extent possible within the constraints of title IV–D of the Act, to address Tribal and international cases, and to improve

customer service and satisfaction. The current regulations were built on a two-state, one-by-one, paper-oriented interstate case processing model. State experience, however, has shown that taking actions to establish and secure support directly across State lines, using a State's long-arm jurisdiction, as well as electronic communication and mass case processing, often increase support collections for children. This has, in fact, been the case as States and the general public have seen collections increase when these powerful tools are put into action.

In writing this regulation, one of our primary goals is to ensure that States can take full advantage of all available automation and communication techniques, such as the Child Support Enforcement Network (CSENet), whenever possible. CSENet is both a state-of-the-art telecommunication network and a software application that plays a pivotal role in transmitting interstate case information between IV–D agencies. CSENet has been designed to receive, edit, store, and transmit the defined standardized batch transactions from one State child support enforcement automated system, through the CSENet server, to another State child support enforcement automated system. We are interested in hearing from States if there are other communication techniques that would work as well or better than CSENet to foster improved communication between States. Automated communication is essential to making interstate case processing work.

Additionally, there is an electronic communication called QUICK (Query Interstate Cases for Kids) that allows caseworkers to view interstate case information in real time. In States that use QUICK, workers can view financial and case status data in other participating QUICK States. With this capability, a caseworker can provide immediate response to a customer or quickly determine the next case action.

We propose to reorganize 45 CFR 303.7 extensively to clarify and streamline case processing responsibilities in intergovernmental cases, incorporating both optional and required procedures under PRWORA and enhanced technology. We have responded to specific changes requested by State IV–D agencies, for example, by revising responsibility for advancing the cost of genetic testing and addressing responsibility for credit bureau reporting. The proposed regulations address case processing ambiguities raised by practitioners around determination of controlling orders, interstate income withholding, and case closure. We have made corresponding changes to the case closure rules in 45 CFR 303.11. Finally, the proposed regulations make conforming changes to the Federal substantial-compliance audit (45 CFR 305.63) and State self-assessment requirements (45 CFR 308.2).

## III. Provisions of the Regulations

The following is a discussion of all the regulatory provisions included in this NPRM. With a few exceptions explained in the applicable sections, we have substituted ''intergovernmental'' in lieu of ''interstate'' throughout these provisions. The term encompasses not only IV–D cases between States, but also all IV–D cases where the parents reside in different jurisdictions, including cases between a State and Tribal IV–D program, cases between a State and a foreign country under sections 454(32) and 459A of the Act, and cases where the State has asserted authority over a nonresident under long-arm jurisdiction.

### *Part 301—State Plan Approval and Grant Procedures*

### Proposed Section 301.1—General Definitions

The proposed rules add definitions of terms used in program regulations. Some terms exist in current regulations but have not been defined; others represent new concepts. In drafting this section, we have defined those terms used in the proposed rule that must be understood consistently by all who use these regulations. The existing definitions remain unchanged. In this section of the preamble, we have grouped the proposed new definitions by topic for a more coherent discussion, rather than alphabetically, as they will appear in § 301.1.

Two definitions pertain particularly to international child support case processing as discussed earlier in this preamble. We define *Country* to include both a foreign reciprocating country (FRC) and any foreign country (or political subdivision thereof) with which the State has entered into a reciprocal arrangement pursuant to section 459A of the Act. We also propose defining *Central authority* as the agency designated by a government to facilitate support enforcement with an FRC. The Federal statute requires that the country with which a federal-level agreement is entered establish a Central authority to facilitate implementation of support establishment and enforcement in cases involving residents of the U.S.

OCSE is the Central authority for the United States under Federal reciprocal arrangements. If the State in which the obligor is living is unknown, pursuant to section 459A(c)(2) of the Act, an FRC may send a request to OCSE, which will use the Federal Parent Locator Service to try to locate the State in which the obligor resides. Otherwise, cases move directly between the Central Authority of the FRC and the State which has case processing authority.

As discussed earlier, current regulations envision state-to-state case processing. The proposed regulation reflects a IV–D agency's responsibilities whether the nonresident parent resides in another State, a federally-recognized Tribe with a IV–D program, or another country. Accordingly, we have added three definitions for terms used throughout the proposed regulations. ''*Intergovernmental IV–D case*'' means a case in which the dependent child(ren) and the noncustodial parent live in different jurisdictions that has been referred by an initiating agency to a responding agency for services. An intergovernmental IV–D case may include any combination of referrals between States, Tribes, and countries. Generally, throughout the proposed regulation, we substitute ''intergovernmental'' where ''interstate'' is used in the current regulation.

As discussed later, there are some provisions where we believe the IV–D agency's responsibility extends only to cases involving two or more States. To delineate such situations, we propose adding a definition for ''*Interstate IV–D case*'' meaning, a IV–D case in which the noncustodial parent lives and/or works in a different State than the custodial parent and child(ren). Unless otherwise specified, the term applies both to one-State and to two-State interstate cases. We believe the proposed definition provides clarity in the context of these regulations.

There are several circumstances in proposed 45 CFR 303.7, detailed later, that only pertain to cases and actions where a State asserts its authority over a person or entity outside its borders in another State. So we propose adding a definition of a ''*One-State interstate IV–D case*'' as an interstate case where a State exercises its jurisdiction over the nonresident parent or otherwise takes direct establishment, enforcement, or other action, in accordance with the long-arm provisions of the UIFSA or other State law. We welcome comments on whether this latter definition is helpful and, if so, appropriate and sufficient.

Five definitions in the proposed regulations relate to UIFSA. ''*Uniform*

*Interstate Family Support Act* (UIFSA)'' means the model act promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and mandated by section 466(f) of the Act to be in effect in all States.

Although used in current interstate regulations, we propose adding definitions of *Initiating agency* and *Responding agency* to establish a common understanding in the context of all intergovernmental IV–D cases. ''Initiating agency'' means the agency from which a referral for action is forwarded to a responding agency and could include a State IV–D agency, a Tribal IV–D agency, or a country as defined in these regulations. ''*Responding agency*'' means the agency that is providing services in response to a referral from an initiating agency in an intergovernmental IV–D case. Although the definitions are inclusive, these regulations only govern State IV–D programs, not Tribal IV–D programs or other countries.

The broadened scope covers State IV–D program responsibilities with respect to Tribal IV–D and international cases. However, while initiating and responding agency definitions reflect the involvement of two governmental entities, we use ''referral for action'' and ''providing services'' to reflect that a State IV–D agency may ask for assistance from another jurisdiction, without referring the case to another State for all necessary IV–D services. States have found that the provision of limited services, such as performing ''quick locate'' (of a person and/or assets), serving process, and identifying and seizing assets across State lines, holds much promise in terms of saving time and enhancing collections.

Two other terms flow principally from UIFSA: ''Tribunal'' and ''controlling order state.'' Encompassing the widest range of expedited and administrative procedures, we propose to define ''*Tribunal*'' in these regulations as a court, administrative agency, or quasi-judicial entity authorized under State law to establish, enforce, or modify support orders or to determine parentage.

A keystone of both UIFSA and FFCCSOA, 28 U.S.C. 1738B, was an end to multiple support orders existing simultaneously. Both laws prohibit entry of a new support order where a valid one exists. However, neither invalidates a support order created under earlier laws. Instead, both FFCCSOA and UIFSA contain rules for determining which of the several orders validly established by different States is controlling and governs prospective support. Because of the need to determine the controlling order in multiple order situations, we responded to requests from our partners to set out State IV–D responsibilities when multiple support orders exist in an interstate case. The proposed rules regarding Determination of Controlling Order (DCO) are contained in § 303.7, discussed later in this preamble. For clarity in the context of those regulations, we propose defining ''*Controlling order State*'' as the State in which the only order was issued or, where multiple orders existed, the State in which the order determined by a tribunal to control prospective current support pursuant to the UIFSA was issued.

As earlier noted, technology has been enhanced almost exponentially since the interstate regulations were revised 20 years ago. Today electronic transmission of information (and payments) is preferred and electronic filing of documents is rapidly becoming the norm. OCSE has committed considerable resources to enhancing electronic communication. A guiding principle in the National Child Support Enforcement Strategic Plan (FY2005–2009) is that: ''Policy and technology decisions are interdependent and coordinated to achieve high performance.'' The exchange of information is critical to successful intergovernmental child support litigation. Yet even with uniform mandated Federal interstate forms, it is often considered burdensome, particularly compared with the more automated, streamlined case processing that State and Federal systems permit in intrastate cases.

Forms are a necessary part of intergovernmental case processing and resolution. To foster uniformity, UIFSA section 316(b) affords enhanced evidentiary weight to pleadings and supporting documents submitted on or incorporated into ''federally-mandated forms.'' However, where available, the transmission of such information electronically clearly serves to expedite case processing. UIFSA 2001 amendments explicitly allow for electronic transmission as well as electronic record keeping by substituting ''in a record'' for ''in writing'' and defining record as ''information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form [(UIFSA 2001 section 102(15)].'' OCSE is working with States to expand and improve electronic transmissions. Standardization of data elements is an ongoing OCSE/State initiative and key to this effort. The Office of Management and Budget has reauthorized the use of the federally-mandated interstate forms until January 31, 2011 and they have been renamed Intergovernmental Child Support Enforcement Forms.

In furtherance of these goals, we propose adding a definition for *form* that accommodates new storage and transmission technologies as they become available. ''*Form*'' means a federally-approved document used for the establishment and enforcement of support obligations whether compiled or transmitted in written or electronic format, including, but not limited to the Order/Notice to Withhold Income for Child Support, and the National Medical Support Notice. In interstate IV–D cases, such forms include those used for child support enforcement proceedings under UIFSA. *Form* also includes any federally-mandated IV–D program reporting forms where appropriate. Current versions of these forms are located on the OCSE Web site at *http://www.acf.hhs.gov/programs/cse/forms/*.

*Part 302—State Plan Requirements*

Proposed Section 302.36—Provision of Services in Intergovernmental IV–D Cases

Current § 302.36 addresses State plan requirements in interstate and Tribal IV–D cases. We propose changes to both the heading and the body of the section to address international IV–D cases. The proposed changes clarify that a State must provide services in all intergovernmental IV–D cases as we have defined that term in proposed § 301.1.

First, the caption to this subsection currently references both ''interstate and intergovernmental IV–D cases.'' The use of interstate is now duplicative and we propose deleting ''interstate'' from the title. For clarity, we have revised current § 302.36(a)(1) and (2). Although the structure is amended slightly, the substance remains the same. Proposed paragraph (a)(1) requires the State plan to ''provide that, in accordance with § 303.7 of this chapter, the State will extend the full range of services available under its IV–D plan'' to any other State. Paragraph (a)(2) similarly restates the existing requirement to provide services to Tribal IV–D programs. We have added a reference to § 309.65(a) under which Tribal IV–D programs operate. We also propose minor language changes, solely for ease of reading.

As discussed earlier in this preamble, Congress specifically authorized Federal-level agreements regarding child support enforcement in 1996.

Section 459A(a) of title IV–D of the Act provides the Secretary of DOS, with the concurrence of the Secretary, the authority to declare any foreign country to be a foreign reciprocating country under certain conditions. Section 459A(d) provides for State-level ''reciprocal arrangements for the establishment and enforcement of support obligations with foreign countries that are not the subject of a declaration pursuant to subsection (a), to the extent consistent with Federal law.'' We propose to add § 302.36(a)(3) requiring that the full range of services also be provided to: ''Any country as defined in § 303.1 of this chapter.'' As defined in § 301.1 and discussed previously, ''country'' encompasses both FRCs and countries with state-level arrangements.

We propose revising current § 302.36(b) by substituting ''intergovernmental'' for ''interstate'' and amending the reference to State Central Registry responsibilities to § 303.7(b), consistent with changes we propose for that section.

*Part 303—Standards for Program Operations*

Proposed Section 303.7—Provision of Services in Intergovernmental IV–D Cases

We propose to reorganize current § 303.7 to more clearly lay out IV–D agency responsibilities and to expand the scope of the existing section from interstate to all intergovernmental IV–D cases, as defined by proposed § 301.1. Frequently, existing paragraphs have merely been moved in this proposed rule with minor language changes to improve readability. Other paragraphs of this section represent either a shift in responsibility between the initiating and responding agencies or address new case processing responsibilities.

State IV–D programs have identified barriers to effective interstate child support enforcement posed by regulations and by inconsistent practices among the States and requested changes to current interstate regulations on genetic testing costs, credit bureau reporting, and interstate income withholding. States also have requested that OCSE delineate responsibilities around determination of the controlling order (DCO) in multiple order cases. This Office considered all issues raised and, as revised, proposed § 303.7 would address them.

The proposed heading of § 303.7 substitutes ''intergovernmental'' for ''interstate.''

(a) General Responsibilities

We believe many IV–D agency responsibilities apply generally in an intergovernmental IV–D case. To avoid unnecessary repetition, we propose that subsection (a) (currently setting out the responsibilities of the interstate central registry) will now contain all generally applicable mandates, irrespective of the IV–D agency role in the case as either an initiating or responding agency.

Current § 303.7(c)(1) requires a responding IV–D agency to ''establish and use procedures for managing its interstate IV–D caseload which ensure provision of necessary services and include maintenance of case records in accordance with § 303.2 of this part.'' We propose moving this paragraph to § 303.7(a)(1) as a general responsibility of all IV–D agencies to their ''intergovernmental IV–D caseload.'' This paragraph also applies to the IV–D agencies' one-state interstate cases.

Similarly, existing § 303.7(c)(2) and (3) have been moved from a responding agency responsibility to a universal IV–D agency responsibility in intergovernmental cases, now located in proposed paragraphs (a)(2) and (3). These paragraphs require the IV–D agency to periodically review program performance for effectiveness and to ensure adequate staffing to provide services in interstate cases. With the exception of substituting ''intergovernmental'' for ''interstate'' these sections are unchanged. Again, these revisions are proposed because we believe the requirements to review program performance and to ensure adequate staffing are not properly restricted to responding State IV–D agencies.

Existing § 303.7(b)(3) requires the initiating State IV–D agency to: ''Provide the IV–D agency in the responding State sufficient, accurate information to act on the case by submitting with each case any necessary documentation and federally-approved interstate forms. The State may use computer-generated replicas in the same format and containing the same information in place of the Federal forms.'' We have divided this provision into two parts, proposed paragraphs (a)(4) and (c)(5). The first part of the existing paragraph has been revised and moved under the general responsibilities of IV–D agencies in intergovernmental cases.

Proposed § 303.7(a)(4) requires all State IV–D agencies to: ''Use federally-approved forms in intergovernmental IV–D cases. When using a paper version, providing one copy of each form and supporting documentation meets this requirement.'' State agencies now use a package consisting of nine federally-mandated forms titled: Provision of Services in Intergovernmental Child Support Enforcement: Standard Forms in all interstate cases. Although not mandatory, Tribal IV–D programs sometimes use them. States also use these forms for international cases.

At or soon after the time a country becomes an FRC, OCSE works with the FRC to prepare the country's chapter for A Caseworker's Guide to Processing Cases with Foreign Reciprocating Countries, available at *http://www.acf.hhs.gov/programs/cse/international/policy.html*. Because the proposed definition for ''form'' includes that it may be ''compiled or transmitted in written or electronic format,'' we have deleted the second sentence of current § 303.7(b)(3) concerning computer-generated replicas of forms as superfluous. We recognize that there will be cases in which use of an electronic form or transmission is not feasible. State IV–D agencies have requested that States be required to send only one paper version of the federally-mandated interstate forms and any order or supporting document that accompanies such a referral. Therefore, the second sentence of proposed § 303.7(a)(4) provides that one copy is sufficient to meet the requirements of this section.

We propose adding § 303.7(a)(5), requiring IV–D agencies to: ''Transmit requests for information and provide requested information electronically to the greatest extent possible in accordance with instructions issued by the Office.'' Given advances in technology and in the interest of reducing paper and paperwork, we explicitly favor electronic transmission. Electronic filing is increasingly recognized by courts and the amended language acknowledges new technologies and accommodates future changes in technologies and legally-acceptable methods of submitting documents.

A consistent request from our State partners has been to clarify the responsibilities of IV–D agencies to determine which of multiple current support orders is controlling prospectively. Several changes to § 303.7 address the determination of the controlling order. We start by proposing a new § 303.7(a)(6), adding a general responsibility on all IV–D agencies to: ''Within 30 working days of receiving a request, provide any order and payment record information requested by a State IV–D agency for a controlling order determination and reconciliation of arrearages.''

The first step in a DCO is to locate all child support orders that may exist in a particular case. While searching the Federal Case Registry (FCR) is the obvious and critical first step, a State also needs to search its own records and other relevant information available. The FCR contains data identifying cases and orders transmitted electronically from the State Case Registries (SCR). The FCR does not provide a copy of the order. Non-IV–D orders issued or modified before October 1, 1998, and any closed IV–D cases are not required to be placed on the SCR, and, therefore, will not be reported to the FCR. The State responsible for providing information on existing orders for a DCO would need to contact the other State(s) listed in the FCR to determine if there is a support order in the State(s) and to request a copy of the order and related payment records.

We heard varying suggestions about how long a IV–D agency should have to obtain and forward such order and accounting information. We believe a search of court or agency records may be time consuming. We propose ''30 working days'' from receipt of request to parallel the current obligation on the initiating agency to provide additional information. Since 2002, OCSE's Interstate Case Reconciliation initiative, aimed at correcting and standardizing IV–D case identifiers, has proven tremendously successful in reconciling interstate caseloads across all of the States. We believe that case identifiers for interstate cases have, for the most part, been established so that both State automated systems and caseworkers recognize shared cases. We also are mindful that OCSE has participated in several Federal/State initiatives to improve interagency communication to expedite interstate case processing. For example, the Federal OCSE Query Interstate Cases for Kids (QUICK) project, currently implemented in nine States, allows IV–D workers real-time access to another participating State's payment records and case status information. We anticipate response times will be greatly reduced as a result. We invite comments on the timeframe proposed in this section.

Proposed § 303.7(a)(7) consolidates existing requirements on the initiating agency [current § 303.7(b)(5)] and the responding agency [current § 303.7(c)(9)] to provide new information to each other. This revision requires IV–D agencies to ''[n]otify the other agency within 10 working days of receipt of new information on an intergovernmental case.'' Existing language has been changed from ''interstate'' to ''intergovernmental.'' In light of proposed requirements in § 303.7(a)(4) and (5), governing use of forms and transmission of information, we also have deleted ''by submitting an updated form and any necessary documentation'' as superfluous.

The final provision under IV–D agencies' general responsibilities in intergovernmental cases is proposed new § 303.7(a)(8). As discussed earlier in this preamble, many cases where the parties reside in different jurisdictions may be handled by one State, especially if another State provides limited assistance. Section 303.7(a)(8) reinforces the longstanding policy that authorizes a State to request from and provide to other States limited services. For example, a ''quick locate'' may be requested to find or verify if a parent or alleged father is in another State. One may also search for sources of income, wages, and assets of the parent. (*See* OCSE AT–98–06 (*http://www.acf.hhs.gov/programs/cse/pol/AT/1998/at-9806.htm*) and OCSE AT–91–09 (*http://www.acf.hhs.gov/programs/cse/pol/AT/1991/at-9109.htm*). States also provide other limited services, e.g., service of process, high-volume automated administrative enforcement in interstate cases (AEI), and coordination of genetic testing. Section 303.7(a)(8) requires all IV–D agencies to ''[c]ooperate with requests for limited services, including locate, service of process, assistance with discovery, teleconferenced hearings, administrative reviews, and high-volume automated administrative enforcement in interstate cases under section 466(a)(14) of the Act.''

(b) Central Registry

Existing responsibilities of the central registry now in § 303.7(a) have been renumbered as paragraph (b). To a significant extent current language remains unchanged. For reasons explained previously ''interstate'' has been replaced by ''intergovernmental'' where the former appears throughout this paragraph. The few additional changes from the existing regulation are described below.

Current § 303.7(a)(1) provides: ''The State IV–D agency must establish an interstate central registry responsible for receiving, distributing and responding to inquiries on all incoming interstate IV–D cases.'' To add clarity, we substitute ''transmitting'' for ''distributing'' and renumber this section as proposed § 303.7(b)(1). We make this change solely to avoid confusion, as ''distribution'' is used throughout Federal IV–D regulations to mean the financial distribution of child support collections. Also, as all functions assigned to the State Central Registry (SCR) must be integrated into the statewide automated system, nothing in this regulation requires physical mailing to an SCR. Initiating and responding IV–D agencies may electronically transmit cases directly to a responding agency's statewide automated system.

Proposed § 303.7(b)(2) is identical to existing paragraph (a)(2) except we have deleted ''from an initiating State.'' An intergovernmental case may come from another State, Tribal IV–D program, FRC or country with which the State has a reciprocal arrangement under section 459A(d) of the Act. Except for the move to paragraph (b), current § 303.7(a)(2)(i) and (ii) are unchanged.

The substance of current § 303.7(a)(2)(iii) addressing responsibilities of the central registry to acknowledge the case has been moved to paragraph (b). The language has been slightly revised, to remove reference to ''the initiating State,'' again recognizing that the central registry handles cases in addition to those forwarded from another State. Proposed § 303.7(b)(2)(iii) requires the central registry to ''acknowledge receipt of the case and request any missing documentation.'' We have similarly streamlined proposed § 303.7(b)(2)(iv) by requiring the central registry to inform the ''initiating agency'' where the case was sent for action, in lieu of the current requirement in paragraph (a)(2)(iv) to notify the ''IV–D agency in the initiating State.'' As defined in § 301.1, ''*initiating agency*'' means the agency from which a referral for action is forwarded to a responding agency and could include a State IV–D agency, a Tribal IV–D agency, or a country as defined in these regulations.

Aside from substituting ''initiating agency'' for the current ''initiating State,'' § 303.7(a)(3) has simply been renumbered as proposed paragraph (b)(3). Some States have expressed concerns that the existing requirement to ''forward the case for any action which can be taken'' pending receipt of additional information the initiating agency failed to provide is problematic and a central registry should be allowed to hold any intergovernmental case referred to it until all information is provided. The goal of the existing requirement is to ensure that complex intergovernmental cases are not held up unnecessarily over what may be a technicality, when some relief may be available to the petitioner. On the other hand, we have heard concerns that this provision allows initiating jurisdictions to be unresponsive and frequently engenders double work by the

responding State agency because the initiating State agency fails to provide information or documentation critical to resolving the matter. In this NPRM, we are leaving this provision unchanged but invite comments on the pros and cons of this case processing requirement.

The final central registry provision simply moves current § 303.7(a)(4) to paragraph (b)(4) but again proposes to substitute ''initiating agencies'' for ''other States.'' The substance of the requirement, to provide a case status within 5 working days of receipt of the request, remains unchanged.

(c) Initiating State IV–D Agency Responsibilities

Readers are again reminded that these proposed regulations apply only to State IV–D agencies. These requirements are not imposed on a foreign country or a Tribal IV–D program that has forwarded a case to a State.

Proposed § 303.7(c) contains necessary revisions to initiating State agency responsibilities currently in paragraph (b). As described earlier, we propose moving initiating State responsibilities now in paragraph (b)(4) (regarding providing necessary information) and (b)(5) (notice of receipt of new information on a case) and the second half of paragraph (b)(3) (permitting use of computer-generated replicas of Federal forms) to proposed paragraph (a) as general responsibilities of IV–D agencies in intergovernmental cases. These proposed paragraphs are described earlier in this preamble under § 303.7(a) *General Responsibilities*.

In making the significant changes to § 303.7, we consulted and considered the varied opinions among our partners. We have proposed only those changes we believe will improve intergovernmental child support enforcement without placing an undue burden on States. To streamline discussion of the proposed requirements for initiating State IV–D agencies, we discuss them as they now appear in paragraph (c).

Determination of Controlling Order (DCO)

We discussed earlier in this preamble concern for assuming responsibility to decide in which State tribunal a determination of controlling order (DCO) and reconciliation of arrearages should be made to improve interstate child support efforts. The first step in such a decision is to identify all support orders. Accordingly, proposed § 303.7(c)(1) adds the requirement that an initiating agency must first: ''Determine whether or not there is a support order or orders in effect in a case using the Federal and State Case Registries, State records, information provided by the recipient of services, and other relevant information available to the State.'' Determining whether or not a support order exists is required to understand whether a new support order may be sought or an existing order enforced or modified.

We next propose in paragraph (c)(2) that the initiating agency must: ''Determine in which State a determination of controlling order and reconciliation of arrearages may be made where multiple orders exist.'' Under UIFSA, a DCO identifies the one order to be prospectively enforced. The law of the State that issued it governs the nonmodifiable aspects of the support order. The issuing tribunal also is where a modification must be sought unless all individual parties and the child have left the issuing jurisdiction or the individual parties have properly consented to another State assuming jurisdiction. (See sections 205, 611, and 613 of UIFSA 1996.) However, for a controlling order determination to be binding, it must be made by the appropriate tribunal. The UIFSA 2001 amendments clarify in section 207(b) that personal jurisdiction over the individual parties is required for a DCO.

Having ascertained under proposed § 303.7(c)(1) that multiple valid support orders exist, the initiating State would then ascertain which of the several tribunals that issued a support order will be able to obtain personal jurisdiction over both the obligor and obligee. If more than one State tribunal has the jurisdiction to determine the controlling order, pursuant to paragraph (c)(4)(i), the initiating agency would be authorized to choose which State IV–D agency should file for such relief.

Use of Long-Arm Jurisdiction

Existing regulations require a State IV–D agency to ''use its long-arm statute to establish paternity, when appropriate.'' We believe that the existing regulation at § 303.7(b)(1) too narrowly focuses on long-arm paternity litigation. Accordingly, we propose in § 303.7(c)(3) that the initiating agency must ''determine the appropriateness of using its one-state interstate remedies to establish paternity and establish, modify, and enforce a support order, including medical support and income withholding.'' We incorporate and build on current paragraph (b)(1), expanding this section to potential one-state resolution of a full range of child support establishment and enforcement responsibilities.

We made clear in OCSE–AT–98–30, Question 1, (*http://www.acf.hhs.gov/programs/cse/pol/AT/1998/at-9830.htm*) that a responding jurisdiction may not ''second guess'' the decision of the initiating State with respect to use of long-arm jurisdiction. OCSE recognizes the benefits of obtaining or retaining control of a case where the responding party resides outside State borders. Indeed, we encourage one-state solutions. However, the initiating State agency is free to weigh the legal and factual circumstances of a case and select whether to exercise long-arm jurisdiction that is available, or not. Nothing in these proposed regulations modify a State's decision-making authority to select a one-state or two-state approach in interstate cases. The choice remains within the purview of the initiating State IV–D agency.

Referring Cases to Another State for Action

Our proposed language retains the requirement to act ''within 20 calendar days of determining that the noncustodial parent is in another jurisdiction and, if appropriate, receipt of any necessary information needed to process the case.'' Proposed § 303.7(c)(4) renumbers and revises current § 303.7(b)(2). However, the existing rule mandates a referral of ''any interstate IV–D case'' to the responding State's central registry ''for action, including requests for location, document verification, administrative reviews in Federal tax refund offset cases, income withholding, and State tax refund offset in IV–D cases.''

In lieu of this requirement, we propose that within 20 calendar days of determining that the noncustodial parent is in another jurisdiction and, if appropriate, receipt of any necessary information needed to process the case; the initiating agency must either, if multiple orders are in existence and identified under paragraph (c)(1), ask an intrastate tribunal for a DCO and reconciliation of arrearages, or determine that a DCO and reconciliation will be requested in the appropriate responding tribunal. Under paragraph (c)(4)(ii), if a one-state interstate remedy will not be used and a DCO by an intrastate tribunal is not required under paragraph (c)(4)(i), the initiating agency must ''refer any intergovernmental IV–D case to the appropriate State central registry, Tribal IV–D program, or central authority of a country for action.'' We note that in international cases there may be a need to translate the forms and necessary supporting documentation. We invite comments regarding reasonable time requirements for such

translation, if necessary. In the proposed regulation, we have not built in time for translation within the specified 20 calendar days because we believe that, until the necessary translation is complete, the initiating agency will not have ''any necessary information needed to process the case'' under paragraph (4).

Necessary Information and Forms

Proposed § 303.7(c)(5) mirrors the first part of current § 303.7(b)(3), continuing the mandate on the initiating agency to ''provide the responding agency sufficient, accurate information to act on the case by submitting with each case any necessary documentation and intergovernmental forms.'' As discussed previously, the remaining part of current paragraph (b)(3), requiring the use of federally-approved forms in hard or electronic format, is now a general responsibility of all IV–D agencies in intergovernmental cases.

Similarly, proposed § 303.7(c)(6) contains the existing requirements of § 303.7(b)(4), again revised to streamline language. We substitute ''responding agency'' for ''IV–D agency or central registry in the responding State'' and delete the now extraneous language about the form of transmission. The latter deletion is appropriate given both the general requirements on use of federally-approved forms and preference for electronic transmission in proposed § 303.7(a)(4) and (5) as well as the proposed definition of ''form.'' The timeframe remains unchanged and the section would now read: ''Within 30 calendar days of receipt of the request for information, provide the responding agency with an updated intergovernmental form and any necessary additional documentation, or notify the responding agency when the information will be provided.''

Interest

We add a new requirement in proposed § 303.7(c)(7). States often raise case processing difficulties caused by the wide range of State policies around charging interest on arrearages. Where a State A order is being enforced in State B, UIFSA section 604(a) provides that the law of the issuing State governs ''the nature, extent, amount, and duration of current payments and other obligations of support and the payment of arrearages under the order.'' Therefore, in calculating the sum due by the obligor, State B must apply the law of State A, including the payment of interest charged by State A, if any.

Historically, automated calculation of interest charged by another State is difficult for State automated CSE systems, especially for older statewide CSE systems. The transferred case is so integrated into the responding State's automated CSE system that if the responding State also charged interest, State systems may incorrectly charge interest at that rate, rather than following the law of the issuing jurisdiction.

States have asked us to require States that charge interest to periodically calculate the amount of interest owed and notify the enforcing State. Therefore, we have added a provision we believe will keep the arrearage balance in the responding State more accurate. Proposed § 303.7(c)(7) requires the initiating agency to ''[n]otify the responding agency at least quarterly of interest charges, if any, owed on overdue support under an initiating State order being enforced in the responding jurisdiction.'' We invite comments on proposed paragraph (c)(7), and on whether and how accounting records should be updated when the controlling order was not issued by the initiating State.

Initiating State Enforcement Activities

*Federal enforcement techniques.* Proposed § 303.7(c)(8) clarifies the responsibility of the initiating State IV–D agency when submitting past-due support for administrative offset and passport denial and addresses when a State may submit past-due support in intergovernmental cases for Federal tax refund offset.

In proposed § 303.7(c)(8), we expressly assign responsibility to submit the qualifying past-due support in an interstate case to the initiating agency, consistent with submittal rules for Federal tax refund offset under § 303.72(a)(1), i.e., a State with an assignment of support rights or an application for IV–D services under § 302.33. In addition, OCSE–AT–98–17 (*http://www.acf.hhs.gov/programs/cse/pol/AT/1998/at-9817.htm*) directs that in interstate cases, the State in which the IV–A, IV–E, or Medicaid assignment of support rights or nonassistance application for IV–D services has been filed (i.e., the initiating State) must submit the past-due support for Federal tax refund offset, administrative offset, or passport denial. It is necessary to specify which State must submit the past-due support debt for offset to avoid both States submitting the same arrearage in a single case. Therefore, we propose that, under paragraph (c)(8), the initiating State agency must: ''Submit all past-due support owed in IV–D cases that meets the certification requirements under § 303.72 of this part for Federal tax refund offset, and such past-due support, as the State determines to be appropriate, for other Federal enforcement techniques such as administrative offset under 31 CFR Part 285.3 and passport denial under section 452(k) of the Act.''

*Reporting Arrearages to Consumer Reporting Agencies.* With respect to responsibility for submitting arrearages to credit bureaus under section 466(a)(7) of the Act, States have requested Federal regulations to specify that the initiating State, rather than the responding State, is responsible for credit bureau reporting. We concur that such a requirement is appropriate to avoid duplicate enforcement efforts and have added proposed § 303.7(c)(9) mandating the initiating agency to: ''[r]eport overdue support to Consumer Reporting Agencies, in accordance with section 466(a)(7) of the Act and § 302.70(a)(7) of this chapter.''

*Request for Review and Adjustment of a Support Order.* Proposed § 303.7(c)(10) is simply a renumbering of existing § 303.7(b)(6) under which the initiating State must send a request for a review of a support order and supporting documentation within 20 calendar days of determining that such a request is required. This provision regarding federally-mandated review and adjustment of support orders remains applicable only in an interstate case.

Initiating State Responsibility for Distribution and Disbursement of Collections

Proposed § 303.7(c)(11) requires that the initiating State: Distribute and disburse any support collections received in accordance with distribution and disbursement requirements in this section and §§ 302.32, 302.51 and 302.52 of this chapter, sections 454(5), 454B, 457, and 1912 of the Act, and instructions issued by the Office. Current regulations at § 303.7(c)(7)(iv) and proposed § 303.7(d)(6)(iv) require the responding State to forward payments to the location specified by the initiating State. However, there is no stated responsibility in current § 303.7 for distribution and disbursement by the initiating agency. We believe it is appropriate to explicitly include initiating State responsibility for distribution and disbursement of collections in proposed § 303.7(c)(11).

Initiating State Notice of Case Closure

We have proposed two new provisions under initiating State responsibilities that are related to case closure. Proposed § 303.7(c)(12) requires an initiating State agency to ''notify the responding agency within 10 working

days of case closure that the initiating State IV–D agency has closed its case pursuant to § 303.11 of this part.'' This provision is consistent with other requirements in proposed § 303.7(c) to keep the responding jurisdiction advised of the status of the intergovernmental case. It is added for clarity; we believe that States already are required to provide a change in case status as ''new information'' under existing regulations. This provision ensures the responding agency is notified of case closure in the initiating State.

The second case closure-related provision addresses direct income withholding. Section 303.100(f)(1) and (2) contain current Federal requirements for direct income withholding. In essence, State law must require all employers in the State to comply with a properly-completed withholding order/notice issued by another State. Article 5 of UIFSA, enacted in every State, mirrors the choice of law requirements in paragraph (f)(2) and provides procedures for direct income withholding.

While direct income withholding has proved to be effective, in paragraph (c)(13) we address the issue of duplicate withholding notices/orders for the same obligor being sent to the obligor's employer by both the initiating and responding States in the same interstate case. We propose requiring the initiating agency under paragraph (c)(13) to ''instruct the responding State agency to close its interstate case and to stop any withholding order or notice the responding agency has sent to an employer before the initiating State transmits a withholding order or notice to the same or another employer unless the two States reach an alternative agreement on how to proceed.'' The initiating State would be required to notify another State IV–D agency under § 303.11(c)(13) to avoid duplicate State income withholding orders or notices.

The use of direct income withholding under UIFSA offers an excellent, streamlined process. It also affords protections for the obligor and the employer. However, during the past decade of operating under direct income withholding, State practitioners and employers have raised concerns about the following situation: State A initiated a two-state interstate case to State B, under which a State B income withholding order is issued to the obligor's State B employer. The withheld support payments flow from the employer to State B, which then forwards the support to State A within 2 days of receipt. State A distributes and disburses the child support. Subsequently, the obligor changes employment, State A and B learn of the new employer through the National Directory of New Hires or State Directory of New Hires, and both States A and B send a withholding notice or order to the new employer. State A directs the employer to send the child support withheld in the same case to State A rather than State B. This can result in errors in payment records.

Question and Answer 21 of OCSE–AT–98–30 (*http://www.acf.hhs.gov/programs/cse/pol/AT/1998/at-9830.htm*) advises States that, while this practice is not precluded by UIFSA or Federal regulation, ''pursuing dual enforcement remedies could lead to confusion on the part of the employer, the obligor and obligee, and the IV–D agencies. If a State pursues direct income withholding after referring a case to another State for enforcement, it must coordinate with the responding State and notify that State of any direct withholding and collections from direct withholding, in accordance with [current] 45 CFR 303.7(b)(5). Communication between the two States is critical to ensure accurate payment records and to avoid duplicative enforcement actions.'' Unless initiating and responding agencies communicate with respect to direct income withholding, problems may arise. Multiple income withholding notices/orders for the same obligor and obligee may result in an employer directing payment to two different locations. Payments made directly to the initiating State may not be properly credited in the responding State, which may take enhanced enforcement activities in State B, despite the possibility that the obligated parent may be in full compliance with the order.

In consideration of these possible consequences and consistent with the expressed preference of IV–D Directors, we propose requiring an initiating agency to choose between two-state enforcement and direct income withholding in such circumstances. Proposed paragraph (c)(13) would establish a clear delineation of responsibilities between States and the critical need to ensure the arrearages and payment records are accurate. It would reduce duplication and confusion. Rapidly-expanded use of electronic payment processing should reduce the time it takes for withheld amounts sent to State B (the responding State) to reach State A, thereby reducing a State's preference for direct income withholding and ensuring access to State enforcement techniques in a responding State, e.g., State tax offset, lottery offset.

That said, it is important to note that, should the initiating State make this choice under proposed paragraph (c)(13), the responding State agency would be required to close its case under proposed § 303.7(d)(11). However, because we believe States should have the flexibility to agree that the responding State should continue to take such limited enforcement actions only it can do, e.g., Automated Enforcement of Interstate cases (AEI), State tax refund offset, lottery offset, professional and recreational license revocation, while the initiating State takes direct action, paragraph (c)(13) permits them to jointly agree to an alternative arrangement that would allow the responding State to continue such limited services.

The final proposed requirement on initiating IV–D agencies addresses concerns about undistributed collections in a responding State because the initiating State closed its case and refuses to accept any collections in that case from the responding State. We propose to add § 303.7(c)(14) providing: ''If the initiating agency has closed its case pursuant to § 303.11 and has not notified the responding agency to close its corresponding case [the initiating State IV–D agency must] make a diligent effort to locate the obligee, including use of the Federal Parent Locator Service and the State Parent Locator Service, and accept, distribute and disburse any payment received from a responding agency.'' See also Question and Answer 2 of PIQ–00–02, *http://www.acf.hhs.gov/programs/cse/pol/PIQ/2000/piq-00-02.htm*, which addresses responding States sending collections in interstate cases to initiating States for distribution when the location of the custodial parent is unknown.

(d) Responding State IV–D Agency Responsibilities

As with the immediately preceding section on initiating State IV–D agency responsibilities, we have reorganized requirements under current § 303.7(c) (addressing responding State responsibilities) and revised language to streamline the section and to recognize the scope of intergovernmental cases. We discuss the changes to responding agency responsibilities, including the additions, in the order they appear in proposed § 303.7(d).

We have added introductory language immediately after the heading to proposed paragraph (d): ''Upon receipt of a request for services from an initiating agency, the responding agency must * * *.'' As discussed earlier in the preamble, these regulations would

govern cases received not only from another State but also from a Tribal IV–D program, from an FRC, or from a country with which the State has entered into a reciprocal arrangement pursuant to section 459A(d) of the Act. With limited and explicit exceptions discussed herein, the State requirements of § 303.7(d) extend to all IV–D intergovernmental cases, as defined by § 301.1, received by a State. Thus, ''intergovernmental'' has been substituted for ''interstate'' throughout paragraph (d). Where we have retained ''interstate'' the election is purposeful and explained below.

Proposed § 303.7(d)(1) has been added to confirm explicitly in this regulation what has been the longstanding OCSE policy, set out in OCSE–AT–98–30 (*http://www.acf.hhs.gov/programs/cse/pol/AT/1998/at-9830.htm*) Question and Answer #1. A responding agency may not question the decision of an initiating agency to opt for a two-state remedy. As reconfirmed by proposed § 303.7(c)(3), the initiating agency is responsible for determining if its use of a one-state remedy, such as asserting jurisdiction over a nonresident or using direct income withholding, is appropriate. Section 303.7(d)(1) requires a responding agency to ''[a]ccept and process an intergovernmental request for services, regardless of whether the initiating agency elected not to use remedies that may be available under the law of that jurisdiction.''

Current § 303.7(c)(4) has been renumbered § 303.7(d)(2). Current § 303.7(c)(4) begins: ''Within 75 days of receipt of an Interstate Child Support Transmittal Form and documents from its interstate central registry:''. With the exception of the introductory sentence, this provision has not been changed. The proposed opening sentence now reads: ''Within 75 calendar days of receipt of an intergovernmental form and documentation from its central registry * * *'' the responding agency must take the specified action. We have deleted the language ''Interstate Child Support Transmittal'' and ''interstate'' in the proposed (d)(2). Under proposed § 303.7(b), the central registry is obligated to handle all intergovernmental cases in accordance with that section.

We have left in place existing requirements for specified actions from existing paragraph (c)(4) in proposed paragraph (d)(2). Paragraph (d)(2)(i) requires ''Provide location services in accordance with § 303.3 of this part if the request is for location services or the form or documentation does not include adequate location information on the noncustodial parent.'' Paragraph (d)(2)(ii) provides, ''If unable to proceed with the case because of inadequate documentation, notify the initiating agency of the necessary additions or corrections to the form or documentation.'' Finally, paragraph (d)(2)(iii) provides, ''If the documentation received with a case is inadequate and cannot be remedied without the assistance of the initiating agency, process the case to the extent possible pending necessary action by the initiating agency.''

We are particularly interested in comments on whether proposed § 303.7(d)(2)(iii) to ''process the case to the extent possible'' when documentation from the initiating agency is inadequate and cannot be remedied without the assistance of the initiating agency remains useful and serves to advance the effectiveness of case processing.

When Noncustodial Parent (NCP) Is Found in a Different State

Current regulation § 303.7(c)(6) provides States the option to either forward or return the interstate package to the initiating jurisdiction within 10 working days of locating the noncustodial parent in a different State. Some States have asked that we eliminate this option and adopt a regulation under which an interstate referral received by the wrong tribunal must be forwarded to the appropriate State where the NCP is located, if known, and the forwarding State must notify the initiating State. The goal is to expedite interstate case processing, avoiding the delay occasioned when the case documentation is returned to the initiating State.

We propose to renumber current § 303.7(c)(6) as § 303.7(d)(3) and to revise it to read as follows: ''Within 10 working days of locating the noncustodial parent in a different State, the responding agency must forward/transmit the forms and documentation to the central registry in the State where the noncustodial parent has been located and notify the initiating agency and central registry where the case has been sent.''

We note that the obligation to forward/transmit the ''forms and documentation'' applies only if the respondent is located in another State. This action is not mandated where the respondent is located in a Tribal territory or in another country. However, the proposed responding State requirement to notify the initiating agency does apply regardless of whether the case was initiated from another State, IV–D Tribe, or country.

The existing regulation also requires notice to both the State and the interstate central registry in the initiating State. We have changed the language ''State'' in the current paragraph to ''initiating agency'' in proposed paragraph (d)(3). As the central registry functions must be integrated into the State CSE automated system, we are requesting comments as to whether there is a need to notify both the initiating agency and the central registry. If not, where should the notice be directed?

Proposed § 303.7(d)(4) is based on and is substantially similar to current § 303.7(c)(5). Applicable to the situation where the noncustodial parent is located in another jurisdiction within the State, we propose that paragraph (d)(4) require the responding agency to: ''[w]ithin 10 working days of locating the noncustodial parent in a different jurisdiction within the State, forward or transmit the forms and documentation to the appropriate jurisdiction and notify the initiating agency and central registry of its action;'', changing ''State'' to ''initiating agency.'' Again, we have left the current notice requirements in place but invite comments as to whether the notice should be to the initiating agency, the central registry, or to both.

Determination of Controlling Order (DCO)

Proposed § 303.7(d)(5) adds a notice requirement where the initiating State agency has requested a controlling order determination. In this case, the responding agency must under (d)(5)(i), ''File the controlling order determination request with the appropriate tribunal in its State within 10 working days of receipt of the request or location of the noncustodial parent, whichever occurs later'' and under (d)(5)(ii), ''Notify the initiating State agency, the Controlling Order State and any State where a support order in the case was issued or registered, of the controlling order determination and any reconciled arrearages within 30 calendar days of receipt of the determination from the tribunal.''

Performance incentives and penalties permit us to move away from measuring process; therefore we hesitate to impose additional time standards. As proposed, States must look at these timeframes as part of the self-assessment process under § 308.2 as revised by these proposed regulations. We particularly want States to comment on the timeframe in paragraphs (d)(5)(i) and (ii). Since the initiating agency is required to provide all documentation, we believe 10 working days under paragraphs (d)(5)(i) is sufficient time for

the responding agency to file the request for a DCO with the appropriate tribunal. The 30 day timeframe in paragraph (d)(5)(ii) is identical to that included under section 207(f) of UIFSA, under which the party obtaining the order shall file a certified copy of it with each tribunal that issued or registered an earlier order of child support, within 30 calendar days after issuance of an order determining the controlling order.

Provide Necessary Services

Current § 303.7(c)(7) has been renumbered as proposed § 303.7(d)(6) and requires the responding agency to provide any necessary services, including establishing paternity and/or a support order, enforcing another State's order, collecting and monitoring payments, and reviewing and adjusting orders. Minor language changes have been made to the introductory sentence to fit the revised structure of the section and to clarify that the list is not intended to be exhaustive. A responding State is required, under proposed paragraph (d)(6), to ''[p]rovide any necessary services as it would in an intrastate IV–D case including * * *.''

The one substantive change to current paragraph (c)(7) in proposed paragraph (d)(6) occurs in paragraph (d)(6)(iv). To conform to other OCSE efforts around systems and interstate communication standards, we propose deleting the following current paragraph (c)(7)(iv) language: ''and include the responding State's identifying code as defined in the Federal Information Processing Standards Publication (FIPS) issued by the National Bureau of Standards or the Worldwide Geographic Location Codes issued by the General Services Administration.''

Proposed paragraph (d)(6)(iv) would require the responding agency to provide any necessary services as it would in an intrastate IV–D case including: ''(iv) Collecting and monitoring any support payments from the noncustodial parent and forwarding payments to the location specified by the initiating agency. The IV–D agency must include sufficient information to identify the case, indicate the date of collection as defined under § 302.51(a) of this chapter, and include the responding State's case identifier and locator code, as defined in accordance with instructions issued by this Office.'' This change allows OCSE greater flexibility to define consistent identifying and locator codes, including ones for FRCs [International Standards Organization (ISO) codes] and Tribal IV–D programs [Bureau of Indian Affairs (BIA) codes]. OCSE DCL–07–02 (*http://www.acf.dhhs.gov/programs/cse/pol/DCL/2007/dcl-07-02.htm*) provides locator code instructions, including for Tribal IV–D and international cases.

Notice of Hearings

We propose moving current § 303.7(c)(8), which requires the responding IV–D agency to notify the initiating State agency of any formal hearing in the responding State, to paragraph (d)(7). Proposed paragraph (d)(7) would read: ''Provide timely notice to the initiating agency in advance of any hearing before a tribunal that may result in establishment or adjustment of an order.'' The language is substantially similar; however we have deleted ''formal'' before ''hearing.'' Given the primary use of expedited quasi-judicial and administrative hearings, and the growing use of alternative dispute resolution proceedings, we believe the proposed language clarifies that notice should be given of any hearing at which a support order is established or modified.

Allocation of Collections

Some State IV–D directors expressed concerns about interstate cases in which a State may allocate collections among multiple orders and cases. Two scenarios are most frequently raised. *Scenario One:* The responding State makes a collection in an interstate Case A, retains some or all of the collection to satisfy arrearages assigned to the responding State and owed by the same obligor in Case B, and does not transmit the entire collection to the initiating State for distribution and disbursement. *Scenario Two:* A responding State makes a collection in interstate Case A, credits the payment to that case, and forwards the money to the initiating State for distribution and disbursement. The initiating State receives the collection for Case A but applies it, in part, to support due by the same obligor to several families in Cases B and C. The initiating State may not advise the responding State how the payment was allocated and distributed.

We recognize these concerns; however, practice with respect to allocation varies significantly among States and there is no consensus on a solution. We believe that to a significant extent concerns raised by the second scenario are resolved by ensuring that the initiating agency refers all cases involving the obligor to the responding agency rather than just one case. Enhanced communication and QUICK also should address issues about conflicting arrearages in the initiating and responding States. We propose adding § 303.7(d)(8) to address allocation of collections in interstate cases with arrearages owed by the same obligor and assigned to the responding State in a different case. Under proposed paragraph (d)(8), responding States would be required to: ''(8) When there is an arrearage assigned to the responding State in a separate case, establish and use procedures to allocate collections, proportionately, between arrearages assigned to the responding State in that separate case and to arrearages owed to an obligee in, or assigned to, the initiating State, when the initiating State has requested assistance from the responding State in collecting those arrearages.'' Of course, payment of current support has priority over payment of arrearages.

Notice of Fees and Costs Deducted

We propose moving current § 303.7(d)(5), currently under *Payment and recovery of costs in interstate IV–D cases* to proposed § 303.7(d)(9) under responding State duties. Current § 303.7(d)(5) requires the IV–D agency in the responding State to identify any fees or costs deducted from support payments when forwarding payments to the IV–D agency in the initiating State in accordance with § 303.7(c)(7)(iv). We believe the requirement to ''identify any fees or costs deducted from the support payments when forwarding payments to the IV–D agency in the initiating State'' is more appropriately placed under responding State responsibilities. We propose only minor changes for readability. Specifically, we have changed the language ''the IV–D agency in the initiating State'' in current paragraph (d)(5) to ''the initiating agency'' in proposed paragraph (d)(9) and corrected the cross-reference from the current language § 303.7(c)(7)(iv) to reflect the appropriate cross-reference in these proposed regulations, § 303.7(d)(6)(iv). Proposed paragraph (d)(9) would therefore read that the responding State agency must ''[i]dentify any fees or costs deducted from support payments when forwarding payments to the initiating agency in accordance with paragraph 303.7(d)(6)(iv) of this section.''

Case Closure in Direct Income Withholding Cases

We propose adding a new § 303.7(d)(10) detailing the actions a responding agency must take when an initiating State has elected to use direct income withholding in an existing intergovernmental IV–D case. The initiating State would be authorized to use direct income withholding only where it follows requirements to instruct the responding agency to close its corresponding case under proposed

§ 303.7(c)(13). Accordingly, proposed paragraph (d)(10) requires the responding agency to: ''Within 10 days of receipt of a request for case closure from an initiating agency under paragraph (c)(13) of this section, stop the responding State's income withholding order or notice and close the intergovernmental IV–D case, unless the two States reach an alternative agreement on how to proceed.'' The rationale for this proposal is discussed earlier under proposed paragraph (c)(13). Again, we note that the election to close an interstate case involving two States belongs exclusively to the initiating agency. If an alternate agreement has been reached between the initiating and responding agencies to stop the withholding in the responding jurisdiction but continue limited services in the responding State, the agencies should document the terms of any alternate agreement and ensure that employers are not faced with conflicting income withholding orders.

Current § 303.7(c)(10) requires the IV–D agency to notify the interstate central registry in the responding State when a case is closed. Renumbered as proposed paragraph (d)(11), it reads as follows: ''Notify the initiating agency when a case is closed pursuant to § 303.11 of this part.'' The current paragraph (c)(10) phrase 'interstate central registry' has been changed in proposed paragraph (d)(11) to 'initiating agency' because these regulations cover the full range of intergovernmental cases. We propose that the IV–D agency send notice to the initiating agency to ensure both jurisdictions in an intergovernmental case are aware of case status. This provision is consistent with other requirements in proposed § 303.7 to keep the involved jurisdictions advised of the status of a case. It is added for clarity; States already are required to provide a change in case status upon receipt of new information under existing regulations.

(e) Payment and Recovery of Costs in Intergovernmental IV–D Cases

Current § 303.7(d) governing *Payment and recovery of costs in interstate cases,* with the exception of current paragraph (d)(5), has been moved to proposed paragraph (e), reorganized, and revised. Current paragraph (d)(5), requiring the responding State to notify the initiating State of fees deducted by a responding State is moved to proposed § 303.7(d)(9), under responding agency responsibilities and described above. Current paragraphs (d)(1) and (2) require the responding State to pay the costs it incurs in processing interstate IV–D cases except for genetic testing costs, which are paid by the initiating agency. Current paragraph (d)(3) directs the responding State, if paternity is established in the responding State, to attempt to obtain a judgment for costs of genetic testing ordered by the IV–D agency from the alleged father who denied paternity. If the costs of initial or additional genetic testing are recovered, the responding State must reimburse the initiating State.

These provisions have been consolidated and revised, primarily to shift the advancement of genetic testing costs from the initiating to the responding agency. As required by Federal law, we also limit the authority of a IV–D agency to recover costs in international cases. Accordingly, we propose deleting current paragraphs (d)(1)–(3) and including as § 303.7(e)(1): ''The responding IV–D agency must pay the costs it incurs in processing intergovernmental IV–D cases, including the costs of genetic testing. If paternity is established, the responding agency must seek a judgment for the costs of testing from the alleged father who denied paternity.''

State IV–D directors and interstate caseworkers have long requested that we change the current obligation for the initiating State to pay the cost of genetic testing in interstate cases in current § 303.7(d)(2) to require the responding State to pay these costs, as is the case with any other costs responding States incur in interstate cases. Charging and collecting genetic testing costs from initiating States has proven administratively burdensome to responding States. In addition, the cost of genetic testing has decreased dramatically from $1000 or more to as little as $150 under State contracts.

Both State agencies retain the right to charge fees and recover costs in interstate cases. However, in international cases receiving services under section 454(32)(C) of the Act, States must provide services without requiring an application or charging fees to the FRC or foreign obligee. Therefore, we have renumbered current paragraph (d)(4) as proposed paragraph (e)(2) and revised it to read as follows: ''Each State IV–D agency may recover its costs of providing services in intergovernmental non-IV–A cases in accordance with § 302.33(d) of this chapter, except that a IV–D agency may not recover costs from an FRC or from a foreign obligee in that FRC, when providing services under sections 454(32) and 459A of the Act.'' The limitation on cost recovery has been added as required by Federal law. Services between FRCs must be cost free. States entering a state-level arrangement with a non-FRC country under section 459A may elect to provide cost-free services but are not mandated to do so. Accordingly, this section refers to FRCs rather than using the more inclusive term ''country.'' However, there is no similar prohibition to charging fees or recovering costs in cases with Tribal IV–D agencies. In addition, Tribal IV–D agencies have the option under § 309.75(e) to charge fees and recover costs.

Proposed Section 303.11—Case Closure Criteria

In intergovernmental cases, a responding State IV–D agency may apply any of the criteria for case closure set out in current regulations at 45 CFR 303.11. Existing paragraphs (b)(1) through (b)(11) pertain to all IV–D cases. Current § 303.11(b)(12) allows a case to be closed when the initiating State fails to take an action essential for the responding State to provide services. This provision currently is the only existing criterion specifically applicable in interstate cases. We propose revising § 303.11(b)(12) to read as follows: ''The IV–D agency documents failure by the initiating agency to take an action which is essential for the next step in providing services.'' Therefore, this case closure criterion would apply to all intergovernmental IV–D cases.

We have added a new paragraph § 303.11(b)(13) providing an additional case closure criterion under which the responding State agency is authorized to close its intergovernmental case based on a notice under § 303.7(c)(12) from the initiating agency that it has closed its case. Under proposed paragraph § 303.7(c)(12), as discussed above, an initiating State agency must notify the responding agency ''within 10 working days of case closure that the initiating State IV–D agency has closed its case pursuant to § 303.11.'' It is not relevant to the responding State agency under which case closure provision of § 303.11(b) the initiating agency has closed its case; it is relevant only that it has done so and timely notified the responding agency. Upon receipt of such a notice, the responding agency would have authority to correspondingly close its case, without having another basis.

The proposed changes to § 303.11 provide a basis for the responding agency to close an intergovernmental case due to lack of necessary action by the initiating agency or upon notice that the initiating agency has closed its case.

*Part 305—Program Performance Measures, Standards, Financial Incentives, and Penalties*

Proposed Section 305.63—Standards for Determining Substantial Compliance With IV–D Requirements

We have made conforming changes to Part 305 at § 305.63 to correct outdated cross-references and to include cross-references to the new proposed § 303.7.

*Part 308—Annual State Self-Assessment Review and Report*

Proposed Section 308.2—Required Program Compliance Criteria

We have made conforming changes to Part 308 at § 308.2 to correct outdated cross-references and to include cross-references to the new proposed requirement in § 303.7. While the language has been revised to reflect the corresponding changes to referenced provisions in § 303.7, we only have added two new program compliance criteria for State Self-Assessments.

First, as discussed earlier, we propose a timeframe under § 303.7(a)(6): 30 days for a State to provide ''any information requested * * * for a controlling order determination and reconciliation of arrearages.'' We propose to add this measurable requirement as a performance criterion in both initiating (§ 308.2(g)(1)(vi)) and responding (§ 308.2(g)(2)(vi)) cases.

A second new performance area involves case closure criteria. As discussed previously under § 303.7 and § 303.11, we impose time-measured requirements for notification of the other State when closing a case. Measurable performance criteria are established where we impose timeframes. Accordingly, we add notification regarding case closure in both initiating (§ 308.2(g)(1)(iv)) and responding (§ 308.2(g)(2)(vii)) cases.

## IV. Impact Analysis

*Paperwork Reduction Act of 1995*

There is a new requirement imposed by these regulations. Proposed § 303.7(d)(5) adds a notice requirement where the initiating agency has requested a controlling order determination. In this case, the responding agency must:

''(i) File the controlling order determination request with the appropriate tribunal in its State within 10 working days of receipt of the request or location of the noncustodial parent, whichever occurs later;''

For this new regulatory requirement statewide Child Support Enforcement systems are already required to have the functionality to generate the documents necessary to establish an order of support. This new regulatory requirement would be considered a minor change or enhancement to a statewide CSE system.

Under paragraph (d)(5)(ii) of the section, the responding Agency must: ''(ii) Notify the initiating State agency, the Controlling Order State and any State where a support order in the case was issued or registered, of the controlling order determination and any reconciled arrearages within 30 calendar days of receipt of the determination from the tribunal.''

This provision should not increase the information collection burden on the State(s) because a Child Support Enforcement Network (CSENet) transaction for transmitting information about the determination of the controlling order to other states already exists. CSENet already has a transaction: *ENF Provide—GSCOE–enforcement—Provision of information, new controlling order.* It is sent by the responding state—the transaction is used to reply to an Enforcement request notifying the Initiating jurisdiction that a new controlling support order is in effect. The amount of the reconciled arrearages can also be transmitted via CSENet in an information data block.

ANNUAL BURDEN ESTIMATES

| Instrument | Number of respondents 54 | Average burden hours per response | Total burden hours |
|---|---|---|---|
| Systems modification | One time system enhancement | 60 labor hours per State to modify statewide CSE system. | 3,240 hours. |

With respect to the information collection burden associated with proposed § 303.7(d)(5)(i), the Administration for Children and Families will consider comment by the public on this proposed collection of information in the following areas:

1. Evaluating whether the proposed collection is necessary for the proper performance of the functions of ACF, including whether the information will have practical utility;

2. Evaluating the accuracy of ACF's estimate of the proposed collection of information, including the validity of the methodology and the assumptions used;

3. Enhancing the quality, usefulness, and clarity of the information to be collected; and

4. Minimizing the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic mechanical, or other technology, e.g., permitting electronic submission of responses.

OMB is required to make a decision concerning the collection of information contained in these proposed regulations between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to the Department on the proposed regulations. Written comments to OMB for the proposed information collection should be sent directly to the following: Office of Management and Budget, either by fax to 202–395–6974 or by e-mail to OIRA *submission@omb.eop.gov.* Please mark faxes and emails to the attention of the desk officer for ACF.

It should be noted that the requirements of the Paperwork Reduction Act of 1995 [(44 U.S.C. 3507(d)], regarding reporting and recordkeeping, apply to the federally-mandated intergovernmental forms referenced in the regulations, (OMB No. 0970–0085). The Office of Management and Budget has reauthorized the use of these forms until January 31, 2011.

*Regulatory Flexibility Analysis*

The Secretary certifies that, under 5 U.S.C. 605(b), as enacted by the Regulatory Flexibility Act (Pub. L. 96–354), this rule will not result in a significant impact on a substantial number of small entities. The primary impact is on State governments. State governments are not considered small entities under the Act.

*Regulatory Impact Analysis*

Executive Order 12866 requires that regulations be reviewed to ensure that they are consistent with the priorities and principles set forth in the Executive Order. These proposed rules provide solutions to problems in securing child support and paternity determinations for children in situations where the parents and children live apart and in different jurisdictions and the Department has determined that they are consistent with the priorities and principles of the Executive Order. There are minimal costs associated with these proposed rules.

These regulations are significant under section 3(f) of the Executive Order because they raise novel policy issues and therefore have been reviewed by the Office of Management and Budget.

*Unfunded Mandates Reform Act of 1995*

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that a covered agency prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $130 million or more in any one year.

If a covered agency must prepare a budgetary impact statement, section 205 further requires that it select the most cost-effective and least burdensome alternative that achieves the objectives of the rules and is consistent with the statutory requirements. In addition, section 203 requires a plan for informing and advising any small governments that may be significantly or uniquely impacted by the proposed rule.

The Department has determined that this proposed rule is not an economically significant rule and will not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of more than $130 million in any one year. Accordingly, we have not prepared a budgetary impact statement, specifically addressed the regulatory alternatives considered, or prepared a plan for informing and advising any significantly or uniquely impacted small government.

*Congressional Review*

This notice of proposed rule making is not a major rule as defined in 5 U.S.C. chapter 8.

*Assessment of Federal Regulations and Policies on Families*

Section 654 of the Treasury and General Government Appropriations Act of 1999 requires Federal agencies to determine whether a proposed policy or regulation may negatively affect family well-being. If the agency's determination is affirmative, then the agency must prepare an impact assessment addressing seven criteria specified in the law. The required review of the regulations and policies to determine their effect on family well-being has been completed and these regulations will have a positive impact on family well-being as defined in the legislation by helping to ensure that parents support their children even when they reside in separate jurisdictions and will strengthen personal responsibility and increase disposable family income.

*Executive Order 13132*

Executive Order 13132 prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on State and local governments or is not required by statute, or the rule preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This proposed regulation does not have federalism impact as defined in the Executive Order. However, consistent with Executive Order 13132, the Department specifically solicits comments from State and local government officials on this proposed rule.

**List of Subjects**

*45 CFR Part 301*

Child support, Grant programs/social programs, Reporting and recordkeeping requirements.

*45 CFR Part 302*

Child support, Grant programs/social programs, Reporting and recordkeeping requirements.

*45 CFR Part 303*

Child support, Grant programs/social programs, Reporting and recordkeeping requirements.

*45 CFR Part 305*

Child support, Grant programs/social programs, Accounting.

*45 CFR Part 308*

Auditing, Child support, Grant programs/social programs, Reporting and recordkeeping requirements.

(Catalog of Federal Domestic Assistance Programs No. 93.563, Child Support Enforcement Program)

**Daniel C. Schneider,**

*Acting Assistant Secretary for Children and Families.*

**Michael O. Leavitt,**

*Secretary, Department of Health and Human Services.*

For the reasons discussed above, title 45 CFR chapter III is proposed to be amended as follows:

## PART 301—STATE PLAN APPROVAL AND GRANT PROCEDURES

1. The authority citation for part 301 is revised to read as follows:

**Authority:** 42 U.S.C. 651 through 658, 659A, 660, 664, 666, 667, 1301, and 1302.

2. Amend § 301.1 by republishing the introductory text and adding the following definitions alphabetically:

### § 301.1 General definitions.

When used in this chapter, unless the context otherwise indicates:

* * * * *

*Central authority* means the agency designated by a government to facilitate support enforcement with a foreign reciprocating country (FRC) pursuant to section 459A of the Act.

* * * * *

*Controlling order state* means the State in which the only order was issued or, where multiple orders existed, the State in which the order determined by a tribunal to control prospective current support pursuant to the UIFSA was issued.

*Country* means a foreign country (or a political subdivision thereof) declared to be an FRC under section 459A of the Act and any foreign country (or political subdivision thereof) with which the State has entered into a reciprocal arrangement for the establishment and enforcement of support obligations to the extent consistent with Federal law pursuant to section 459A(d) of the Act.

* * * * *

*Form* means a federally-approved document used for the establishment and enforcement of support obligations whether compiled or transmitted in written or electronic format, including but not limited to the Order/Notice to Withhold Income for Child Support, and the National Medical Support Notice. In interstate IV–D cases, such forms include those used for child support enforcement proceedings under the UIFSA. *Form* also includes any federally-mandated IV–D reporting form, where appropriate.

*Initiating agency* means the agency from which a referral for action is

forwarded to a responding agency and could include a State IV–D agency, a Tribal IV–D agency or a country as defined in these regulations.

*Intergovernmental IV–D case* means a case in which the dependent child(ren) and the noncustodial parent live in different jurisdictions that has been referred by an initiating agency to a responding agency for services. An intergovernmental IV–D case may include any combination of referrals between States, Tribes, and countries.

*Interstate IV–D case* means a IV–D case in which the noncustodial parent lives and/or works in a different State than the custodial parent and child(ren). Unless otherwise specified, the term applies both to one-state and to two-state interstate cases.

* * * * *

*One-state interstate IV–D case* means an interstate case where a State exercises its jurisdiction over the nonresident parent or otherwise takes direct establishment, enforcement or other action, in accordance with the long-arm provisions of the UIFSA or other State law.

* * * * *

*Responding agency* means the agency that is providing services in response to a referral from an initiating agency in an intergovernmental IV–D case.

* * * * *

*Tribunal* means a court, administrative agency, or quasi-judicial entity authorized under State law to establish, enforce, or modify support orders or to determine parentage.

*Uniform Interstate Family Support Act* (UIFSA) means the model act promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and mandated by section 466(f) of the Act to be in effect in all States.

## PART 302—STATE PLAN REQUIREMENTS

3. The authority citation for part 302 is revised to read as follows:

**Authority:** 42 U.S.C. 651 through 658, 659A, 660, 664, 666, 667, 1302, 1396a (a)(25), 1396b(d)(2), 1396b(o), 1396b(p), and 1396(k).

4. Revise § 302.36 to read as follows:

### § 302.36 Provision of services in intergovernmental IV–D cases.

(a) The State plan shall provide that, in accordance with § 303.7 of this chapter, the State will extend the full range of services available under its IV–D plan to:

(1) Any other State;

(2) Any Tribal IV–D program operating under § 309.65(a) of this chapter; and

(3) Any country as defined in § 303.1 of this chapter.

(b) The State plan shall provide that the State will establish a central registry for intergovernmental IV–D cases in accordance with the requirements set forth in § 303.7(b) of this chapter.

## PART 303—STANDARDS FOR PROGRAM OPERATIONS

5. The authority citation for part 303 is revised to read as follows:

**Authority:** 42 U.S.C. 651 through 658, 659A, 660, 663, 664, 666, 667, 1302, 1396a(a)(25), 1396b(d)(2), 1396b(o), 1396b(p) and 1396(k).

6. Revise § 303.7 to read as follows:

### § 303.7 Provision of services in intergovernmental IV–D cases.

(a) *General Responsibilities.* A State IV–D agency must:

(1) Establish and use procedures for managing its intergovernmental IV–D caseload that ensure provision of necessary services as required by this section and include maintenance of necessary records in accordance with § 303.2 of this part;

(2) Periodically review program performance on intergovernmental IV–D cases to evaluate the effectiveness of the procedures established under this section;

(3) Ensure that the organizational structure and staff of the IV–D agency are adequate to provide for the administration or supervision of the following functions specified in § 303.20(c) of this part for its intergovernmental IV–D caseload: intake; establishment of paternity and the legal obligation to support; location; financial assessment; establishment of the amount of child support; collection; monitoring; enforcement, review and adjustment, and investigation;

(4) Use federally-approved forms in intergovernmental IV–D cases. When using a paper version, providing one copy of each form and supporting documents meets this requirement;

(5) Transmit requests for information and provide requested information electronically to the greatest extent possible in accordance with instructions issued by the Office;

(6) Within 30 working days of receiving a request, provide any order and payment record information requested by a State IV–D agency for a controlling order determination and reconciliation of arrearages;

(7) Notify the other agency within 10 working days of receipt of new information on an intergovernmental case; and

(8) Cooperate with requests for limited services, including locate, service of process, assistance with discovery, teleconferenced hearings, administrative reviews, and high-volume automated administrative enforcement in interstate cases under section 466(a)(14) of the Act.

(b) *Central registry.* (1) The State IV–D agency must establish a central registry responsible for receiving, transmitting, and responding to inquiries on all incoming intergovernmental IV–D cases.

(2) Within 10 working days of receipt of an intergovernmental IV–D case, the central registry must:

(i) Ensure that the documentation submitted with the case has been reviewed to determine completeness;

(ii) Forward the case for necessary action either to the central State Parent Locator Service for location services or to the appropriate agency for processing;

(iii) Acknowledge receipt of the case and request any missing documentation; and

(iv) Inform the initiating agency where the case was sent for action.

(3) If the documentation received with a case is inadequate and cannot be remedied by the central registry without the assistance of the initiating agency, the central registry must forward the case for any action that can be taken pending necessary action by the initiating agency.

(4) The central registry must respond to inquiries from initiating agencies within 5 working days of receipt of the request for a case status review.

(c) *Initiating State IV–D agency responsibilities.* The initiating agency must:

(1) Determine whether or not there is a support order or orders in effect in a case using the Federal and State Case Registries, State records, information provided by the recipient of services, and other relevant information available to the State;

(2) Determine in which State a determination of the controlling order and reconciliation of arrearages may be made where multiple orders exist;

(3) Determine the appropriateness of using its one-state interstate remedies to establish paternity and establish, modify, and enforce a support order, including medical support and income withholding;

(4) Within 20 calendar days of determining that the noncustodial parent is in another jurisdiction and, if appropriate, receipt of any necessary information needed to process the case:

(i) If the agency has determined there are multiple orders in effect under paragraph (c)(1) of this section, ask the appropriate intrastate tribunal for a determination of the controlling order

and for a reconciliation of arrearages or determine the request for such a determination will be made through the appropriate responding agency; and

(ii) Unless the case requires intrastate action in accordance with paragraphs (c)(3) or (4)(i) of this section, refer any intergovernmental IV–D case to the appropriate State central registry, Tribal IV–D program, or central authority of a country for action;

(5) Provide the responding agency sufficient, accurate information to act on the case by submitting with each case any necessary documentation and intergovernmental forms;

(6) Within 30 calendar days of receipt of the request for information, provide the responding agency with an updated intergovernmental form and any necessary additional documentation, or notify the responding agency when the information will be provided;

(7) Notify the responding agency at least quarterly of interest charges, if any, owed on overdue support under an initiating State order being enforced in the responding jurisdiction;

(8) Submit all past-due support owed in IV–D cases that meet the certification requirements under § 303.72 of this part for Federal tax refund offset, and such past-due support, as the State determines to be appropriate, for other Federal enforcement techniques, such as administrative offset under 31 CFR 285.3 and passport denial under section 452(k) of the Act.

(9) Report overdue support to Consumer Reporting Agencies, in accordance with section 466(a)(7) of the Act and § 302.70(a)(7) of this chapter;

(10) Send a request for review of a child support order to another State within 20 calendar days of determining that a request for review of the order should be sent to the other State and of receipt of information from the requestor necessary to conduct the review in accordance with section 466(a)(10) of the Act and § 303.8 of this part;

(11) Distribute and disburse any support collections received in accordance with this section and §§ 302.32, 302.51, and 302.52 of this chapter, sections 454(5), 454B, 457, and 1912 of the Act, and instructions issued by the Office;

(12) Notify the responding agency within 10 working days of case closure that the initiating State IV–D agency has closed its case pursuant to § 303.11 of this part;

(13) Instruct the responding agency to close its interstate case and to stop any withholding order or notice the responding agency has sent to an employer before the initiating State transmits a withholding order or notice to the same or another employer unless the two States reach an alternative agreement on how to proceed; and

(14) If the initiating agency has closed its case pursuant to § 303.11 and has not notified the responding agency to close its corresponding case, make a diligent effort to locate the obligee, including use of the Federal Parent Locator Service and the State Parent Locator Service, and accept, distribute and disburse any payment received from a responding agency.

(d) *Responding State IV–D agency responsibilities*. Upon receipt of a request for services from an initiating agency, the responding agency must:

(1) Accept and process an intergovernmental request for services, regardless of whether the initiating agency elected not to use remedies that may be available under the law of that jurisdiction;

(2) Within 75 calendar days of receipt of an intergovernmental form and documentation from its central registry:

(i) Provide location services in accordance with § 303.3 of this part if the request is for location services or the form or documentation does not include adequate location information on the noncustodial parent;

(ii) If unable to proceed with the case because of inadequate documentation, notify the initiating agency of the necessary additions or corrections to the form or documentation;

(iii) If the documentation received with a case is inadequate and cannot be remedied without the assistance of the initiating agency, process the case to the extent possible pending necessary action by the initiating agency;

(3) Within 10 working days of locating the noncustodial parent in a different State, the responding agency must forward/transmit the forms and documentation to the central registry in the State where the noncustodial parent has been located and notify the initiating agency and central registry where the case has been sent;

(4) Within 10 working days of locating the noncustodial parent in a different jurisdiction within the State, forward/transmit the forms and documentation to the appropriate jurisdiction and notify the initiating agency and central registry of its action;

(5) If the request is for a determination of controlling order:

(i) File the controlling order determination request with the appropriate tribunal in its State within 10 working days of receipt of the request or location of the noncustodial parent, whichever occurs later; and

(ii) Notify the initiating State agency, the Controlling Order State and any State where a support order in the case was issued or registered, of the controlling order determination and any reconciled arrearages within 30 calendar days of receipt of the determination from the tribunal;

(6) Provide any necessary services as it would in an intrastate IV–D case including:

(i) Establishing paternity in accordance with § 303.5 of this part and attempting to obtain a judgment for costs should paternity be established;

(ii) Establishing a child support obligation in accordance with § 302.56 of this chapter and §§ 303.4, 303.31 and 303.101 of this part;

(iii) Processing and enforcing orders referred by an initiating agency, whether pursuant to UIFSA or other legal processes, using appropriate remedies applied in its own cases in accordance with §§ 303.6, 303.31, 303.32, 303.100 through 303.102, and 303.104 of this part;

(iv) Collecting and monitoring any support payments from the noncustodial parent and forwarding payments to the location specified by the initiating agency. The IV–D agency must include sufficient information to identify the case, indicate the date of collection as defined under § 302.51(a) of this chapter, and include the responding State's case identifier and locator code, as defined in accordance with instructions issued by this Office; and

(v) Reviewing and adjusting child support orders upon request in accordance with § 303.8 of this part;

(7) Provide timely notice to the initiating agency in advance of any hearing before a tribunal that may result in establishment or adjustment of an order;

(8) When there is an arrearage assigned to the responding State in a separate case, establish and use procedures to allocate collections, proportionately, between arrearages assigned to the responding State in that separate case and to arrearages owed to an obligee in, or assigned to, the initiating State, when the initiating State has requested assistance from the responding State in collecting those arrearages;

(9) Identify any fees or costs deducted from support payments when forwarding payments to the initiating agency in accordance with paragraph (d)(6)(iv) of this section;

(10) Within 10 days of receipt of a request for case closure from an initiating agency under paragraph (c)(13) of this section, stop the

responding State's income withholding order or notice and close the intergovernmental IV–D case, unless the two States reach an alternative agreement on how to proceed; and

(11) Notify the initiating agency when a case is closed pursuant to § 303.11 of this part.

(e) *Payment and recovery of costs in intergovernmental IV–D cases.* (1) The responding IV–D agency must pay the costs it incurs in processing intergovernmental IV–D cases, including the costs of genetic testing. If paternity is established, the responding agency must seek a judgment for the costs of testing from the alleged father who denied paternity.

(2) Each State IV–D agency may recover its costs of providing services in intergovernmental non-IV–A cases in accordance with § 302.33(d) of this chapter, except that a IV–D agency may not recover costs from an FRC or from a foreign obligee in that FRC, when providing services under sections 454(32) and 459A of the Act.

7. Amend § 303.11 by revising paragraph (b)(12) and adding a new paragraph (b)(13) to read as follows:

**§ 303.11 Case closure criteria.**

* * * * *

(b) * * *

(12) The IV–D agency documents failure by the initiating agency to take an action which is essential for the next step in providing services; and

(13) The initiating agency has notified the responding State that the initiating State has closed its case under § 303.7(c)(12).

* * * * *

## PART 305—PROGRAM PERFORMANCE MEASURES, STANDARDS, FINANCIAL INCENTIVES, AND PENALTIES

8. The authority citation for part 305 is revised to read:

**Authority:** 42 U.S.C. 609(a)(8), 652(a)(4) and (g), 658 and 1302.

**§ 305.63 [Amended]**

9. Amend § 305.63 by

a. Removing ''interstate'' and adding ''intergovernmental'' in its place wherever it occurs in paragraphs (c)(2) through (5) and paragraphs (d)(1) through (4);

b. Removing ''§ 303.7(a), (b) and (c)(1) through (6) and (8) through (10)'' and adding ''§ 303.7 (a), (b), (c), (d)(1) through (5) and (7) through (12), and (e)'' in its place wherever it occurs in paragraphs (c)(2) through (5); and

c. Removing ''§ 303.7(a), (b) and (c)(4) through (6), (c)(8) and (9)'' and adding ''§ 303.7 (a)(4) through (8), (b), (c), (d)(2) through (5) and (7) and (12)'' in its place wherever it occurs in paragraphs (d)(1) through (4).

## PART 308—ANNUAL STATE SELF-ASSESSMENT REVIEW AND REPORT

10. The authority citation for part 308 continues to read as follows:

**Authority:** 42 U.S.C. 654(15)(A) and 1302.

11. Amend § 308.2 by:

a. Removing ''interstate'' and adding ''intergovernmental'' in its place wherever it occurs in paragraphs (b)(1), (c)(1) and (2), and (f)(1);

b. Removing ''§ 303.7(a), (b) and (c)(4) through (6), (c)(8) and (9)'' and adding ''§ 303.7 (a)(4) through (8), (b), (c), (d)(2) through (5) and (7) and (12)'' in its place wherever it occurs in paragraphs (b)(1), (c)(1) and (2), and (f)(1); and

c. Revising paragraph (g) to read as follows:

**§ 308.2 Required program compliance criteria.**

* * * * *

(g) *Intergovernmental services.* A State must have and use procedures required under this paragraph in at least 75 percent of the cases reviewed. For all intergovernmental cases requiring services during the review period, determine the last required action and determine whether the action was taken during the appropriate timeframe:

(1) Initiating intergovernmental cases:

(i) Except when a State has determined that one-state action is required in accord with § 303.7(c)(2), (3) or (4)(i), within 20 calendar days of determining that the noncustodial parent is in another jurisdiction and, if appropriate, receipt of any necessary information needed to process the case, referring that case to the appropriate State Central Registry, Tribal IV–D program, or central authority of the country for action pursuant to § 303.7(c)(4)(ii) of this chapter;

(ii) If additional information is requested, providing the responding agency with an updated form and any necessary additional documentation, or notify the responding agency when the information will be provided, within 30 calendar days of the request pursuant to § 303.7(c)(6) of this chapter;

(iii) Within 20 calendar days after determining that a request for review of the order should be sent to the other State IV–D agency and of receipt of information necessary to conduct the review, sending a request for review and adjustment pursuant to § 303.7(c)(10) of this chapter;

(iv) Within 10 working days of closing its case pursuant to § 303.11 of this chapter, notifying the responding agency pursuant to § 303.7(c)(12) of this chapter;

(v) Within 10 working days of receipt of new information on a case, notifying the responding State pursuant to § 303.7(a)(7) of this chapter;

(vi) Within 30 working days of receiving a request, providing any order or payment record requested by a responding agency for controlling order determination and reconciliation of arrears pursuant to § 303.7(a)(6) of this chapter.

(2) Responding intergovernmental cases:

(i) Within 10 working days of receipt of an intergovernmental IV–D case, the central registry reviewing submitted documentation for completeness, forwarding the case to the State Parent Locator Service (SPLS) for location services or to the appropriate agency for processing, acknowledging receipt of the case, and requesting any missing documentation from the initiating agency, and informing the initiating agency where the case was sent for action, pursuant to § 303.7(b)(2) of this chapter;

(ii) The central registry responding to inquiries from initiating agencies within five working days of a receipt of request for case status review pursuant to § 303.7(b)(4) of this chapter;

(iii) Within 10 days of locating the noncustodial parent in a different jurisdiction within the State or in a different State, forwarding/transmitting the forms and documentation in accordance with Federal requirements pursuant to § 303.7(d)(3) and (4) of this chapter;

(iv) Within two business days of receipt of collections, forwarding any support payments to the initiating jurisdiction pursuant to section 454B(c)(1) of the Act;

(v) Within 10 working days of receipt of new information notifying the initiating jurisdiction of that new information pursuant to § 303.7(a)(7) of this chapter;

(vi) Within 30 working days of receiving a request, providing any order or payment record requested by an initiating agency for controlling order determination and reconciliation of arrears pursuant to § 303.7(a)(6) of this chapter;

(vii) Within 10 days of receipt of a notice or request for case closure from an initiating agency under § 303.7(c)(13) of this chapter, stopping the responding State's income withholding order or notice and closing the responding State's case, pursuant to § 303.7(d)(10) of this chapter, unless the two States

reach an alternative agreement on how to proceed.

* * * * *

[FR Doc. E8–28812 Filed 12–5–08; 8:45 am]

**BILLING CODE 4184–01–P**

## DEPARTMENT OF HOMELAND SECURITY

## Coast Guard

## 46 CFR Parts 71, 114, 115, 122, 170, 171, 172, 174, 175, 176, 178, 179, and 185

**[Docket No. USCG–2007–0030]**

**RIN 1625–AB20**

## Passenger Weight and Inspected Vessel Stability Requirements

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking; reopening of comment period.

**SUMMARY:** The Coast Guard is reopening the period for public comment on its notice of proposed rulemaking (NPRM) on regulations governing the stability of passenger vessels and the maximum number of passengers that may safely be permitted on board a vessel.

**DATES:** The comment period for the proposed rule published at 73 FR 49244, August 20, 2008, is reopened. Comments and related material will be accepted on or before February 6, 2009.

**ADDRESSES:** You may submit comments identified by docket number USCG–2007–0030 using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov*.

(2) *Fax:* 202–493–2251.

(3) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these methods. For instructions on submitting comments, see the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this notice, call Mr. William Peters, U.S. Coast Guard, Office of Design and Engineering Standards, Naval Architecture Division (CG–5212), telephone 202–372–1371. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

**SUPPLEMENTARY INFORMATION:**

### Public Participation and Request for Comments

We encourage you to submit comments and related material on the ''Vessel Passenger Crowding Stability Criteria Study.'' All comments received will be posted, without change, to *http://www.regulations.gov* and will include any personal information you have provided.

*Submitting comments:* If you submit a comment, please include the docket number for this notice (USCG–2007–0030) and provide a reason for each suggestion or recommendation. You may submit your comments and material online, or by fax, mail or hand delivery, but please use only one of these means. We recommend that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov*, select the Advanced Docket Search option on the right side of the screen, insert ''USCG–2007–0030'' in the Docket ID box, press Enter, and then click on the balloon shape in the Actions column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period.

*Viewing comments and the study:* To view the comments and the study, go to *http://www.regulations.gov*, select the Advanced Docket Search option on the right side of the screen, insert USCG–2007–0030 in the Docket ID box, press Enter, and then click on the item in the Docket ID column. If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

*Privacy Act:* Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act, system of records notice regarding our public dockets in the January 17, 2008 issue of the **Federal Register** (73 FR 3316).

### Background and Purpose

On August 20, 2008, The Coast Guard published an NPRM entitled ''Passenger Weight and Inspected Vessel Stability Requirements'' (73 FR 49244). During the NPRM's original comment period, which ended November 18, 2008, members of the public requested that the Coast Guard add to the docket a study cited in support of certain stability findings that resulted in proposed changes to 46 CFR part 171 in the NPRM.

The 12-page study, entitled the ''Pontoon Vessel Passenger Crowding Stability Criteria Study,'' was added to the docket on October 30, 2008 (document number USCG–2007–0030–0139.1). Following the addition of the study, members of the public stated that they did not have sufficient time to review and comment on this study before the close of the comment period.

The Coast Guard is reopening the comment period for 60 days. The comment period will close on February 6, 2009. This reopening will permit you additional time to review and comment on the study; additionally, you are reminded that you may comment on any comments placed in the docket. We may change the proposed rules in response to the comments received.

Dated: December 2, 2008.

**Howard L. Hime,**

*Acting Director of Commercial Regulations and Standards, U.S. Coast Guard.*

[FR Doc. E8–28979 Filed 12–5–08; 8:45 am]

**BILLING CODE 4910–15–P**

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

**[FWS–R9–IA–2008–0116; 96100–1671–000–B6]**

**RIN 1018–AW38**

## Endangered and Threatened Wildlife and Plants; Proposed Rule To List Black-Breasted Puffleg as Endangered Throughout Its Range Under the Endangered Species Act

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), propose to list as endangered the foreign species, black-breasted puffleg (*Eriocnemis nigrivestis*—a hummingbird native to Ecuador)—under the Endangered Species Act of 1973, as amended (Act). This proposal, if made final, would extend the Act's protection to this species. We intend that any final action resulting from this proposal to list this species be as accurate and as effective as possible. Therefore, we request from all interested parties comments or suggestions regarding this proposed rule.

**DATES:** We will accept comments as indicated in the **SUPPLEMENTARY INFORMATION** section that are received or postmarked on or before February 6, 2009. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by January 22, 2009.

**ADDRESSES:** You may submit comments by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS–R9–IA–2008–0116; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept comments by e-mail or fax. We will post all comments on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the **SUPPLEMENTARY INFORMATION** section below for more information).

**FOR FURTHER INFORMATION CONTACT:** Rosemarie Gnam, Chief, Division of Scientific Authority, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Room 110, Arlington, VA 22203; telephone 703–358–1708; facsimile 703–358–2276. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

**SUPPLEMENTARY INFORMATION:**

### Public Comments

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We will not consider comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

If you submit a comment via *http://www.regulations.gov*, your entire comment—including any personal identifying information—will be posted on the Web site. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on *http://www.regulations.gov*.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov*, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Division of Scientific Authority, 4401 N. Fairfax Drive, Room 110, Arlington, VA 22203; telephone 703–358–1708.

### Background

Section 4(b)(3)(A) of the Act requires us to make a finding (known as a ''90-day finding'') on whether a petition to add a species to, remove a species from, or reclassify a species on the Federal Lists of Endangered and Threatened Wildlife and Plants has presented substantial information indicating that the requested action may be warranted. To the maximum extent practicable, the finding must be made within 90 days following receipt of the petition and published promptly in the **Federal Register**. If we find that the petition has presented substantial information indicating that the requested action may be warranted (a positive finding), section 4(b)(3)(A) of the Act requires us to commence a status review of the species if one has not already been initiated under our internal candidate assessment process. In addition, section 4(b)(3)(B) of the Act requires us to make a finding within 12 months following receipt of the petition on whether the requested action is warranted, not warranted, or warranted but precluded by higher priority listing actions (this finding is referred to as the ''12-month finding''). Section 4(b)(3)(C) of the Act requires that a finding of warranted but precluded for petitioned species should be treated as having been resubmitted on the date of the warranted but precluded finding, and is, therefore, subject to a new finding within 1 year and subsequently thereafter until we take action on a proposal to list or withdraw our original finding. The Service publishes an annual notice of resubmitted petition findings (annual notice) for all foreign species for which listings were previously found to be warranted but precluded.

### Previous Federal Action

On May 6, 1991, we received a petition (1991 petition) from Alison Stattersfield, of International Council for Bird Preservation (ICBP), to list 53 foreign birds under the Act, including the black-breasted puffleg that is the subject of this proposed rule. On December 16, 1991, we made a positive 90-day finding and announced the initiation of a status review of the species included in the 1991 petition (56 FR 65207). On March 28, 1994 (59 FR 14496), we published a 12-month finding on the 1991 petition, along with a proposed rule to list 30 African birds under the Act, of which were from the 1991 petition. In that document, we announced our finding that listing the remaining 38 species from the 1991 petition, including the black-breasted puffleg, was warranted but precluded because of other listing activity.

Per the Service's listing priority guidelines (September 21, 1983; 48 FR 43098), we identified the listing priority numbers (LPNs) (ranging from 1 to 12) for all outstanding foreign species in our 2007 ANOR (72 FR 20184), published on April 23, 2007. In that notice, the black-breasted puffleg was designated with an LPN 2 and we determined that listing continued to be warranted but precluded. It should be noted that ''Table 1—Candidate Review,'' in our 2007 ANOR, erroneously noted the black-breasted puffleg with an LPN of 3. However, the correct LPN in 2007 was ''2,'' as was discussed in the body of the notice (72 FR 20184, p. 20197).

On January 12, 1995 (60 FR 2899), we reiterated the warranted-but-precluded status of the remaining species from the 1991 petition, with the publication of the final rule to list the 30 African birds. We made subsequent warranted-but-precluded findings for all outstanding foreign species from the 1991 petition, including the black-breasted puffleg, as published in our annual notices of review (ANOR) on May 21, 2004 (69 FR

29354), and April 23, 2007 (72 FR 20184).

On January 23, 2008, the United States District Court ordered the Service to propose listing rules for five foreign bird species, actions which had been previously determined to be warranted but precluded: The Andean flamingo (*Phoenicoparrus andinus*), black-breasted puffleg (*Eriocnemis nigrivestis*), Chilean woodstar (*Eulidia yarrellii*), medium tree finch (*Camarhynchus pauper*), and the St. Lucia forest thrush (*Cichlherminia lherminieri sanctaeluciae*). The court ordered the Service to issue proposed listing rules for these species by the end of 2008.

On July 29, 2008 (73 FR 44062), we published in the **Federal Register** a notice announcing our annual petition findings for foreign species (2008 ANOR). In that notice, we announced that listing was warranted for 30 foreign bird species, including the black-breasted puffleg, which is the subject of this proposed rule. The Andean flamingo, Chilean woodstar, medium tree finch, and St. Lucia forest thrush are the subject of separate proposed rules currently under preparation.

**Species Information**

*Species Description*

The black-breasted puffleg, endemic to Ecuador and a member of the hummingbird family (Trochilidae), is approximately 3.25 inches (in) (8.5 centimeters (cm)) long (Fjeldså and Krabbe 1990, p. 272; Ridgely and Greenfield 2001a, p. 373; Ridgely and Greenfield 2001b, p. 280). The species is locally known as ''*Calzadito pechinegro*'' or ''*Zamarrito pichinegro*'' (United Nations Monitoring Programme-World Conservation Monitoring Centre (UNEP–WCMC) 2008b, p. 1). Black-breasted pufflegs have distinctive white leg plumage (ergo, the name ''puffleg'') and straight, black bills. Males have entirely black upperparts, mostly black underparts, and dark steel-blue forked tails. Females have shiny, bronze-green upper plumage, turning blue toward the tail, with golden-green underparts (BirdLife International (BLI) 2007, p. 1).

*Taxonomy*

This species was first taxonomically described by Bourcier and Mulsant in 1852 and placed in Trochilidae as *Eriocnemis nigrivestis* (BLI 2007, p. 1). According to the species database for the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the black-breasted puffleg is also known by the synonym, *Trichilus nigrivestis* (UNEP–WCMC 2008b). Both CITES and BirdLife International recognize the species as *Eriocnemis nigrivestis* (BLI 2007, p. 1; UNEP–WCMC. 2008b, p. 1). Therefore, we accept the species as *Eriocnemis nigrivestis*, which also follows the Integrated Taxonomic Information System (ITIS 2008, p. 1).

*Habitat and Life History*

Black-breasted pufflegs prefer humid temperate and elfin forests (Fjeldså and Krabbe 1990, p. 272; Ridgely and Greenfield 2001a, p. 373; Ridgely and Greenfield 2001b, p. 280). This habitat is described as grassy ridges surrounded by stunted montane forest with a dense understory (de Hoyo *et al.* 1999, p. 639), where *Polylepis* trees (no common name) predominate (World Land Trust 2007, p. 1). Altitudinal migrants, the species is found mainly at higher altitudes—above 10,000 feet (ft) (3,100 meters (m))—during the rainy season (November–February) and at lower elevations 9,006–10,000 ft (2,745–3,100 m) the rest of the year (del Hoyo *et al.* 1999, p. 639; Fjeldså and Krabbe 1990, p. 272). However, the species has been recorded at elevations as low as 7,874 ft (2,400 m) up to 11,483 ft (4,570 m) (del Hoyo *et al.* 1999, p. 639; Fjeldså and Krabbe 1990, p. 272; Ridgely and Greenfield 2001a, p. 374).

As recently as 1990, researchers were unaware of the puffleg's breeding habits (Fjeldså and Krabbe 1990, p. 272) and there continues to be little information (BLI 2007, p. 1). Del Hoyo *et al.* (1999, p. 639) reported that the species breeds from October to March, producing a clutch size of 2, and that the female incubates the eggs. Based on the species' seasonal migration (del Hoyo *et al.* 1999, p. 639; Fjeldså and Krabbe 1990, p. 272), breeding presumably occurs at altitudes above 10,000 ft (3,100 m).

Their altitudinal migration coincides with the flowering of certain plants during the rainy season, including the small rubiad tree (*Palicourea huigrensis* (no common name)), which serves as its primary nectar source (Bleiweiss and Olalla 1983, pp. 657–658; del Hoyo *et al.* 1999, pp. 530–531; Fjeldså and Krabbe 1990, p. 272). The species also feeds on flower nectar of other shrubs and vines, including: *Thibaudia floribunda* (no common name), *Disterigma* sp. (no common name), *Rubus* sp. (no common name), *Tropaeolum* sp. (no common name), and *Psychotria uliginosa* (no common name) (Bleiweiss and Olalla 1983, pp. 657–658; Collar *et al.* 1992, pp. 516–517; del Hoyo *et al.* 1999, pp. 530–531; Phillips 1998, p. 21). Black-breasted pufflegs feed low in the shrubbery along forest margins, often while perched (Fjeldså and Krabbe 1990, p. 272; Ridgely and Greenfield 2001b, p. 280). The species will frequently perch and will infrequently alight on the ground (del Hoyo *et al.* 1999, p. 639).

*Historical Range and Distribution*

Historically, the black-breasted puffleg inhabited the elfin forests along the northern ridge-crests of both Volcán Pichincha and Volcán Atacazo in northwest Ecuador (BLI 2007, p. 2; Fjeldså and Krabbe 1990, p. 272; Krabbe *et al.* 1994, p. 9). The species appears to have been extirpated from Volcán Atacazo (World Land Trust 2007, p. 3). It has not been confirmed on Volcán Atacazo since 1902; the possible sighting of a female at treeline (3,500 m; 11,483 ft) in 1983 has never been confirmed (BLI 2007, 2; Collar *et al.* 1992, p. 174; del Hoyo *et al.* 1999, p. 639). Habitat loss, specifically the felling of *Polylepis* wood for conversion to charcoal, was the primary cause of historical black-breasted puffleg declines (Philips 1998, p. 21) (see Factor A). Following more than 13 years without any observation of the species, the black-breasted puffleg was rediscovered on Volcán Pichincha in 1993 (Phillips 1998, p. 21). The number of specimens in museum collections taken in the nineteenth century up until 1950 is over 100, suggesting the species was once more common (Collar *et al.* 1992, p. 516).

*Current Range and Distribution*

The black-breasted puffleg is currently known to occur only on the north side of Volcán Pichincha near Quito, Ecuador, in temperate elfin forests at altitudes between 9,350 and 11,483 ft (2,850 and 3,500 m) on the (Fjeldså and Krabbe 1990, p. 272; Ridgely and Greenfield 2001a, p. 373; Ridgely and Greenfield 2001b, p. 280) Volcán Pichincha peaks at 15,699 ft (4,785 m) (Phillips 1998, p. 21). The current extent of the species' range is approximately 33 square miles ($mi^2$) (88 square kilometers ($km^2$)) (BLI 2004, p. 2; Hirschfeld 2007, pp. 178–179).

*Population Estimates*

The black-breasted puffleg is currently restricted to a single population, ranging in size from 50 to no more than 250 adult individuals, with a declining trend (BLI 2007, p. 2; del Hoyo *et al.* 1999, p. 530). BirdLife International, a global organization that consults with and assimilates information from species experts, estimated that the species has experienced a population decline of between 50 and 79 percent in the past 10 years, with more than 20 percent of this loss having occurred within the

past 5 years. This rate of decline is predicted to continue (BLI 2007, p. 4).

*Conservation Status*

The black-breasted puffleg is identified as a critically endangered species under Ecuadorian law (Ecolex 2003b, p. 36). The black-breasted puffleg is classified as ''Critically Endangered'' in the 2006 IUCN Red List, because it has an extremely small range and the population is restricted to one location (BLI 2007, p. 1).

**Summary of Factors Affecting the Species**

Under section 4(a)(1) of the Act (16 U.S.C. 1533(a)(1)) and regulations promulgated to implement the listing provisions of the Act (50 CFR part 424.11), we may list a species as threatened and endangered on the basis of five threat factors: (A) Present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. Listing may be warranted based on any of the above threat factors, either singly or in combination.

Under the Act, we may determine a species to be endangered or threatened. An endangered species is defined as a species which is in danger of extinction throughout all or a significant portion of its range. A threatened species is defined as a species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. Therefore, for the black-breasted puffleg, we evaluated the best available scientific and commercial information under the five listing factors to determine whether it met the definition of endangered or threatened.

*A. The Present or Threatened Destruction, Modification, or Curtailment of the Habitat or Range*

The black-breasted puffleg is currently restricted to the elfin forests along the northern ridge-crests of the Volcán Pichincha in northwest Ecuador (BLI 2007, p. 2; Fjeldså and Krabbe 1990, p. 272; Krabbe *et al.* 1994, p. 9). The species has not been confirmed in any other known locality on Volcán Atacazo since 1902 (BLI 2007, 2; Collar *et al.* 1992, p. 174). Within the current range of the black-breasted puffleg, approximately 93 percent of the habitat has been destroyed, and the current extent of the species' range is approximately 88 km$^2$ (33 mi$^2$) (BLI 2004, p. 2; Hirschfeld 2007, pp. 178–179).

*Deforestation rates and patterns:* The ridge-crests within the range of the black-breasted puffleg are relatively level, and local settlers have cleared the majority of forested habitat within the species' range and converted it to potato cultivation and grazing (Bleiweiss and Olalla 1983, p. 656; del Hoyo 1999, pp. 530–531). Some ridges are almost completely devoid of natural vegetation, and even if black-breasted pufflegs still occur in these areas, their numbers are most likely quite low (BLI 2004, p. 2).

The areas outside the Yanacocha Reserve (see Refugia), but still within the range of the black-breasted puffleg, continue to be affected by habitat loss and fragmentation. In an analysis of deforestation rates and patterns using satellite imagery in the western Andean slopes of Colombia and Ecuador, Viña *et al.* (2004, pp. 123–124) found that from 1973 through 1996, a total of 82,924 ha (204,909 ac) of tropical forests within the area studied were converted to other uses. This corresponds to a nearly one-third total loss of primary forest habitat or a nearly 2 percent mean annual rate within the study area. More recent reports identified similar forest habitat losses in Ecuador. Between the years 1990 and 2005, Ecuador lost a total of 2.96 million ha (7.31 million ac) of primary forest, which represents a 16.7 percent deforestation rate and a total loss of 21.5 percent of forested habitat since 1990 (Butler 2006, pp. 1–3; FAO 2003, p. 1).

*Other Anthropogenic Factors:* Within the range of the black-breasted puffleg, numerous human activities are affecting the current status of the species, including: Clearance of forested habitat for subsistence agriculture or commercial use or grazing (Hirschfeld 2007, pp. 178–179); habitat destruction and alteration as a result of fire (Bird Conservation 2005, p. 12; Goodland 2002, pp. 16–17; Hirschfeld 2007, pp. 178–179; Phillips 1998, pp. 20–21); habitat destruction and pollution due to oil development and distribution (Amazon Watch 2001, pp. 1–16; Cárdenas and Rodríguez 2004, pp. 355; Goodland 2002, pp. 16–17; Hirschfeld 2007, pp. 178–179); and increased access and habitat destruction resulting from road development (Hirschfeld 2007, pp. 178–179). Roads create barriers to animal movement, expose animals to traffic hazards, and increase human access into habitat, facilitating further exploitation and habitat destruction (Hunter 1996, 158–159).

In 2001, the Ecuadorian government agreed to construct a pipeline to transport heavy oil from the Amazon basin to Esmeraldas on the Pacific Coast (The Mindo Working Group 2001, p. 1). The environmental impact study revealed that the proposed route went through black-breasted puffleg habitat (The Mindo Working Group 2001, pp. 5, 11). Satellite mapping showed that much of the area in puffleg habitat was already destroyed, with little remaining habitat above 2,800 m (9,186 ft). The Black-breasted Puffleg had previously been found at 3,100 m (10,167 ft), in an upper extension from the likely unsuitable forested zone lower down. The pipeline, as proposed, would pass through pasture slightly above this patch and would further destroy habitat with the construction of a road (The Mindo Working Group 2001, p. 11). The pipeline was recently constructed, transecting every major ecosystem on the Volcán Pichinche, including black-breasted puffleg habitat. The pipeline also deforested pristine habitat, making these areas more accessible and opening them up to further human infiltration (BLI 2007, p. 12).

*Refugia:* In 2001, the Yanacocha Reserve (reserve) was established on the slopes of Volcán Pichincha (Bird Conservation 2005, p. 12; Philips 1998, p. 20). The Reserve encompasses approximately 1,250 ha (3,100 ac), including approximately 960 ha (2,372 ac) of elfin (*Polylepis* spp.) forest (Hirschfeld 2007, pp. 178–179; World Land Trust 2007, p. 1). This reserve encompasses habitat that is used seasonally by the black-breasted puffleg, from March to July, when the species is migrating up or down the mountain (Bird Conservation 2005, p.12; World Land Trust 2007, p. 1). Within the reserve, charcoal production, considered the primary cause for the species' historical decline, was forbidden (Philips 1998, p. 21). The Yanacocha Reserve is managed for ecotourism, environmental education, and conservation initiatives, including restoration of the *Polylepis* woodland (BLI 2007, p. 8; Fondacion Jocotoco 2006, p. 1). The Reserve is negatively affected by human population pressures, including clearing for agricultural expansion and fires caused by slash-and-burn agricultural practices (Bird Conservation 2005, p. 12; Philips 1998, p. 21). Hunting, extraction of non-timber resources (such as orchids), and tourism are considered to have a minor impact within the Reserve (BLI 2007, p. 12).

Summary of Factor A

The black-breasted puffleg prefers elfin forests at altitudes between 2,850–3,500 m (9,350–11,483 ft) (Fjeldså and Krabbe 1990, p. 272; Ridgely and

Greenfield 2001a, p. 373; Ridgely and Greenfield 2001b, p. 280). The current population is small and limited to a narrow elevational band on Volcán Pichinche, which contains fragmented, disjunct, and isolated habitat. Although the species range is partly included in a protected area, the habitat within the reserve continues to be altered or disturbed by human activities. The construction of a pipeline through black-breasted puffleg habitat led to loss and disturbance of pristine habitat and increased human access into the area with the development of infrastructure. Habitat destruction, alteration, and conversion were key factors in the species' historical decline and continue to be factors affecting the status of the species. Therefore, we find that the present destruction, modification, and curtailment of habitat are a threat to the black-breasted puffleg.

*B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes*

In 1987, the black-breasted puffleg was listed in CITES Appendix II, which includes species that are not necessarily threatened with extinction, but which require regulation of international trade in order to ensure that trade of the species is compatible with the species' survival. International trade in specimens of Appendix–II species is authorized through permits or certificates under certain circumstances, including verification that trade will not be detrimental to the survival of the species in the wild and that the specimen was legally acquired (UNEP–WCMC 2008a, p. 1).

Since its listing in 1987, there have been five CITES-permitted international shipments of the black-breasted puffleg, consisting of a total of 3 specimens imported into the United States and 14 re-exported through the United States. According to the World Conservation Monitoring Centre trade data (UNEP–WCMC 2008c, p. 1), all of these transactions involved the transport of specimens; 9 for scientific purposes, 6 for commercial trade, and 2 for personal purposes. This trade occurred between 1996 and 2002, and there has been no CITES trade in this species since 2002 (UNEP–WCMC 2008c, p. 1). Although we are concerned that the species' small population size (see Factor E) cannot withstand excessive harvest, we believe that this limited amount of international trade, controlled via valid CITES permits, is not a threat to the species.

We are unaware of any other information currently available that addresses the occurrence of overutilization for commercial, recreation, scientific, or education purposes that may be affecting the black-breasted puffleg population. As such, we do not consider overutilization to be a threat to the species.

*C. Disease or Predation*

We are not aware of any occurrence of disease or predation that may be causing a decline of the black-breasted puffleg. As a result, we do not consider disease or predation to be a threat to the black-breasted puffleg.

*D. The Inadequacy of Existing Regulatory Mechanisms*

The black-breasted puffleg is identified as a critically endangered species under Ecuadorian law and Decree 3,516 of 2003—Unified Text of the Secondary Legislation of the Ministry of Environment (Ecolex 2003b, p. 36). Decree 3,516 summarizes the law governing environmental policy in Ecuador and provides that the country's biodiversity be protected and used primarily in a sustainable manner. Appendix 1 of Decree No. 3,516 lists the Ecuadorian fauna and flora that are considered endangered. Species are categorized as critically endangered (En peligro critico), endangered (En peligro), or vulnerable (Vulnerable) (Ecolex 2003b, p. 17). Resolution No. 105 of January 28, 2000, and Agreement No. 143 of January 23, 2003, regulate and prohibit commercial and sport hunting of all wild bird species, except those specifically identified by the Ministry of the Environment or otherwise permitted (Ecolex 2000, p. 1; Ecolex 2003a, p. 1). The Ministry of the Environment does not permit commercial or sport hunting of the black-breasted puffleg because of its status as a critically endangered species (Ecolex 2003b, p. 17). However, we do not consider hunting (Factor B) to be a current threat to the black-breasted puffleg, so this law does not reduce any threats to the species.

Ecuador has numerous laws and regulations pertaining to forests and forestry management including: The Forestry Act (comprised of Law No. 74 of 1981—Forest Act and conservation of natural areas and wildlife (Faolex 1981, p. 1–54)—and Law No. 17 of 2004—Consolidation of the Forest Act and conservation of natural areas and wildlife (Faolex 2004, pp. 1–29)); a Forestry Action Plan (1991–1995); the Ecuadorian Strategy for Forest Sustainable Development of 2000 (Estrategia para el Desarrollo Forestal Sostenible); and, Decree 346, which recognizes that natural forests are highly vulnerable (ITTO 2006, p. 225). However, the International Tropical Timber Organization considered ecosystem management and conservation in Ecuador, including effective implementation of mechanisms that would protect the black-breasted puffleg and its habitat, to be lacking (ITTO 2006, p. 229).

The governmental institutions responsible for oversight appear to be under-resourced, and there is a lack of law enforcement on the ground. Despite the creation of a national forest plan, there appears to be a lack of capacity to implement this plan due to insufficient political support, unclear or unrealistic forestry standards, inconsistencies in application of regulations, discrepancies between actual harvesting practices and forestry regulations, the lack of management plans for protected areas, and high bureaucratic costs. All these inadequacies have facilitated ongoing habitat destruction, such as widespread unauthorized logging (ITTO 2006, p. 229), forest clearing for conversion to agriculture or grazing (Bleiweiss and Olalla 1983, p. 656; del Hoyo 1999, pp. 530–531; Hirschfeld 2007, pp. 178–179), habitat destruction and alteration as a result of fire caused by slash-and-burn agriculture (Bird Conservation 2005, p. 12; Goodland 2002, pp. 16–17; Hirschfeld 2007, pp. 178–179; Phillips 1998, pp. 20–21), habitat destruction and pollution due to oil development and distribution (Amazon Watch 2001, pp. 1–16; BLI 2007, p. 12; Cárdenas and Rodríguez 2004, pp. 355; Goodland 2002, pp. 16–17; Hirschfeld 2007, pp. 178–179; The Mindo Working Group 2001, p. 1); and increased access and habitat destruction resulting from road development (Hirschfeld 2007, pp. 178–179). In addition, most of Ecuador's forests are privately owned or owned by communities (ITTO 2006, p. 224) and the management and administration of Ecuador's forest resources and forest harvest practices is insufficient and unable to protect against unauthorized forest harvesting, degradation, and conversion (ITTO 2006, p. 229). Thus, Ecuadorian forestry regulations have not mitigated the threat of habitat destruction (Factor A).

The Ecuadorian government recognizes 31 different legal categories of protected lands (e.g., national parks, biological reserves, geo-botanical reserves, bird reserves, wildlife reserves, etc.). Currently, the amount of protected land (both forested and non-forested) in Ecuador totals approximately 4.67 million ha (11.5 million ac) (ITTO 2006, p. 228). However, only 38 percent of these lands have appropriate conservation measures in place to be considered protected areas according to international standards (i.e., areas that are managed for scientific study or

wilderness protection, for ecosystem protection and recreation, for conservation of specific natural features, or for conservation through management intervention (IUCN 1994, pp. 17–20). Moreover, only 11 percent have management plans, and less than 1 percent (13,000 ha (32,125 ac)) have implemented those management plans (ITTO 2006, p. 228).

The black-breasted puffleg occurs within the Yanacocha Reserve (931 ha (2,300 ac)) at least seasonally, from March to July, as it migrates from higher to lower altitudes (Bird Conservation 2005, p. 12; World Land Trust 2007, p. 1). The area is being managed for ecotourism, environmental education, and conservation initiatives, including restoration of the *Polylepis* woodland (Fondacion Jocotoco 2006, p. 1). However, within the Reserve, there are ongoing human population pressures from expanding agriculture, along with slash-and-burn agricultural practices (BLI 2007, p. 12) (Factor A). Thus, regulatory mechanisms associated with protected land do not mitigate the impact of threats from habitat destruction.

The black-breasted puffleg is listed in Appendix II of CITES (UNEP–WCMC 2008b). CITES is an international treaty among 173 nations, including Ecuador and the United States that entered into force in 1975 (UNEP–WCMC 2008a, p. 1). In the United States, CITES is implemented through the U.S. Endangered Species Act (ESA). Under this law, the Secretary of the Interior and the Secretary of Commerce were given the joint responsibility for determining whether to place animals and plants on the Federal list of endangered and threatened species and for taking measures to protect and conserve the listed species. The Secretary of the Interior has delegated the Department's responsibility for CITES to the Director of the U.S. Fish and Wildlife Service (FWS) and established the Scientific and Management Authorities to implement the treaty. Under this treaty, countries work together to ensure that international trade in animal and plant species is not detrimental to the survival of wild populations by regulating the import, export, re-export, and introduction from the sea of CITES-listed animal and plant species (USFWS 2008, p. 1). However, as discussed under Factor B, we do not consider international trade to be a threat impacting the black-breasted puffleg. Therefore, protection under this Treaty does not reduce any threats to the species.

Summary of Factor D

The black-breasted puffleg is protected under CITES. However, overutilization (Factor B) is not a threat to this species. Ecuador has adopted numerous laws and regulatory mechanisms to administer and manage wildlife and their habitat. The black-breasted puffleg is listed as endangered under Ecuadorian law and ranges partly within a protected area (Yanacocha Reserve). However, on-the-ground enforcement of these laws and oversight of the local jurisdictions implementing and regulating activities is insufficient for these measures to be effective in conserving the black-breasted puffleg or its habitat. As discussed under Factor A, habitat destruction, degradation, and fragmentation continue throughout the existing range of the black-breasted puffleg. Therefore, we find that the existing regulatory mechanisms, as implemented, are inadequate to mitigate the primary threat of habitat destruction to the black-breasted puffleg.

*E. Other Natural or Manmade Factors Affecting the Continued Existence of the Species*

*Small Population Size:* The black-breasted puffleg population has declined as a result of habitat destruction (Bleiweiss and Olalla 1983, pp. 656–661; Collar *et al.* 1992, pp. 516–517) (Factor A). A large collection of museum specimens (over 100) suggests that the species was more common and more widespread than the currently known populations (BLI 2004, p. 2; Collar *et al.* 1994, p. 121). Between 1950 and 1993, only three confirmed sightings of the species were made (Hirschfeld 2007, pp. 178–179). The black-breasted puffleg ranges partly within the Yanacocha Reserve, along a narrow elevational strip between 2,440 and 3,700 m (8,000 and 12,100 ft) (Fjeldså and Krabbe 1990, p. 272; Krabbe *et al.* 1994, pp. 8–9). The total population size of the black-breasted puffleg is estimated to range from 50 to no more than 250 adult individuals, with the trend of all the populations being in decline (BLI 2007, p. 2).

Small population sizes render species vulnerable to any of several risks, including inbreeding depression, loss of genetic variation, and accumulation of new mutations. Inbreeding can have individual or population-level consequences, either by increasing the phenotypic expression (the outward appearance or observable structure, function or behavior of a living organism) of recessive, deleterious alleles or by reducing the overall fitness of individuals in the population (Charlesworth & Charlesworth 1987, p. 231; Shaffer 1981, p. 131). Small, isolated populations of wildlife species are also susceptible to demographic problems (Shaffer 1981, p. 131), which may include reduced reproductive success of individuals and skewed sex ratios. Once a population is reduced below a certain number of individuals, it tends to rapidly decline towards extinction (Franklin 1980, pp. 147–148; Gilpin and Soulé 1986, p. 25; Holsinger 2000, pp. 64–65; Soulé 1987, p. 181).

Based on genetic considerations, a generally accepted approximation of minimum viable population size is described by the 50/500 rule, where minimum viable population size is defined as the minimum number of individuals that is sufficient to respond over time to unexpected environmental conditions within the species' habitat (Shaffer 1981, pp. 132–3; Soulé 1980, pp. 160–162). This rule states that an effective population ($N_e$) of 50 individuals is the minimum size required to avoid imminent risks from inbreeding. $N_e$ represents the number of animals in a population that actually contribute to reproduction (i.e., the number of breeding individuals), and is often much smaller than the census, or total number of individuals in the population (N). Furthermore, the rule states that the long-term fitness of a population requires an $N_e$ of at least 500 individuals, so that it will not lose its genetic diversity over time and will maintain an enhanced capacity to adapt to changing conditions. Therefore, an analysis of the fitness of this population would be a good indicator of the species' overall survivability. The total population size of the black-breasted puffleg is estimated to be between 50 and 249 individuals. Fifty just meets the threshold for the minimum effective population size required to avoid risks from inbreeding ($N_e$ = 50 individuals). The upper limit of the population, 249 individuals, is well below the minimum threshold ($N_e$ = 500 individuals) at which long-term fitness of a population is likely to lose enough genetic diversity over time, thus reducing its capacity to adapt to changing conditions.

The black-breasted puffleg's restricted range combined with its small population size (BLI 2007, p. 2; del Hoyo *et al.* 1999, p. 639; Fjeldså and Krabbe 1990, p. 272; Krabbe *et al.* 1994, p. 9) makes the species particularly vulnerable to the threat of adverse natural (e.g., genetic, demographic, or environmental) and manmade (e.g., deforestation, habitat alteration, wildfire) events that destroy individuals and their habitat (Holsinger 2000, pp. 64–65; Primack 1998, pp. 279–308;

Young and Clarke 2000, pp. 361–366). As such, we currently consider the single black-breasted puffleg population to be at risk due to lack of short- and long-term viability.

Summary of Factor E

The black-breasted puffleg is currently limited to one small population; this reduction in range makes it vulnerable to genetic and demographic risks that negatively impact the species' short- and long-term viability. The species' population size has declined considerably within the past 10 years (50–79 percent), and this rate of decline is expected to continue. Based on this information, we have determined that the species is particularly vulnerable to the threat of adverse natural (e.g., genetic, demographic) and manmade (e.g., slash-and-burn agriculture, infrastructural development) events that destroy individuals and their habitat, and that the genetic and demographic risks are exacerbated by the manmade factors (Factor A)

Status Determination for the Black-Breasted Puffleg

There are three primary factors impacting the continued existence of the black-breasted puffleg: (1) Habitat destruction, fragmentation, and degradation; (2) limited size and isolation of remaining populations; and (3) inadequate regulatory mechanisms. The black-breasted puffleg, a small hummingbird known to exist in one population, occupies a narrow range of distribution, preferring temperate elfin forests at altitudes of between 2,850 and 3,500 m (9,350 and 11,483 ft). The species is an altitudinal migrant, spending the breeding season (November–February) in the humid elfin forest and the rest of the year at lower elevations.

The primary threat to this species, habitat loss, has led to widespread deforestation, and conversion of primary forests to human settlement and agricultural uses has led to the fragmentation of habitat throughout the range of the black-breasted puffleg and isolation of the remaining populations. This habitat, which is already disturbed and fragmented, continues to be altered by anthropogenic factors such as habitat alteration, destruction, and fragmentation as a result of agricultural development, oil development and distribution, and road development. Although the puffleg is listed as a critically endangered species under Ecuadorian law and part of its range occurs within a protected area, implementation of existing regulatory mechanisms is inadequate to protect the species (Factor D), as they have been ineffective in curbing the primary threat to the black-breasted puffleg, which is habitat loss or alteration (Factor A).

The total population size of the black-breasted puffleg is estimated to range from 50 to no more than 250 adult individuals, with a declining trend. The black-breasted puffleg's restricted range, combined with its small population size, makes the species particularly vulnerable to the threat of adverse natural (e.g., genetic, demographic, or environmental) and manmade (e.g., deforestation, habitat alteration, wildfire) events that destroy individuals and their habitat.

We have carefully assessed the best available scientific and commercial information regarding the past, present, and potential future threats faced by the black-breasted puffleg. The population of this species has declined between 50 and 79 percent in the past 10 years, with more than 20 percent of this loss having occurred within the past 5 years, including the possible local extirpation of the species from Volcán Atacazo. These rates of decline are expected to continue. Habitat destruction, alteration, conversion, and fragmentation (Factor A) have been and continue to be factors in the black-breasted puffleg's decline. The impacts of habitat loss are exacerbated by the species' already small population size, making the black-breasted puffleg particularly vulnerable to natural and human factors (e.g., genetic isolation, wildfire, agricultural development, increased human settlement, road development, and oil pipeline development) (Factor E). We consider the threats to the black-breasted puffleg to be equally present and of the same magnitude throughout the species' current range. Based on this information, we conclude that the black-breasted puffleg is in danger of extinction throughout all of its range. Based on the best available scientific and commercial information regarding the past, present, and potential future threats faced by the black-breasted puffleg, we determine that the black-breasted puffleg is endangered throughout its range. Therefore, on the basis of the best available scientific and commercial information, we are proposing to list the black-breasted puffleg as an endangered species.

**Available Conservation Measures**

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness, and encourages and results in conservation actions by Federal and State governments, private agencies and groups, and individuals.

Section 7(a) of the Act, as amended, and as implemented by regulations at 50 CFR part 402, requires Federal agencies to evaluate their actions within the United States or on the high seas with respect to any species that is proposed or listed as endangered or threatened, and with respect to its critical habitat, if any is being designated. However, given that the black-breasted puffleg is not native to the United States, no critical habitat is being proposed for designation with this rule.

Section 8(a) of the Act authorizes limited financial assistance for the development and management of programs that the Secretary of the Interior determines to be necessary or useful for the conservation of endangered and threatened species in foreign countries. Sections 8(b) and 8(c) of the Act authorize the Secretary to encourage conservation programs for foreign endangered species and to provide assistance for such programs in the form of personnel and the training of personnel.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all endangered and threatened wildlife. As such, these prohibitions would be applicable to the black-breasted puffleg. These prohibitions, pursuant to 50 CFR 17.21, make it illegal for any person subject to the jurisdiction of the United States to ''take'' (take includes: Harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or to attempt any of these) within the United States or upon the high seas, import or export, deliver, receive, carry, transport, or ship in interstate or foreign commerce in the course of a commercial activity; or sell or offer for sale in interstate or foreign commerce, any endangered wildlife species. It also is illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken in violation of the Act. Certain exceptions apply to agents of the Service and State conservation agencies.

Permits may be issued to carry out otherwise prohibited activities involving endangered and threatened wildlife species under certain circumstances. Regulations governing permits are codified at 50 CFR 17.22 for endangered species and 17.32 for threatened species. With regard to endangered wildlife, a permit must be issued for the following purposes: For scientific purposes, to enhance the

propagation or survival of the species, and for incidental take in connection with otherwise lawful activities.

**Public Hearings**

The Act provides for one or more public hearings on this proposal, if we receive any requests for hearings. We must receive your request for a public hearing within 45 days after the date of this publication in the **Federal Register**. Such requests must be made in writing and be addressed to the Chief of the Division of Scientific Authority (see **ADDRESSES** section). We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings at least 15 days before the first hearing.

**Peer Review**

In accordance with our policy, ''Notice of Interagency Cooperative Policy for Peer Review in Endangered Species Act Activities,'' that was published on July 1, 1994 (59 FR 34270), we will seek the expert opinion of at least three appropriate independent specialists regarding this proposed rule. The purpose of peer review is to ensure listing decisions are based on scientifically sound data, assumptions, and analysis. We will send copies of this proposed rule to the peer reviewers immediately following publication in the **Federal Register**.

*Required Determinations*

**Regulatory Planning and Review (Executive Order 12866)**

The Office of Management and Budget has determined that this rule is not significant under Executive Order 12866.

**National Environmental Policy Act (NEPA) (42 U.S.C. 4321 et seq.)**

We have determined that Environmental Assessments and Environmental Impact Statements, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Act. A notice outlining our reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

**Clarity of the Rule**

We are required by Executive Orders 12866 and 12988, and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must: (a) Be logically organized; (b) Use the active voice to address readers directly; (c) Use clear language rather than jargon; (d) Be divided into short sections and sentences; and, (e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

*References Cited*

A complete list of all references cited in this proposed rule is available on the Internet at *http://www.regulations.gov* or upon request from the Division of Scientific Authority, U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

*Author(s)*

The primary author(s) of this proposed rule is the staff of the Division of Scientific Authority, U.S. Fish and Wildlife Service (see **ADDRESSES** section).

**List of Subjects in 50 CFR Part 17**

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

**Proposed Regulation Promulgation**

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

## PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

**Authority:** 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Public Law 99–625, 100 Stat. 3500; unless otherwise noted.

2. In § 17.11(h), by adding a new entry for ''puffleg, black-breasted,'' in alphabetical order under BIRDS to the List of Endangered and Threatened Wildlife to read as follows:

**§ 17.11 Endangered and threatened wildlife.**

* * * * *

(h) * * *

| Species | | Historic range | Vertebrate population where endangered or threatened | Status | When listed | Critical habitat | Special rules |
|---|---|---|---|---|---|---|---|
| Common name | Scientific name | | | | | | |
| * | * | * | * | * | * | * | |
| BIRDS | | | | | | | |
| * | * | * | * | * | * | * | |
| Puffleg, black-breasted | *Eriocnemis nigrivestis* | Ecuador, South America. | Entire | E | | NA | NA |
| * | * | * | * | * | * | * | |

Dated: November 25, 2008.

**H. Dale Hall,**

*Director, U.S. Fish and Wildlife Service.*

[FR Doc. E8–29004 Filed 12–5–08; 8:45 am]

**BILLING CODE 4310–55–P**

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## DEPARTMENT OF THE INTERIOR

## Fish and Wildlife Service

## 50 CFR Part 17

**[FWS–R9–IA–2008–0108; 96100–1671–0000–B6]**

**RIN 1018–AW01**

## Endangered and Threatened Wildlife and Plants; Listing the Medium Tree Finch (Camarhynchus pauper) as Endangered Throughout Its Range

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), propose to list the medium tree finch (*Camarhynchus pauper*) as endangered under the Endangered Species Act of 1973, as amended (Act). This proposal, if made final, would extend the Act's protection to this species. The Service seeks data and comments from the public on this proposed rule.

**DATES:** We will accept comments received or postmarked on or before February 6, 2009. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by January 22, 2009.

**ADDRESSES:** You may submit comments by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS–R9–IA–2008–0108; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept comments by e-mail or fax. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

**FOR FURTHER INFORMATION CONTACT:** Monica A. Horton, Division of Scientific Authority, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Room 110, Arlington, VA 22203; telephone 703–358–1708; facsimile 703–358–2276. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

**SUPPLEMENTARY INFORMATION:**

### Public Comments

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, we request comments or suggestions on this proposed rule. We particularly seek comments concerning:

(1) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to this species and regulations that may be addressing those threats.

(2) Additional information concerning the range, distribution, and population size of this species, including the locations of any additional populations of this species.

(3) Any information on the biological or ecological requirements of the species.

(4) Current or planned activities in the areas occupied by the species and possible impacts of these activities on this species.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We will not consider comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

If you submit a comment via *http://www.regulations.gov,* your entire comment—including any personal identifying information—will be posted on the Web site. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on *http://www.regulations.gov.*

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Division of Scientific Authority, 4401 N. Fairfax Drive, Room 110, Arlington, VA 22203; telephone 703–358–1708.

### Background

Section 4(b)(3)(A) of the Act requires us to make a finding (known as a ''90-day finding'') on whether a petition to add a species to, remove a species from, or reclassify a species on the Federal List of Endangered and Threatened Wildlife and Plants has presented substantial information indicating that the requested action may be warranted. To the maximum extent practicable, the finding must be made within 90 days following receipt of the petition and published promptly in the **Federal Register**. If we find that the petition has presented substantial information indicating that the requested action may be warranted (a positive finding), section 4(b)(3)(A) of the Act requires us to commence a status review of the species if one has not already been initiated under our internal candidate assessment process. In addition, section 4(b)(3)(B) of the Act requires us to make a finding within 12 months following receipt of the petition on whether the requested action is warranted, not warranted, or warranted but precluded by higher priority listing actions (this finding is referred to as the ''12-month finding''). Section 4(b)(3)(C) of the Act requires that a finding of warranted but precluded for petition species should be treated as having been resubmitted on the date of the warranted but precluded finding, and is, therefore, subject to a new finding within 1 year and subsequently thereafter until we take action on a proposal to list or withdraw our original finding. The Service publishes an annual notice of resubmitted petition findings (annual notice) for all foreign species for which listings were previously found to be warranted but precluded.

### Previous Federal Actions

On May 6, 1991, we received a petition (hereafter referred to as the 1991 petition) from the International Council for Bird Preservation (ICBP) to add 53 species of foreign birds to the List of Endangered and Threatened Wildlife (50 CFR 17.11(h)), including the medium tree finch, which is the subject of this proposed rule. In response to the 1991 petition, we published a positive 90-day finding on December 16, 1991 (56 FR 65207), for all 53 species, and announced the initiation of a status review. On March 28, 1994 (59 FR 14496), we published a 12-month finding on the 1991 petition, along with a proposed rule to list 30 African birds under the Act (16 U.S.C. 1531 *et seq.*). In that document, we proposed listing 15 of the 53 bird species included in the 1991 petition, and announced our finding that listing the remaining 38 species from the 1991 petition, including the medium tree finch, was warranted but precluded because of other listing activity.

On May 21, 2004 (69 FR 29354) and April 23, 2007 (72 FR 20184), we published in the **Federal Register** notices announcing our annual petition findings for foreign species. In those

notices, we made warranted but precluded findings for all outstanding foreign species from the 1991 petition, including the medium tree finch, which is the subject of this proposed rule.

Per the Service's listing priority guidelines (September 21, 1983; 48 FR 43098), our 2007 annual notice of review (ANOR) (April 23, 2007; 72 FR 20184) identified the listing priority numbers (LPNs) (ranging from 1 to 12) for all outstanding foreign species, including the medium tree finch, which was designated with an LPN of 11. The medium tree finch does not represent a monotypic genus. As reported in the 2007 ANOR, the magnitude of threat to the species was moderate, as the species was common in the forested highlands and its habitat had not been highly degraded. The immediacy of threat was not imminent because the species' habitat is protected by the area's National Park and World Heritage Site status.

On January 23, 2008, the United States District Court ordered the Service to propose listing rules for five foreign bird species, actions which had been previously determined to be warranted but precluded: Andean flamingo (*Phoenicoparrus andinus*), black-breasted puffleg (*Eriocnemis nigrivestis*), Chilean woodstar (*Eulidia yarrellii*), medium tree finch (*Camarhynchus pauper*), and St. Lucia forest thrush (*Cichlherminia lherminieri sanctaeluciae*). The court ordered the Service to issue proposed listing rules for these species by the end of 2008.

On July 29, 2008 (73 FR 44062), we published in the **Federal Register** a notice announcing our annual petition findings for foreign species. In that notice, we announced that proposing 30 taxa for listing under the Act is warranted. In order to comply with the recent court order, the medium tree finch was included as one of the 30 taxa for which listing is warranted.

**Species Information**

The medium tree finch (*Camarhynchus pauper*) is endemic to the island of Floreana in the Galapagos Islands, Ecuador (BirdLife International 2008; Harris 1982, p. 150; Sibley and Monroe 1990, p. 771). It is one of the 14 species of Darwin's finches, collectively named in recognition of Charles Darwin's work on the theory of evolution (Grant 1986, p. 6), and is approximately 12.5 centimeters (cm) (5 inches (in)) in length (BirdLife International 2008; Harris 1982, p. 150). Medium tree finches have wings and tails that are short and rounded, and often hold their tail slightly cocked in a wren-like manner (Jackson 1985, p. 188). Males have a black head, neck, and upper breast (Fitter *et al.* 2000, p. 78; Harris 1982, p. 150; Jackson 1985, p. 188), and an underside that is gray-brown, and white or yellowish in color (BirdLife International 2008). Their tail and back is olive green (Fitter *et al.* 2000, p. 78). Females have a head that is more gray-brown (BirdLife International 2008), and a body that is generally olive-green above and pale yellowish below (Fitter *et al.* 2000, p. 78). It is similar to the large and small tree finches of the same genus, but differs from the large tree finch (*Camarhynchus psittacula*) primarily due to its significantly smaller and less parrot-like beak, and from the small tree finch (*Camarhynchus parvulus*) because of its larger beak (BirdLife International 2008; Harris 1982, p. 150). It is also known as the Charles tree finch, the Santa Maria tree finch, and the Floreana tree finch (Sibley and Monroe 1990, p. 771), due to the fact that the island of Floreana is also referred to as Charles Island or Santa Maroa Island, the official Spanish name of the island (Grant 1986, Appendix; Harris 1973, p. 265). The species is locally known as ''*Pinzón Mediano de Árbol*'' (Castro and Phillips 1996, p. 130). The species was first taxonomically described by Ridgeway in 1890 (Sibley and Monroe 1990, p. 771).

**Habitat and Life History**

Floreana, one of the 19 principal islands that make up the Galapagos archipelago (McEwen 1988, p. 234), is 173 square kilometers ($km^2$) (67 square miles ($mi^2$)) in area, and has a maximum elevation of 640 meters (m) (2,100 feet (ft)) (Swash and Still 2005, p. 10).

The medium tree finch mainly occurs in the moist highland forests (*i.e.*, the *Scalesia* zone, named for the dominant plants, *Scalesia* spp., found in this zone) (Christensen and Kleindorfer 2008, in preparation; Stewart 2006, p. 193), primarily above 300 m (984 ft) (Castro and Phillips 1996, p. 130). The *Scalesia* zone begins at an altitude between 180 (Wiggins and Porter 1971, p. 22) and 200 m (591–656 ft), and ends at approximately 600 m (1,968 ft) (Stephenson 2000, p. 34), and is the first of the moist zones found on the Galapagos Islands (Fitter *et al.* 2000, p. 137).

On Floreana, the *Scalesia* zone is a lush evergreen cloud forest dominated by *Scalesia pedunculata* (daisy tree), the largest of the 20 species of *Scalesia* found in the Galapagos (Fitter *et al.* 2000, p. 137; Jackson 1985, p. 95). *Scalesia* form dense stands (Fitter *et al.* 2000, p. 137), with *S. pedunculata* frequently reaching 15 m (49 ft) in height, and can reach up to 20 m (66 ft) or more given good environmental conditions (Fitter *et al.* 2000, p. 137; Wiggins and Porter 1971, p. 22).

The *Scalesia* zone on Floreana is also dominated by the endemic trees *Croton scouleri* (Galápagos croton) and *Zanthoxylum fagara* (lime prickly-ash), with other dominant plants including *Phoradendron henslowii* (mistletoe), the shrub *Macraea laricifolia,* and introduced fruit species such as *Citrus limetta, Passiflora edulis,* and *Psidium guajava* (Christensen and Kleindorfer 2008, in preparation). Beneath the top of the canopy, epiphytes (plants that live on another plant without causing harm to the host plant) cover trunks, branches, twigs, and even the leaves of some plant species (Fitter *et al.* 2000, p. 137; Wiggins and Porter 1971, p. 24). Common epiphytes found in the *Scalesia* zone are mosses, liverworts, ferns, *Peperomia,* bromeliads (such as *Tillandsia*), and orchids (Fitter *et al.* 2000, p. 137; Jackson 1985, p. 60; Wiggins and Porter 1971, pp. 22, 24). Epiphytes are a prominent feature of the moist zones of the Galapagos Islands because of the large amount of time that clouds and mist cover the upper elevations of the higher islands (Fitter *et al.* 2000, p. 137).

A large amount of the *Scalesia* zone has been destroyed on the inhabited islands because it is the best area for agriculture (Fitter *et al.* 2000, p. 137; Jackson 1985, p. 61). The garúa (dense sea mist that sometimes blankets the highlands) keeps the area well-watered during the cool season (Fitter *et al.* 2000, p. 137; Jackson 1985, p. 61), which makes the area ideal for agricultural use.

Stotz *et al.* (1996) reported that the elevational zone in which the medium tree finch is most common is ''Hill Tropical,'' described as hills and lower slopes, between 500–900 m (1,640–2,953 ft) (pp. 121, 262). The species reaches its minimum elevation in relatively low-relief lowland areas and reaches its maximum elevation at 600 m (1,969 ft) (Stotz *et al.* 1996, p. 262). As a result, one can infer from this data that the medium tree finch is predominantly found at the highest end of its elevational distribution, between 500 and 600 m (1,640 and 1,969 ft).

According to Stotz *et al.* (1996), the medium tree finch uses more than one level at which it forages within its habitat; specifically, they noted that it can be found foraging from the understory (undergrowth) to the canopy (pp. 120, 262). In addition, Bowman (1963) reports that *Camarhynchus* species spend a little less than 25 percent of their time foraging at the

ground level, while spending the majority of their time foraging above ground (p. 132). The medium tree finch uses its powerful tip-biting bill to search under twigs and foliage, probe crevices in the bark of trees, and cut into tough woody tissues in search of insect larvae (Bowman 1963, pp. 117, 125), which is its primary food source (Bowman 1963, p. 121). The species also feeds, to a lesser extent, on seeds (Bowman 1963, p. 121), nectar, young buds, and leaves (Castro and Phillips 1996, p. 130).

The peak breeding season for the medium tree finch is February–April (O'Connor *et al.* 2008b, in preparation). The species prefers to nest in the tree *Scalesia pedunculata* (O'Connor *et al.* 2008b, in preparation), and has an average clutch size of two to four eggs (O'Connor *et al.* 2008a, in preparation). The nests of Darwin's finches are similar in construction from one species to another; the male builds a dome-shaped nest, made from twigs, grass, pieces of bark, lichens, feathers, and other materials, with a small, round, side entrance (Jackson 1985, p. 191). In a study of the nesting success of the small tree finch in the highlands of Santa Cruz Island in the Galapagos, Kleindorfer (2007) found that all nests were located 6 to 10 m (20 to 33 ft) above the ground, on horizontal branches of *Scalesia pedunculata*, and positioned by interweaving surrounding smaller twigs and leaves (p. 796).

**Range and Distribution**

According to BirdLife International (2008), the current range of the medium tree finch is estimated to be 23 $km^2$ (9 $mi^2$). The species' range encompasses the entire highland area of Floreana; however, the medium tree finch is restricted to fragmented forest patches within the highlands, which total approximately 12 $km^2$ (4.5 $mi^2$) to 17 $km^2$ (6.5 $mi^2$) of available habitat (O'Connor *et al.* 2008b, in preparation). Harris (1982) reported that the species was common in the highlands on Floreana and uncommon to rare on the coast (p. 150).

Population numbers of this species are poorly known, with an indirect estimation at 1,000 to 2,499 birds in the year 2000 (BirdLife International 2008). Fessl *et al.* (2006a) reported that there were about 300 breeding pairs remaining on Floreana (p. 745). In a study by O'Connor *et al.* (2008b, in preparation), they compared bird abundance survey data from 2004 and 2008 in order to estimate the population density of the medium tree finch in the highlands of Floreana. Based on the results of their study, O'Connor *et al.* (2008b, in preparation) estimate that the total medium tree finch population currently consists of 860–1,220 individuals (72 birds/$km^2$ (28 birds/$mi^2$), calculated as an average over the 4 survey sites in 2008). Their study also showed that the population density of the species at Cerro Pajas, the largest patch of prime *Scalesia* habitat (9 $km^2$ (3.5 $mi^2$)), decreased from 154 birds/$km^2$ (59 birds/$mi^2$) in 2004 to 60 birds/$km^2$ (23 birds/$mi^2$) in 2008 (O'Connor *et al.* 2008b, in preparation).

**Conservation Status**

The medium tree finch is identified as a ''critically endangered'' species under Ecuadorian law, Decree No. 3,516—Unified Text of the Secondary Legislation of the Ministry of Environment (ECOLEX 2003b). This poorly known species is considered ''Vulnerable'' by the International Union for Conservation of Nature (IUCN) because it has a very small range and is restricted to a single island where introduced species are considered a potential threat to the species and its habitat (BirdLife International 2008).

Stotz *et al.* (1996) described the conservation priority for the medium tree finch as ''high,'' which they defined as a species that is ''threatened,'' usually because of range or habitat restriction, and already showing signs of serious population decline (p. 262).

**Summary of Factors Affecting the Species**

Section 4 of the Act (16 U.S.C. 1533), and its implementing regulations at 50 CFR 424, set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act. The five factors are: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting its continued existence.

*A. The Present or Threatened Destruction, Modification, or Curtailment of its Habitat or Range*

Floreana has the longest history of human habitation of any of the Galapagos Islands (Fitter *et al.* 2000, p. 207; Schofield 1989, p. 229); it was first settled in 1832, three years before Darwin's historic visit (Jackson 1985, p. 3; Stewart 2006, pp. 55, 68; Sulloway 2008a, in litt.). Human settlement has resulted in changes to the habitat on Floreana, including clearing of native vegetation for agriculture and ranching, as well as the introduction of nonnative animals and plants (Grant *et al.* 2005, p. 501).

The medium tree finch prefers to nest and forage in the tree *Scalesia pedunculata* (O'Connor *et al.* 2008b, in preparation). Currently, *S. pedunculata* only occurs in small patches in the highlands of Floreana because the highlands have been cleared for agriculture, destroyed by introduced mammals, and outcompeted by invasive plants (O'Connor *et al.* 2008b, in preparation). Although the Galapagos National Park covers 97 percent of the land on the Galapagos Islands, a disproportionate amount of the limited moist highlands falls in the remaining 3 percent (Stewart 2006, p. 105). As a result, a large amount of this area has been cleared or altered for farming, and the rest has been degraded or destroyed by the introduction of animals and plants (Stewart 2006, p. 105). Currently, only 12 $km^2$ (4.5 $mi^2$) to 17 $km^2$ (6.5 $mi^2$) of habitat for the medium tree finch remains in the highlands of Floreana, and the amount of suitable habitat continues to decline due to the factors described below.

**Agriculture and Ranching**

Birds, such as the medium tree finch, are currently facing problems in the highlands of inhabited islands like Floreana, due to the extensive destruction and degradation of habitat resulting from agriculture (BirdLife International 2008; Castro and Phillips 1996, pp. 22–23; Fitter *et al.* 2000, p. 74). On Floreana, the highlands (or *Scalesia* zone) cover an area of approximately 21 $km^2$ (8 $mi^2$) (O'Connor *et al.* 2008b, in preparation). Within this highland forest, approximately 4 km2 (1.5 mi2) has been cleared for agriculture (O'Connor *et al.* 2008b, in preparation). Agriculture is concentrated at higher elevations because of the availability of richer soil and greater moisture (Schofield 1989, p. 233). The *Scalesia* zone is the richest zone in terms of soil fertility and productivity (Jackson 1985, p. 61), and, therefore, has been extensively cleared for agricultural and cattle ranching purposes (Grant 1986, p. 30; Harris 1982, p. 37; Jackson 1985, pp. 61, 233). When the forest is cleared for agriculture and ranching, or when cattle are allowed to roam freely within native vegetation, nesting and foraging sites of the medium tree finch are destroyed, which can have a negative effect on the species (Stotz *et al.* 1996, p. 121).

**Introduced Species**

Introduced species are currently considered a major threat to the native species of the Galapagos Islands (Causton *et al.* 2006, p. 121; Fitter *et al.* 2000, p. 218). Since the early 1800s, humans have introduced animals and plants to the Galapagos Islands that have threatened the native vegetation (Schofield 1989, pp. 227, 233).

*Animals*

When settlers arrived on the Galapagos Islands, they brought with them domestic animals, some of which escaped and started feral populations (Jackson 1985, p. 233). On Floreana, introduced animals include goats (*Capra hircus*), donkeys (*Equs asinus*), cattle, and pigs (Christensen and Kleindorfer 2008, in preparation; Jackson 1985, p. 232). These animals impact the island by significantly altering the habitat (Grant *et al.* 2005, p. 501; Schofield 1989, pp. 229–233). This impact, as well as predation of endemic species by cats (*Felis catus*) and rats (*Rattus rattus*) (discussed under Factor C), has been linked with the extinction of at least four bird species on the island of Floreana: the large ground finch (*Geospiza magnirostris*), the sharp beaked ground finch (*Geospiza difficilis*), the Floreana mockingbird (*Nesomimus trifasciatus*) (Christensen and Kleindorfer 2008, in preparation; Grant *et al.* 2005, p. 501; Harris 1982, pp. 36–37; Sulloway 1982, pp. 68–69, 88–89), and, most recently, the warbler finch (*Certhidea fusca*) (Grant *et al.* 2005, p. 501).

Introduced animals magnify the detrimental effects of clearing large areas of native vegetation on Floreana for agriculture and ranching (Grant 1986, p. 30), by further degrading and destroying the habitat (Grant *et al.* 2005, p. 501). The habitat of the medium tree finch continues to be altered by herbivore degradation caused by free-ranging, domestic livestock (BirdLife International 2008; Jackson 1985, p. 110; Lawesson 1986, p. 12). Lawesson (1986) reported that the *Scalesia* forest on Floreana is under the most immediate threat from introduced animals (p. 13).

*Goats:* Of all the introduced animals on the Galapagos Islands, goats are the most destructive animals (Fitter *et al.* 2000, p. 218; Schofield 1989, p. 227) and the most serious threat to Galapagos ecosystems (Harris 1982, p. 38; Smith 2005, p. 304). Goats were probably introduced to the Galapagos Islands in the 19th century by whalers, fisherman, and pirates, who were looking for an alternative source of meat (Charles Darwin Research Station 2006a; Fitter *et al.* 2000, p. 218). They were also brought to the islands by settlers as livestock (Charles Darwin Research Station 2006a).

Goats adapt to varying conditions extremely well, and they thrive at all elevations on the Galapagos Islands (Schofield 1989, p. 229), from the arid lowlands to the moist highlands (Fitter *et al.* 2000, p. 218), where the medium tree finch occurs. They have a rapid reproductive rate, which has allowed their population to flourish at the expense of native animals and vegetation (Jackson 1985, pp. 232–233).

Goats destroy native vegetation by eating plants down to the ground (Smith 2005, p. 304), converting forests into barren grasslands and causing erosion (Charles Darwin Research Station 2006a). Their ability to eat almost anything has allowed goats to quickly eat their way across an island (Smith 2005, p. 304). A study of goats on Santiago Island in the Galapagos showed that at higher elevations, grazing by goats had eliminated young trees of *Scalesia pedunculata, Zanthoxylum fagara*, and *Psidium galapageium*, in addition to the forest understory (Schofield 1989, p. 229). On Floreana, Schofield (1989) reports that approximately 77 percent of the plant species, other than cacti, were either reduced in number or completely eliminated by goats (p. 229). Although feral goats have caused considerable damage to the vegetation in the highlands of Floreana, where the medium tree finch occurs (O'Connor 2008, in litt.), an eradication program begun in 2006 has most likely eliminated goats from the island of Floreana (Gardener 2008, in litt.; O'Connor 2008, in litt.).

*Cattle:* Cattle were introduced to Floreana in 1832 (Hoeck 1984, as cited in Schofield 1989, p. 231). Initially, cattle were kept at lower elevations, but with inadequate moisture available in the lower zones, they were allowed to move into the highlands (Kastdalen 1982, p. 9), where the medium tree finch occurs. Cattle trample and heavily graze upon native vegetation (Hamann 1981 and Van der Werff 1979, as cited in Schofield 1989, p. 231). When allowed to roam freely through highland forests, they essentially destroy the understory layer (Stotz *et al.* 1996, p. 121). On Santa Cruz Island, cattle inhibited growth of *Scalesia pedunculata* (Kastdalen 1982, p. 8). Schofield (1989) reported that no organized effort had been made to eliminate cattle, but the Galapagos National Park Service does encourage ranchers to fence in herds on Floreana (p. 232). Although most cattle have been removed from within the boundaries of the Galapagos National Park (Gardener 2008, in litt.), cattle are still present in the highlands of Floreana and regularly roam freely within the habitat of the medium tree finch (O'Connor 2008, in litt.)

*Donkeys:* In 1887, large numbers of donkeys (*Equus asinus*) were seen grazing on hillsides and at the summit on Floreana (Slevin 1959, as cited in Schofield 1989, p. 232). By 1932, donkeys had already tramped out regular paths through the vegetation on Floreana (Wittmer 1961, as cited in Schofield 1989, p. 232). On Santa Cruz, Kastdalen (1982) noted that they followed cattle into the humid highlands (p. 9). Studies have shown that donkeys on Floreana have depleted some populations of *Scalesia* spp. and *Alternanthera nesiotes*, another endemic plant (Eliasson 1982, p. 10). Today, donkeys still persist in the highlands of Floreana (Gardener 2008, in litt.; O'Connor 2008, in litt.), where the medium tree finch occurs.

*Pigs:* Pigs (*Sus scrofa*) have lived on the Galapagos Islands for over 150 years (Schofield 1989, p. 232). In 1835, Darwin remarked upon the many wild pigs he observed in the forests on Floreana (Schofield 1989, p. 232). Pigs live primarily at higher elevations, where abundant forage is available year-round (Schofield 1989, p. 232). Pigs destroy native vegetation (Jackson 1985, p. 233) directly by digging up and eating plants (Hoeck 1984, as cited in Schofield 1989, p. 232). Currently, pigs continue to be maintained in the agricultural areas of the highlands of Floreana (O'Connor 2008, in litt.), where the medium tree finch occurs.

*Eradication Programs:* Since the Galapagos National Park and the Charles Darwin Foundation were established in 1959, efforts to control and eradicate introduced animals have been ongoing (Galapagos Conservancy n.d.(a)). In 1965, the Charles Darwin Research Station began the first eradication program to rid the Galapagos island of Santa Fe of goats (Fitter *et al.* 2000, p. 218). Ten years after the program began, the last goat was culled, and now the vegetation on the island has recovered and native species are beginning to thrive once again (Fitter *et al.* 2000, p. 218). Over the years, many of these control programs have been successful in eradicating introduced animals from some of the Galapagos Islands, including exterminating 25,000 feral pigs on Santiago Island (Smith 2005, p. 305); removing goats from Espãnola, Plaza Sur, Santa Fe, Marchena and Ŕabida Islands (Smith 2005, p. 305); and the very successful ''Project Isabela,''

which recently eliminated goats from Pinta Island, donkeys and goats from northern Isabela Island, and donkeys, goats, and pigs from Santiago Island (Galapagos Conservancy n.d.(b)).

As a result of the success of Project Isabela, the Charles Darwin Foundation is planning several projects, in partnership with the Galapagos National Park Service, including eradication of goats and donkeys from Floreana (Charles Darwin Foundation n.d.(c)). In December 2006, the Galapagos National Park started a project with the goal of restoring the ecology of Floreana (Galapagos Conservation Trust News 2007). The first phase of ''Project Floreana'' is to eradicate some of the introduced animals, such as goats and donkeys, in order to stop the continuing degradation of the vegetation of the island and allow some of the native and endemic plant species to recover (Galapagos Conservation Trust News 2007).

From the experience gained during Project Isabela, the program was able to eradicate 98 percent of the donkeys and goats on Floreana in 22 days (Galapagos Conservation Trust News 2007). Currently, goats have been unofficially eradicated from Floreana; however, the elimination of donkeys is still in progress (Gardener 2008, in litt.). A follow-up census and control effort will be conducted next year to determine the results of this eradication program (Gardener 2008, in litt.). Due to the removal of these invasive species, it is expected that within the next few years the benefits to the ecosystem on Floreana will be seen (Galapagos Conservation Trust News 2007). This is expected to result in an increase in native flora and fauna, and the repopulation by native flora and fauna of areas previously destroyed on Floreana by herbivore degradation (Galapagos Conservation Trust News 2007). However, at this time, we believe that introduced species still pose a threat to the medium tree finch and its habitat.

*Plants*

Introduced plants outcompete native vegetation for sunlight, water, and nutrients (Smith 2005, p. 304). Since agriculture is concentrated at higher elevations because of the rich soil and moisture available in these areas, introduced plants are more frequently found in the humid highland forests and often escape from cultivated areas into native vegetation (Schofield 1989, p. 233). Schofield (1989) found that accidental escape of introduced plant species, as well as the purposeful introduction of these species, had altered the highland habitat where tree finches occur (pp. 233–235).

Christensen and Kleindorfer (2008, in preparation) found that the medium tree finch frequently forages on introduced fruit species. They report that this observation may suggest that the species is able to adapt to and potentially benefit from this change in their environment (Christensen and Kleindorfer 2008, in preparation). However, they did not observe any species of tree finch, including the medium tree finch, nesting in an introduced plant species (Christensen and Kleindorfer 2008, in preparation). A further study by O'Connor *et al.* (2008b, in preparation) found that the majority (99 percent) of nests built by medium tree finches were constructed in native species, *Scalesia pedunculata* (83 percent), *Zanthoxylum fagara* (14 percent), and *Croton scouleri* (2 percent), with 1 percent of the nests built in an introduced species, guava (*Psidium guajava*).

On Floreana, small populations of *Scalesia* forest still exist in the highlands, but these areas are under pressure and competition from the aggressive *Psidium guajava* and *Lantana camara* (Lawesson 1986, p. 13).

*Guava:* The cultivated guava (*Psidium guajava*) with its edible fruits is the most widespread introduced plant species on the Galapagos Islands (Schofield 1989, p. 233). Guava has been characterized as out of control and invading vast areas of native vegetation in the humid highlands on Floreana (Eckhardt 1972, p. 585; Eliasson 1982, p. 11; Tuoc 1983, p. 25). It is an aggressive, introduced plant that covers 8,000 ha (19,768 ac) on Floreana (Parque Nacional Galápagos n.d.(a)).

The dispersal of guava is aided by introduced cattle, which eat the fruits, and then wander from the farm into the National Park and excrete the seeds in their dung (De Vries and Black 1983, p. 19; Tuoc 1983, p. 25). In addition, as cattle graze, they trample other vegetation, providing the open spaces and abundant light needed for the germination of guava seeds (Van der Werff 1979, as cited in Schofield 1989, p. 233). Once guava becomes established in an open habitat, they grow quickly and shade seedlings of native species like *Scalesia pedunculata*, thus preventing their growth (Parque Nacional Galápagos n.d.(a); Perry 1974, p. 12).

One obvious step to take in order to minimize the further spread of guava is to fence cattle (De Vries and Black, p. 19; Tuoc 1983, p. 25). Although some residents have already done this, herds of free-ranging cattle are unable to be restricted in this manner (Schofield 1989, pp. 233–234). In 1971, a campaign was started to cut down guava trees on Santa Cruz Island (Schofield 1989, p. 234). One report indicated that more than 95,000 guava trees were eliminated between 1980 and 1981 (Tuoc 1983, p. 25). Schofield (1989) believes that this program should be expanded to other islands with large populations of guava (p. 234). Currently, we have no information to indicate that a program to eliminate guava has occurred on Floreana.

*Other Plant Species:* Floreana is also impacted by other introduced plant species. *Lantana camara* was introduced as an ornamental on Floreana in 1832, and now covers 3,000 ha (7,413 ac) (Parque Nacional Galápagos n.d.(a)). It is a quick spreading, tropical shrub that displaces native vegetation, and is now found on Floreana from the arid region up to the *Scalesia* forest (Hamann 1984, as cited in Schofield 1989, p. 234). Citrus trees (*Citrus* spp.) have been reported as ''common'' (Eliasson 1982, p. 11) and have invaded the native vegetation at higher elevations on Floreana (Eliasson 1982, p. 11; Porter 1973, p. 276). Cattle and pigs aid in the further spread of citrus trees (*Citrus* spp.) by feeding on the fruits and dispersing seeds in new locations (Wittmer 1961, as cited in Schofield 1989, p. 234).

**Summary of Factor A**

The medium tree finch is found primarily in the moist highland forests (*i.e.*, the *Scalesia* zone) on the island of Floreana. Since the island was first settled in 1832, the habitat of the medium tree finch has been cleared for agriculture and ranching, and further degraded by introduced animals and plants. Herbivores, such as donkeys, cattle, and pigs, continue to destroy the species' habitat by trampling and grazing heavily on native vegetation, including *Scalesia pedunculata*, the tree primarily used by the medium tree finch for nesting and foraging. In addition, cattle and pigs help to spread introduced plants, such as guava and citrus trees, by feeding on the fruits and depositing the seeds into native vegetation. These introduced plants outcompete native species, such as *Scalesia pedunculata*, reducing the availability of nest sites for the medium tree finch. Although an eradication program was started in December 2006 to eliminate goats and donkeys from Floreana, we are not aware of any current programs to remove cattle and pigs from the island. As a result, these introduced species will continue to destroy and degrade the habitat of the

medium tree finch, which has already been reduced to an area of only 12 $km^2$ (4.5 $mi^2$) to 17 $km^2$ (6.5 $mi^2$). Therefore, we find that habitat destruction of the moist highland forests of Floreana, as a result of agriculture and introduced species, is a threat to the continued existence of the medium tree finch.

*B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes*

We are not aware of any scientific or commercial information that indicates overutilization of the medium tree finch for commercial, recreational, scientific, or educational purposes poses a threat to this species. As a result, we are not considering overutilization to be a contributing factor to the continued existence of the medium tree finch.

*C. Disease or Predation*

Disease

The recent discovery of an introduced parasitic fly (*Philornis downsi*) on Floreana Island (Kleindorfer, pers. comm., as cited in Grant *et al.* 2005, p. 502; Wiedenfeld *et al.* 2007, p. 17) has raised concerns about the impact this parasite might be having on the medium tree finch (Dudaniec *et al.* 2008; Fessl *et al.* 2006b, p. 59). In March 1997, Fessl, Couri, and Tebbich observed the presence of *Philornis downsi* in the nests of Darwin's finches on the Galapagos Islands for the first time (Fessl and Tebbich 2002, p. 445).

*Philornis downsi* was sampled by the entomologists S.B. and J. Peck, and B.J. Sinclair, in 1989, although the fly was not formally identified until the collections were examined in detail in 1998 (Fessl and Tebbich 2002, p. 445; Fessl *et al.* 2001, p. 318). However, it now appears that *P. downsi* was present on the Galapagos Islands at least 40 years ago, as it was recently identified from collections made on Santa Cruz Island in 1964 (Causton *et al.* 2006, pp. 134, 143). We are not aware of any information indicating when *P. downsi* may have been introduced to the island of Floreana.

*Philornis downsi* is a Muscidae (fly) from a genus of obligate bird parasites (Couri 1985, as cited in Fessl and Tebbich 2002, p. 445; Fessl *et al.* 2001, p. 317), depending entirely on a host for its survival. The adult fly is non-parasitic, and feeds on fruits, flowers, and decaying material (Fessl *et al.* 2001, p. 317; Fessl *et al.* 2006b, p. 56). Larvae of *P. downsi* belong to the group of external haematophages (bloodsuckers); first, second, and third instar (developmental stage) larvae are blood feeders, believed to suck blood from nestlings during the night and then retreat to the bottom of the nest during the day (Dodge and Aitken 1968 and Skidmore 1985, as cited in Fessl *et al.* 2006b, p. 56). Adult flies lay eggs inside the nasal cavities of newly hatched nestlings (usually 1 to 3 days old), which hatch into first instar larvae (Muth 2007, as cited in Dudaniec *et al.* 2008; Fessl *et al.* 2006a, p. 744). As the larvae reach their second instar stage, they exit the nasal cavities of nestlings and begin to live as nest-dwelling haematophagous larvae (Fessl *et al.* 2006a, p. 744). Second and third instar larvae of *P. downsi* seem to be exclusively external (Fessl *et al.* 2006b, p. 59), feeding on the blood and tissues of nestlings (Dudaniec and Kleindorfer 2006, pp. 15–16). The majority of larvae reach their third instar stage at the time of host fledging (Dudaniec *et al.* 2008). At this stage, the larvae of *P. downsi* detach from the nestling and form their pupae at the bottom of the nesting material, remaining for approximately 2 weeks before emerging as adult flies (Dudaniec and Kleindorfer 2006, p. 16; Fessl *et al.* 2006b, p. 56).

*Philornis downsi* occurs in finch nests on Floreana (Wiedenfeld *et al.* 2007, p. 17), and has been shown to significantly lower fledgling success of the finches (Fessl and Tebbich 2002, pp. 448–450). A number of studies have associated *Philornis* parasitism with mortality (Fessl and Tebbich 2002, p. 448), reduced nestling growth and development (Fessl *et al.* 2006b, p. 58), and a reduction in hemoglobin level (Dudaniec *et al.* 2006, p. 88).

A study by Fessl and Tebbich (2002) on Santa Cruz Island found that 97 percent of finch nests were infected with the *Philornis downsi* parasite, both in the lower arid zone and the higher *Scalesia* zone of the island (p. 449). Parasitism by *P. downsi* caused complete brood loss in approximately 19 percent of the infected finch nests and partial brood loss (defined as the successful fledging of one or two nestlings) in an additional 8 percent of the finch nests studied (Fessl and Tebbich 2002, p. 448). They also found that in parasitized nests, the percentage of successful fledglings differed significantly depending upon brood size; nests with only one nestling always failed, nests with two nestlings successfully fledged nestlings 50 percent of the time, and nests with three or four nestlings successfully fledged nestlings 75–85 percent of the time (Fessl and Tebbich 2002, p. 448). The high nestling mortality in small broods may be the result of the high parasite-to-nestling ratio, as compared to larger broods (Fessl and Tebbich 2002, p. 449). Since *P. downsi* infects nests regardless of the number of nestlings (Fessl and Tebbich 2002, p. 450), large broods may be able to spread the larval load among more nestlings, thereby reducing the number of larvae affecting each individual nestling.

In an experimental study conducted on Santa Cruz Island, Fessl *et al.* (2006b) found that high mortality of nestlings was directly attributable to parasitism by *Philornis downsi*, as evidenced by a near threefold increase in fledgling success in a parasite-reduced group (86.6 percent) versus a parasite-infested control group (33.9 percent) (pp. 58–59). They also found that within 4 days, mass gain was significantly higher (an almost two-fold positive difference) in the parasite-reduced group than in the parasite-infested control group (Fessl *et al.* 2006b, p. 58). In studies of other avian species, fledgling body mass has been found to be a key factor for juvenile survival (Magrath 1991, pp. 343–344; Tinbergen and Boerlijist 1990, pp. 1123–1124). As a result, Fessl *et al.* (2006b) concluded that the results of their study showed that given the significant difference in body mass between the two groups, parasitized nests will likely provide less recruitment into the breeding population (p. 59). Further, because species with small broods have been found to suffer higher parasite loads and higher nestling mortality (Fessl and Tebbich 2002, pp. 445, 449–450), infestation of *P. downsi* on species with naturally low clutch sizes, such as the medium tree finch, is of particular concern (Fessl *et al.* 2006b, p. 59).

Dudaniec *et al.* (2006) found a significant negative correlation between *Philornis downsi* parasite intensity and hemoglobin concentrations, and a positive correlation between parasite intensity and immature red blood cell counts, in small ground finches studied on Santa Cruz and Floreana Islands (pp. 88, 90, 92). Small ground finch nestlings with higher *P. downsi* intensities suffered from lower hemoglobin concentrations and reduced fledging success (Dudaniec *et al.* 2006, p. 92). Furthermore, nestlings with lower parasite intensity had higher hemoglobin levels and increased fledging success (Dudaniec *et al.* 2006, p. 93). Dudaniec *et al.* (2006) also found a negative correlation between the number of immature red blood cells and hemoglobin levels in nestlings (p. 92).

The fitness impacts to nestlings of lower hemoglobin levels are likely to be significant (Dudaniec *et al.* 2006, p. 93). The results of a study by O'Brien *et al.* (2001) showed that low hemoglobin levels in nestlings reduce the transport

of oxygen to tissues (p. 75). Thus, fledglings that are anemic (hemoglobin deficient) from parasite feeding may have a reduced ability to sustain flight and, consequently, a reduced ability to escape predators and find food (O'Brien *et al.* 2001, p. 75). The high hemoglobin levels found by Dudaniec *et al.* (2006) in mature birds, combined with their observation that adult finches were never found to be actively parasitized, suggest that adult birds are not physiologically affected by *Philornis downsi* (p. 92).

Fessl *et al.* (2006a) reported extremely high levels of blood loss in nestlings (18 to 55 percent) caused by *Philornis downsi* larvae (p. 745). Daily blood loss over 10 percent is likely to have negative impacts on nestlings, including health problems and developmental deficiencies, while blood loss over 25 percent would become lethal (Kaneko, pers. comm., as cited in Gold and Dahlsten 1983, p. 569).

In 2006, nesting success in the medium tree finch was examined for the first time (Fessl *et al.* 2006a, p. 746). The study by O'Connor *et al.* (2008a, in preparation) on tree finches in the highlands of Floreana showed that the medium tree finch had the highest *Philornis downsi* parasite intensity (an average of 52 parasites per nest), compared to small and large tree finches. Of 63 medium tree finch nests, only 16 nests had nestlings that survived to 6 days post-hatching, and only 4 nests produced fledglings (O'Connor *et al.* 2008a, in preparation). Most nests failed to produce fledglings; 68.8 percent (11 of 16) of medium tree finch nests suffered total brood loss, while 18.8 percent (3 of 16) of nests had partial brood loss (O'Connor *et al.* 2008a, in preparation). *Philornis downsi* larvae or pupae were found in 100 percent (16 of 16) of medium tree finch nests, and all nestlings had *P. downsi* parasites (O'Connor *et al.* 2008a, in preparation). The majority (54 percent) of nestling mortality in medium tree finches was due to parasitism by *P. downsi* (O'Connor *et al.* 2008a, in preparation). All nestlings found dead in nests had large open wounds on their bodies and significant loss of blood or body fluids, all of which are signs of *P. downsi* parasitism (O'Connor *et al.* 2008a, in preparation).

O'Connor *et al.* (2008a, in preparation) discuss the reasons why the *Philornis downsi* parasite intensity is high in the medium tree finch. One possibility they explain is that the medium tree finch's preferred breeding habitat is next to an agricultural area, where the close proximity of the agriculture fields (with citrus trees and other fruits) act as a feeding location for the adult flies (O'Connor *et al.* 2008a, in preparation). In addition, moist highlands favor consistent breeding of medium tree finches, thus providing flies with a dependable supply of nestlings for *P. downsi* larvae to feed upon (O'Connor *et al.* 2008a, in preparation). Currently, the medium tree finch has the highest *P. downsi* parasite intensity of any finch species on Floreana, and the second highest of any finch species studied on the Galapagos Islands (O'Connor *et al.* 2008a, in preparation).

A study by Wiedenfeld *et al.* (2007) found that there was a significant increase in the number of *Philornis downsi* parasites (larvae, pupae, or puparia) per nest at higher altitudes (*i.e.*, in the humid highlands) (pp. 17–18). According to their study, the distribution of *P. downsi* seems to be related to the amount of humidity and moisture available on the islands (Wiedenfeld *et al.* 2007, p. 18). Although it appears that the fly does more poorly in dry conditions (either in the lowland, arid zone of islands, or during drought), birds also do more poorly in these situations (Wiedenfeld *et al.* 2007, p. 18). In addition, during years of abundant rainfall when birds breed more successfully, the flies are also likely to be more plentiful, and, therefore, can cause higher mortality (Wiedenfeld *et al.* 2007, p. 18).

It is believed that finches do not suffer from any type of endemic, haematophagous ectoparasite (a bloodsucking parasite that lives on the outside of its host, and not within the host's body) (Fessl *et al.* 2006b, p. 56). Therefore, they have not developed an adaptive response to this kind of introduced pathogen (Altizer *et al.* 2003, as cited in Dudaniec and Kleindorfer 2006, p. 19). Because the medium tree finch is newly colonized by *Philornis downsi*, it may experience significant initial mortality since the host has not yet developed a strong behavioral or immunological defense mechanism against the parasite (Dudaniec and Kleindorfer 2006, pp. 18–19).

As many of these studies show, finches have a slim chance of reproducing without avoiding effects of *Philornis downsi* mortality (Dudaniec and Kleindorfer 2006, p. 18; Wiedenfeld *et al.* 2007, p. 18). Causton *et al.* (2006) developed a system to evaluate the invasiveness of insect species introduced to the Galapagos Islands based on trophic functional role, distribution in the Galapagos, and their history of invasiveness elsewhere (p. 121). *Philornis downsi* was given the highest invasiveness ranking affecting fauna endemic to the Galapagos Islands, because *P. downsi* seriously impacts species of high conservation value in the Galapagos (Causton *et al.* 2006, pp. 123, 134). Grant *et al.* (2005) reported that the decline and possible local extinction of one of Darwin's finches, the warbler finch (*Certhidea fusca*), on Floreana by 2004 may have been partially caused by *P. downsi* (p. 502; Fessl *et al.* 2006b, p. 59), although there is no conclusive evidence (Dudaniec and Kleindorfer 2006, p. 13).

It is best to eliminate invasive species before they are able to adapt to the local environment in which they have colonized (Frankham 2005, p. 385). However, for *Philornis downsi*, this introduced parasitic fly has become firmly established in the Galapagos Islands, prompting the need for a long-term eradication program in conjunction with continuous quarantine and monitoring practices (Dudaniec *et al.* 2008).

Programs to eradicate *Philornis downsi* from the Galapagos Islands are difficult and costly (Fessl *et al.* 2006b, p. 59). In the experimental study by Fessl *et al.* (2006b), they found that a single insecticide treatment of 1 percent pyrethrin solution (done at a nestling age of 4 days) was sufficient to reduce the number of parasites per nest to almost zero (pp. 57–59). This treatment offers one short-term solution to locally protect single nests of species of high conservation concern (Fessl *et al.* 2006b, p. 59). However, this treatment is not practicable as a long-term solution for controlling the fly throughout the Galapagos Islands because it would be extremely labor intensive and would require the nests of all host species to be treated on every island in the Galapagos where *P. downsi* is found (at least 11 islands; Wiedenfeld *et al.* 2007, p. 16).

The Charles Darwin Foundation (CDF) has begun an effort to develop biological control approaches for *Philornis downsi* (Charles Darwin Foundation n.d.(c)). In 2008, CDF received $58,000 for Phase I of the CDF Priority Project: ''Control of the parasitic fly *Philornis downsi*'' (Charles Darwin Foundation n.d.(a)). This project will study the biology and life history of *P. downsi*, aiding in the development of effective, long-term control methods that will not harm other species (Charles Darwin Foundation 2007). CDF reports that control methods are urgently needed to eliminate the threat of extinction among bird species, such as the medium tree finch, affected by this parasite (Charles Darwin Foundation 2007).

Predation

Floreana has a suite of introduced predators including black rats (*Rattus rattus*) and cats (*Felis catus*) (Kleindorfer *et al.* 2008, in preparation). These predators feed on eggs, nestlings, and even adult birds (Castro and Phillips 1996, p. 22), and have depleted native populations (Grant *et al.* 2005, p. 501; Jackson 1985, p. 232).

*Rats:* Black rats are one of the worst introduced species to the Galapagos Islands, destroying bird nests and eggs, and consuming hatchlings (Charles Darwin Foundation n.d.(b); Charles Darwin Research Station 2006b). Rats arrived on the Galapagos Islands on ships beginning in the late 1600s, and currently are found on all inhabited islands, including Floreana (Charles Darwin Research Station 2006b). Rats are currently present in the highlands of Floreana, and can be seen running up and down trees, or along the forest floor in the habitat of the medium tree finch (O'Connor 2008, in litt.). Because rats can easily climb, they have been implicated in the population declines of tree-nesting birds, such as the mangrove finch (*Camarhynchus heliobates*) (Charles Darwin Research Station 2006b).

The CDF's long-term plan is to successfully eradicate introduced rats on all islands, a necessary measure in order to restore the Galapagos Islands and its endemic species (Charles Darwin Research Station 2006b). Currently, a control program is ongoing in the highlands of Floreana to control rats in the nesting area of the Galapagos petrel (*Pterodroma phaeopygia*) (Gardener 2008, in litt.). The project is being conducted at Cerro Pajas (Cruz and Cruz 1996, pp. 25–30), the site of the largest patch of prime *Scalesia* habitat (9 $km^2$ (3.5 $mi^2$)) (O'Connor 2008, in litt.), where the medium tree finch occurs. Although an eradication program has begun, it has not yet been completed, and therefore, rats remain a threat to the medium tree finch.

A study of tree finches in the highlands of Floreana by O'Connor *et al.* (2008a, in preparation) found that one-third of medium tree finch nests experienced nestling predation (in both years, 2006 and 2008), and egg depredation was observed in 22 percent of the nests (but only in 2008). Although nest predation was not observed directly, the identity of the predators could be inferred from the condition of the nest (O'Connor 2008, in litt.). It is likely that rats were predominantly responsible for the predation (O'Connor 2008, in litt.). Because agricultural areas are close to the breeding sites of the medium tree finch, they provide support for the continued persistence and movement of introduced predators, mainly rodents (O'Connor *et al.* 2008a, in preparation).

*Cats:* Cats are highly predatory animals, targeting birds and other native species (Charles Darwin Foundation n.d.(b); Charles Darwin Research Station 2006c; Smith 2005, p. 304). Cats were introduced to the Galapagos Islands by ships and as domestic pets of settlers (Charles Darwin Research Station 2006c). Today, cats are currently found in the agricultural areas of the highlands of Floreana (Gardener 2008, in litt.; O'Connor 2008, in litt.), where the medium tree finch occurs.

Both feral and domestic cats prey upon and impact the survival of Darwin's finches, and are a threat to endemic species on Floreana (Charles Darwin Research Station 2006c). In the 19th century, cats may have caused significant declines in the populations of large ground finches, sharp-beaked ground finches, and mockingbirds, pushing them toward extinction on Floreana (Grant *et al.* 2005, p. 501).

The Galapagos National Park Service and the CDF are working to control and eradicate domestic and feral cats on all of the islands (Charles Darwin Research Station 2006c). This plan includes working with communities to gain acceptance of and compliance with the sterilization or removal of domestic cats, and the development of an eradication program to eliminate feral cats from natural areas on all populated islands, such as Floreana (Charles Darwin Research Station 2006c).

**Summary of Factor C**

*Philornis downsi*, an introduced parasitic fly, poses a significant threat to the survival of the medium tree finch. The larvae feed on finch nestlings causing mortality, reduced nestling growth, lower fledgling success, and a reduction in hemoglobin levels, which all combine to severely affect the recruitment dynamics of the species. The medium tree finch has the highest *P. downsi* parasite intensity of all the finch species found on Floreana, and the second highest of any finch species studied on the Galapagos Islands. Although a project examining the biology of *P. downsi* and how to control it was begun in 2008, a long-term control method for the parasitic fly has not yet been developed. As a result, the medium tree finch and its reproductive success will continue to be negatively impacted by *P. downsi*. Therefore, we find that parasitism by *Philornis downsi* is a significant threat to the continued existence of the medium tree finch.

Introduced predators on Floreana, such as black rats and cats, feed on eggs and nestlings of birds, causing dramatic reductions in native populations. One study found that 33 percent of medium tree finch nests experienced nestling predation, while egg depredation was observed in 22 percent of the nests. Although nest predation was not observed directly, rats are most likely responsible for much of the predation. In an effort to help restore endemic species on the Galapagos Islands, one goal of CDF was to develop programs to eradicate introduced rats and cats on all islands. Even though an effort to eliminate rats from the Galapagos petrel nesting area in the highlands of Floreana has begun, it has not yet been completed. Furthermore, we do not have any information to indicate that an eradication program for cats has begun on the island of Floreana. Therefore, we find that predation is a threat to the continued existence of the medium tree finch.

*D. Inadequacy of Existing Regulatory Mechanisms*

The medium tree finch is identified as a ''critically endangered'' species under Ecuadorian law and Decree No. 3,516—Unified Text of the Secondary Legislation of the Ministry of Environment of 2002 (ECOLEX 2003b). Decree No. 3,516 of 2002 summarizes the law governing environmental policy in Ecuador and provides that the country's biodiversity be protected and used primarily in a sustainable manner (ECOLEX 2003b). Appendix 1 of Decree No. 3,516 lists the Ecuadorian fauna and flora that are considered threatened or in danger of extinction. Species are categorized as critically endangered (En peligro crítico), endangered (En peligro), or vulnerable (Vulnerable).

Resolution No. 105—Regulatory Control of Hunting Seasons and Wildlife Species in the Country and Agreement No. 143—Standards for the Control of Hunting Seasons and Licenses for Hunting of Wildlife, regulate and prohibit commercial and sport hunting of all wild bird species, except those specifically identified by the Ministry of the Environment or otherwise permitted (ECOLEX 2000; ECOLEX 2003a). The Ministry of the Environment does not permit commercial or sport hunting of the medium tree finch because of its status as a ''critically endangered'' species (ECOLEX 2003b). However, we do not consider hunting (Factor B) to be a threat to the medium tree finch, so this law does not address any of the threats to the species.

The first legislation to specifically protect the Galapagos Islands and its

wildlife and plants was enacted in 1934 and further supplemented in 1936, but effective legislation was not passed until 1959, when the Ecuadorian government passed new legislation declaring the islands a National Park (Fitter *et al.* 2000, p. 216; Jackson 1985, pp. 7, 230; Stewart 2006, p. 164). Ecuador designated 97 percent of the Galapagos land area as the National Park, leaving the remaining 3 percent distributed between the inhabited areas on Santa Cruz, San Cristóbal, Isabela, and Floreana Islands (Jackson 1985, p. 230; Schofield 1989, p. 236). A disproportionate amount of the limited moist highlands falls in the remaining 3 percent (Stewart 2006, p. 105). The land is divided into various zones signifying the level of human use (Parque Nacional Galápagos n.d.(b)). Although Floreana Island includes a large ''conservation and restoration'' zone, it does include a significant ''farming'' zone (Parque Nacional Galápagos n.d.(b)), where agricultural and grazing activities continue to impact the habitat.

In March 1998, the National Congress and the Ecuadorian President enacted the Law of the Special Regimen for the Conservation and Sustainable Development of the Province of the Galapogos, which has given the islands some legislative support to establish regulations related to the transport of introduced species and implement a quarantine and inspection system (Causton *et al.* 2000, p. 10; Instituto Nacional Galápagos n.d.; Smith 2005, p. 304).

As a result, in 1999, the Inspection and Quarantine System for Galapagos (SICGAL) was implemented (Causton *et al.* 2006, p. 121), with the aim of preventing introduced species from reaching the islands (Causton *et al.* 2000, p. 10; Charles Darwin Foundation n.d.(d)). Inspectors are stationed at points of entry and exit on the Galapagos Islands and Continental Ecuador, where they check freight and luggage for permitted and prohibited items (Charles Darwin Foundation n.d.(d)). The goal is to rapidly contain and eliminate newly arrived species (detected by SICGAL and early warning monitoring programs) that are considered threats for the Galapagos Islands (Causton *et al.* 2006, p. 121). However, a scarcity of information on alien insect species currently on the Galapagos Islands prevents officials from knowing whether or not a newly detected insect is in fact a recent introduction (Causton *et al.* 2006, p. 121). Without the necessary information to make this determination, they cannot afford to spend the time and resources on a rapid response when the ''new introduction'' is actually a species that already occurs elsewhere on the Galapagos Islands (Causton *et al.* 2006, p. 121).

The April 2007 World Heritage Centre–IUCN monitoring mission report assessed the state of conservation on the Galapagos Islands based on information gathered during their monitoring mission and multiple meetings, and found continuing problems (UNESCO World Heritage Centre 2007). The report found deficiencies that preclude the full application and enforcement of the Special Law for Galapagos (UNESCO World Heritage Centre 2007). Also, although the risk from invasive species is rapidly increasing, the report found that the Agricultural Health Service of Ecuador (SESA) and SICGAL do not have adequate staff and capacity to deal with the nature and scale of the problem (UNESCO World Heritage Centre 2007). SICGAL estimates that 779 invertebrates entered the Galapagos Islands via aircraft in 2006 (UNESCO World Heritage Centre 2007). In addition, the report found that the staff of the Galapagos National Park lack the capacity and facilities for effective law enforcement (UNESCO World Heritage Centre 2007).

Previous UNESCO–IUCN Galapagos mission reports (in 2005 and 2006) to the World Heritage Committee have consistently outlined major threats to the long-term conservation of the Galapagos Islands, including the introduction of nonnative plant and animal species (UNESCO World Heritage Centre News 2007b). UNESCO World Heritage Centre reports that, despite an excellent legal framework, national government institutions encounter difficulties in ensuring full application of laws (UNESCO World Heritage Centre News 2007b).

The Galapagos Islands were declared a World Heritage Site (WHS) under the auspices of the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 1978 (UNESCO World Heritage Centre n.d.(a)), as they were recognized to be ''cultural and natural heritage of outstanding universal value that needs to be protected and preserved'' (UNESCO World Heritage Centre n.d.(b)). The aim of establishment as a WHS is conservation of the site for future generations (UNESCO World Heritage Centre 2008). However, due to threats to this site posed by invasive species, increasing tourism, and immigration, in June 2007, the World Heritage Committee placed the Galapagos on the ''List of World Heritage in Danger,'' with the intent of increasing support for the islands' conservation (UNESCO World Heritage Centre News 2007a).

In March 2008, the UNESCO World Heritage Centre/United Nations Foundation project for invasive species management provided funding of 2.19 million U.S. dollars (USD) to the Ecuadorian National Environmental Fund's ''Galapagos Invasive Species'' account to support invasive species control and eradication activities on the islands (UNESCO World Heritage Centre News 2008). In addition, the Ecuador government previously had contributed 1 million USD to this fund (UNESCO World Heritage Centre News 2008), demonstrating the government of Ecuador's commitment to reducing the threat of invasive species to the islands.

**Summary of Factor D**

Ecuador has developed numerous laws and regulatory mechanisms to administer and manage wildlife on the Galapagos Islands. However, these laws and regulatory mechanisms do not target reducing the threats to this species. The medium tree finch is listed as ''critically endangered'' under Ecuadorian law. Although 97 percent of the land on the Galapagos Islands is designated as the National Park, some of the land on Floreana is identified as a ''farming'' zone, where agricultural and grazing activities continue to threaten the habitat of the species. Additional regulations have created an inspection and quarantine system in order to prevent the introduction of nonnative species. However, this program does little to eradicate species already introduced to the Galapagos Islands. Therefore, we find that the existing regulatory mechanisms are inadequate to mitigate the current threats to the medium tree finch.

*E. Other Natural or Manmade Factors Affecting Its Continued Existence*

We are not aware of any scientific or commercial information that indicates other natural or manmade factors affecting the continued existence of the medium tree finch pose a threat to this species. As a result, we are not considering other natural or manmade factors to be a contributing factor to the continued existence of the medium tree finch.

Status Determination for the Medium Tree Finch

We have carefully assessed the best available scientific and commercial information regarding the past, present, and potential future threats faced by the medium tree finch. The species is currently at risk throughout all of its range primarily due to the immediate

and ongoing threat of the introduced parasitic fly, *Philornis downsi*. The clearing of native vegetation for agriculture and ranching, the destruction and degradation of habitat caused by introduced animals and plants (Factor A), predation (Factor C), and inadequate existing regulatory mechanisms (Factor D) are also considered to be threats to this species.

*Philornis downsi* is the greatest current threat to the survival of Darwin's finches on the Galapagos Islands (O'Connor *et al.* 2008a, in preparation). As shown in numerous studies (Dudaniec *et al.* 2006; Fessel and Tebich 2002; Fessel *et al.* 2006b; O'Connor *et al.* 2008a), the fitness costs of *P. downsi* parasitism in finches may be severe, with high incidences of nestling mortality, as well as lower fledgling success, reduced nestling growth, and reduced hemoglobin levels in nestlings.

Currently, the medium tree finch has the highest *Philornis downsi* parasite intensity of all the finch species found on Floreana, and the second highest of any finch species studied on the Galapagos Islands. *Philornis downsi* has been found in 100 percent of medium tree finch nests, causing parasitism of all nestlings.

A recent study (O'Connor *et al.* 2008a) showed that only 6.3 percent of active medium tree finch nests produced fledglings, with the majority (54 percent) of nestling mortality caused by *Philornis downsi* parasitism. With severely low reproductive success, the medium tree finch is likely to provide very little recruitment into the breeding population. Since finches are not known to suffer from a similar type of endemic parasite, it appears that they have not yet developed an adaptive response or defense mechanism against *P. downsi*. Therefore, a long-term control method for *P. downsi* is needed in order to eliminate this threat to the species.

The medium tree finch is found primarily in the moist highland forests (*i.e.*, the *Scalesia* zone) on the island of Floreana, which currently covers approximately 21 $km^2$ (8 $mi^2$). Because of the significant amounts of moisture and fertile soil available in the highlands, approximately 4 $km^2$ (1.5 $mi^2$) of the highland forests on Floreana have been altered or cleared for agricultural purposes.

Although the Galapagos National Park covers 97 percent of the land on the Galapagos Islands, the remaining 3 percent includes a large portion of the moist highlands on inhabited islands, such as Floreana, which allows farming to continue in this area today. Introduced animals, both domestic livestock and feral populations, have magnified the negative effects of clearing large areas of native vegetation for agriculture and ranching. Herbivores destroy the species' habitat on Floreana by trampling and grazing heavily on native vegetation, including *Scalesia pedunculata*, the tree primarily used by the medium tree finch for nesting and foraging. Introduced fruit trees, which have seeds easily spread by cattle and pigs, grow quickly and shade native seedlings of *Scalesia pedunculata*. Even though the Galapagos National Park Service encourages ranchers to fence in their cattle on Floreana, cattle still stray into native vegetation to graze.

Other introduced species, such as black rats and cats, prey on the eggs and nestlings of birds. One study (O'Connor *et al.* 2008a) found that 33 percent of medium tree finch nests experienced nestling predation, while egg depredation was observed in 22 percent of the nests. Agricultural areas close to the breeding sites of the medium tree finch allow for the continued persistence and movement of introduced predators, mainly rats, into the habitat of the medium tree finch.

Although an eradication program has been developed on Floreana to eliminate some of the introduced species, such as donkeys, goats, and rats, we are not aware of current programs to remove other introduced herbivores or introduced predators from Floreana. In addition, the programs to eliminate donkeys and rats from Floreana have not yet been completed; therefore, these introduced species continue to pose a threat to the medium tree finch and its habitat.

Even though the medium tree finch is listed as a ''critically endangered'' species under Ecuadorian law and its range includes the Galapagos National Park, existing regulatory mechanisms do not adequately protect the habitat of the species, and have not reduced the threats of introduced predators or parasitism by *Philornis downsi*, the primary threat to the medium tree finch.

Sulloway (2008a, in litt.) recently conducted an analysis of the relative numbers of tree finch specimens in the California Academy of Sciences' collections, comparing them to the frequencies found by Dr. Sonia Kleindorfer between 2000 and 2006. His analysis indicates that the medium tree finch is much less common today than it was prior to 1961 (Sulloway 2008a, in litt.). Specifically, the odds of seeing a medium tree finch today are approximately 25 percent what they would have been more than 50 years ago (Sulloway 2008a, in litt.). As reported by Sulloway (2008a, in litt.) and O'Connor *et al.* (2008b, in preparation), the population density of the medium tree finch is declining. Sulloway (2008b, in litt.) suggests that the decline in the population of the medium tree finch that he reported over the last 50 years is probably not due to the effects of human activities or introduced species. He based this response on the idea that the population of the medium tree finch had done fine for over a century, during which time settlers, introduced animals, and introduced plants had been present on Floreana (Sulloway 2008b, in litt.). More likely, he explains, the source of any significant and sustained changes in population densities of the medium tree finch since the early 1960s is parasitism by *Philornis downsi* (Sulloway 2008b, in litt.). Based on our analysis, we determined that the medium tree finch is currently at risk throughout all of its range primarily due to the immediate and ongoing threat of the introduced parasitic fly, *P. downsi*. However, the clearing of native vegetation for agriculture and ranching, and the destruction and degradation of habitat caused by introduced animals and plants are also considered to be threats to the species.

Section 3 of the Act defines an ''endangered species'' as ''any species which is in danger of extinction throughout all or a significant portion of its range'' and a ''threatened species'' as ''any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' Based on the immediate and ongoing significant threats to the medium tree finch throughout its entire range, as described above, we determine that the medium tree finch is in danger of extinction throughout all of its range. Therefore, on the basis of the best available scientific and commercial information, we are proposing to list the medium tree finch as an endangered species.

## Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness, and encourages and results in conservation actions by Federal governments, private agencies and groups, and individuals.

Section 7(a) of the Act, as amended, and as implemented by regulations at 50 CFR part 402, requires Federal agencies to evaluate their actions within the United States or on the high seas with respect to any species that is proposed

or listed as endangered or threatened, and with respect to its critical habitat, if any is being designated. However, given that the medium tree finch is not native to the United States, no critical habitat is being proposed for designation in this rule.

Section 8(a) of the Act authorizes limited financial assistance for the development and management of programs that the Secretary of the Interior determines to be necessary or useful for the conservation of endangered and threatened species in foreign countries. Sections 8(b) and 8(c) of the Act authorize the Secretary to encourage conservation programs for foreign endangered species and to provide assistance for such programs in the form of personnel and the training of personnel.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all endangered and threatened wildlife. As such, these prohibitions would be applicable to the medium tree finch. These prohibitions, under 50 CFR 17.21, make it illegal for any person subject to the jurisdiction of the United States to ''take'' (take includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or to attempt any of these) within the United States or upon the high seas, import or export, deliver, receive, carry, transport, or ship in interstate or foreign commerce in the course of a commercial activity, or to sell or offer for sale in interstate or foreign commerce, any endangered wildlife species. It also is illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken in violation of the Act. Certain exceptions apply to agents of the Service and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered and threatened wildlife species under certain circumstances. Regulations governing permits are codified at 50 CFR 17.22 for endangered species, and at 17.32 for threatened species. With regard to endangered wildlife, a permit must be issued for the following purposes: for scientific purposes, to enhance the propagation or survival of the species, and for incidental take in connection with otherwise lawful activities.

Peer Review

In accordance with our joint policy with National Marine Fisheries Service, ''Notice of Interagency Cooperative Policy for Peer Review in Endangered Species Act Activities,'' published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate independent specialists regarding this proposed rule. The purpose of peer review is to ensure that our proposed rule is based on scientifically sound data, assumptions, and analyses. We will send copies of this proposed rule to the peer reviewers immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment during the public comment period, on our specific assumptions and conclusions regarding the proposal to list the medium tree finch as endangered.

We will consider all comments and information we receive during the comment period on this proposed rule during our preparation of a final determination. Accordingly, our final decision may differ from this proposal.

*Public Hearings*

The Act provides for one or more public hearings on this proposal, if we receive any requests for hearings. We must receive your request for a public hearing within 45 days after the date of this **Federal Register** publication (see DATES). Such requests must be made in writing and be addressed to the Chief of the Division of Scientific Authority at the address shown in the **FOR FURTHER INFORMATION CONTACT** section. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** at least 15 days before the first hearing.

## Required Determinations

*Regulatory Planning and Review (Executive Order 12866)*

The Office of Management and Budget has determined that this rule is not significant under Executive Order 12866.

*National Environmental Policy Act (NEPA)*

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), need not be prepared in connection with regulations adopted under section 4(a) of the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

*Clarity of the Rule*

We are required by Executive Orders 12866 and 12988, and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

*References Cited*

A complete list of all references cited in this proposed rule is available on the Internet at *http://www.regulations.gov* or upon request from the Division of Scientific Authority, U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

*Author*

The primary author of this proposed rule is Monica A. Horton, Division of Scientific Authority, U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

## List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

## Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

## PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

**Authority:** 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Public Law 99–625, 100 Stat. 3500; unless otherwise noted.

2. Amend § 17.11(h) by adding a new entry for ''Tree finch, medium'' in alphabetical order under ''BIRDS'' to the List of Endangered and Threatened Wildlife to read as follows:

### § 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

| Species | | Historic range | Vertebrate population where endangered or threatened | Status | When listed | Critical habitat | Special rules |
|---|---|---|---|---|---|---|---|
| Common name | Scientific name | | | | | | |
| * | * | * | * | * | * | * | |
| BIRDS | | | | | | | |
| * | * | * | * | * | * | * | |
| Tree finch, medium ..... | *Camarhynchus pauper* | Ecuador (Galapagos Islands). | Entire ..... | E | | NA | NA |
| * | * | * | * | * | * | * | |

* * * * *

Dated: November 25, 2008.

**H. Dale Hall,**

*Director, U.S. Fish and Wildlife Service.*

[FR Doc. E8–28998 Filed 12–5–08; 8:45 am]

**BILLING CODE 4310–55–P**

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## DEPARTMENT OF THE INTERIOR

## Fish and Wildlife Service

## 50 CFR Part 21

**[FWS–R9–MB–2008–0109; 91200–1231–9BPP]**

**RIN 1018–AW11**

## Migratory Bird Permits; Revision of Expiration Dates for Double-Crested Cormorant Depredation Orders

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule; availability of draft environmental assessment; request for public comment.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, propose to extend our two existing depredation orders for double-crested cormorants (*Phalacrocorax auritus*) in the Code of Federal Regulations (CFR) at 50 CFR 21.47 and 21.48 so that we can continue to authorize take of double-crested cormorants without a permit under the terms and conditions of the depredation orders and gather data on the effects of double-crested cormorant control actions. If we do not extend these depredation orders, any action to control depredating double-crested cormorants will require a permit. We have prepared a draft environmental assessment (DEA) to analyze the environmental impacts associated with our proposed extensions. We invite the public to comment on the DEA and our proposed extension. The DEA is posted at *http://www.fws.gov/migratorybirds.*

**DATES:** We will accept comments on the DEA, the proposed extension, or both, that are received or postmarked on or before January 22, 2009.

**ADDRESSES:** You may submit comments on the DEA or the proposed extension by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: RIN 1018–AW11; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203–1610.

We will not accept e-mails or faxes. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide (see the Public Comments section below for more information).

**FOR FURTHER INFORMATION CONTACT:** Terry Doyle, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, Division of Migratory Bird Management, 4401 North Fairfax Drive, Mail Stop 4107, Arlington, VA 22203–1610, or telephone 703–358–1825.

**SUPPLEMENTARY INFORMATION:**

### Background

The U.S. Fish and Wildlife Service is the Federal agency delegated the primary responsibility for managing migratory birds. This delegation is authorized by the Migratory Bird Treaty Act (MBTA) (16 U.S.C. 703 *et seq.*), which implements conventions with Great Britain (for Canada), Mexico, Japan, and the Soviet Union (Russia). Part 21 of title 50 of the CFR covers migratory bird permits. Subpart D deals specifically with the control of depredating birds and currently includes eight depredation orders. A depredation order is a regulation that allows the take of specific species of migratory birds, at specific locations and for specific purposes, without a depredation permit.

The depredation orders at 50 CFR 21.47 and 21.48 for double-crested cormorants allow for take of the species under the provisions of our 2003 Environmental Impact Statement (EIS) (68 FR 47603), in which we assessed the impacts of the depredation orders and determined that they would not significantly affect the status of the species. The EIS is available by contacting us at the address in the **FOR FURTHER INFORMATION CONTACT** section. The depredation orders are scheduled to expire in April 2009. We have no data to suggest that the orders have had any significant negative effect on double-crested cormorant populations. Extending the orders for an additional five years will not, in the judgment of Service biologists, pose a significant, detrimental effect on the long-term viability of double-crested cormorant populations.

### Public Comments

You may submit your comments and materials concerning our proposed rule and DEA by one of the methods listed in the **ADDRESSES** section. We will not accept comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

If you submit a comment via *http://www.regulations.gov,* your entire comment, including any personal identifying information, will be posted on the Web site. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on *http://www.regulations.gov.*

### Required Determinations

*Regulatory Planning and Review (E.O. 12866)*

The Office of Management and Budget (OMB) has determined that this proposed rule is not significant under E.O. (E.O.) 12866. OMB bases its determination upon the following four criteria:

(a) Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the

environment, or other units of the government.

(b) Whether the rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the rule raises novel legal or policy issues.

*Regulatory Flexibility Act (5 U.S.C. 601 et seq.)*

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (Pub. L. 104–121)), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions).

SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule would not have a significant economic impact on a substantial number of small entities. We have examined this rule's potential effects on small entities as required by the Regulatory Flexibility Act, and have determined that this action would not have a significant economic impact on a substantial number of small entities. The proposed rule would allow small entities to continue actions they have been able to take under the regulations—actions specifically designed to improve the economic viability of those entities—and, therefore, would not significantly affect them economically. We certify that because this proposed rule would not have a significant economic effect on a substantial number of small entities, a regulatory flexibility analysis is not required.

This proposed rule is not a major rule under the SBREFA (5 U.S.C. 804 (2)).

a. This proposed rule would not have an annual effect on the economy of $100 million or more.

b. This proposed rule would not cause a major increase in costs or prices for consumers; individual industries; Federal, State, tribal, or local government agencies; or geographic regions.

c. This proposed rule would not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

*Unfunded Mandates Reform Act*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we have determined the following:

a. This proposed rule would not ''significantly or uniquely'' affect small governments. A small government agency plan is not required. Actions under the proposed regulation would not affect small government activities in any significant way.

b. This proposed rule would not produce a Federal mandate of $100 million or greater in any year. It would not be a ''significant regulatory action'' under the Unfunded Mandates Reform Act.

*Takings*

In accordance with E.O. 12630, this proposed rule does not have significant takings implications. A takings implication assessment is not required. This proposed rule does not contain a provision for taking of private property.

*Federalism*

This proposed rule does not have sufficient Federalism effects to warrant preparation of a Federalism assessment under E.O. 13132. It would not interfere with the ability of States to manage themselves or their funds. No significant economic impacts are expected to result from the proposed change in the depredation order.

*Civil Justice Reform*

In accordance with E.O. 12988, the Office of the Solicitor has determined that the proposed rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of E.O. 12988.

*Paperwork Reduction Act*

We examined these proposed regulations under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). We may not collect or sponsor, and you are not required to respond to a collection of information unless it displays a currently valid Office of Management and Budget control number. The Office of Management and Budget approved the information collection requirements for this part, and assigned OMB Control Number 1018–0121. There are no new information collection requirements associated with this regulations change.

*National Environmental Policy Act*

We have completed a Draft Environmental Assessment (DEA) on this proposed regulations change. The DEA is a part of the administrative record for this proposed rule. In accordance with the National Environmental Policy Act (NEPA, 42 U.S.C. 4321 *et seq.* and part 516 of the U.S. Department of the Interior Manual (516 DM), extension of the expiration dates of the depredation orders will not have a significant effect on the quality of the human environment, nor would it involve unresolved conflicts concerning alternative uses of available resources, therefore preparation of an Environmental Impact Statement (EIS) is not required.

*Government-to-Government Relationship With Tribes*

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), E.O. 13175, and 512 DM 2, we have evaluated potential effects on Federally recognized Indian Tribes and have determined that there are no potential effects. This proposed rule would not interfere with the ability of Tribes to manage themselves or their funds or to regulate migratory bird activities on Tribal lands.

*Energy Supply, Distribution, or Use (E.O. 13211)*

On May 18, 2001, the President issued E.O. 13211 addressing regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule change would not be a significant regulatory action under E.O. 12866, nor would it significantly affect energy supplies, distribution, or use. This action would not be a significant energy action, and no Statement of Energy Effects is required.

*Compliance With Endangered Species Act Requirements*

Section 7 of the Endangered Species Act (ESA) of 1973, as amended (16 U.S.C. 1531 *et seq.*), requires that ''The Secretary [of the Interior] shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter'' (16 U.S.C. 1536 (a) (1)). It further states that the Secretary must ''insure that any action authorized, funded, or carried out * * * is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat'' (16 U.S.C. 1536(a)(2)). We have concluded that the proposed regulation change would not affect listed species.

*Clarity of This Regulation*

We are required by E.O.'s 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

**Literature Cited**

U.S. Fish and Wildlife Service. 2003. Final Environmental Impact Statement: Double-Crested Cormorant Management. Available at *http://www.fws.gov/migratorybirds/issues/cormorant/finaleis/CormorantFEIS.pdf*.

**List of Subjects in 50 CFR Part 21**

Exports, Hunting, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

For the reasons stated in the preamble, we propose to amend part 21 of subchapter B, chapter I, title 50 of the Code of Federal Regulations, as follows:

## PART 21—MIGRATORY BIRD PERMITS

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

**Authority:** Migratory Bird Treaty Act, 40 Stat. 755 (16 U.S.C. 703); Public Law 95–616, 92 Stat. 3112 (16 U.S.C. 712(2)); Public Law 106–108, 113 Stat. 1491, Note Following 16 U.S.C. 703.

**§ 21.47 [Amended]**

2. Amend § 21.47(f) by removing the number ''2009'' and adding in its place the number ''2014.''

**§ 21.48 [Amended]**

3. Amend § 21.48(f) by removing the number ''2009'' and adding in its place the number ''2014.''

Dated: November 25, 2008.

**David M. Verhey,**

*Acting Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. E8–29018 Filed 12–5–08; 8:45 am]

BILLING CODE 4310–55–P

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 21**

**[FWS–R9–MB–2008–0064; 91200–1231–9BPP]**

**RIN 1018–AV66**

## Migratory Bird Permits; Removal of Rusty Blackbird and Tamaulipas (Mexican) Crow From the Depredation Order for Blackbirds, Cowbirds, Grackles, Crows, and Magpies, and Other Changes to the Order

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, propose a change in the regulations governing control of depredating blackbirds, cowbirds, grackles, crows, and magpies at 50 CFR 21.43. Because of long-term evidence of population declines throughout much of their ranges, we propose to remove the Rusty Blackbird (*Euphagus carolinus*) and the Mexican (Tamaulipas) Crow (*Corvus imparatus*) from the list of species that may be controlled under the depredation order. After this change, a depredation permit would be necessary to conduct control actions to take either of these species. We also propose to add a requirement to use nontoxic shot or bullets when a firearm is used to control any species listed under the order, and we propose to add a requirement to report on control actions taken under the order.

**DATES:** We will accept comments received or postmarked on or before March 9, 2009.

**ADDRESSES:** You may submit comments on the proposed rule by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: RIN 1018–AV66; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203–1610.

We will not accept e-mails or faxes. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide (*see* the Public Comments section below for more information).

*Information Collection:* See ''Paperwork Reduction Act'' in **SUPPLEMENTARY INFORMATION** for information on submitting comments on the proposed information collection requirements.

**FOR FURTHER INFORMATION CONTACT:** Dr. George T. Allen, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, Division of Migratory Bird Management, 4401 North Fairfax Drive, Mail Stop 4107, Arlington, VA 22203–1610, or telephone 703–358–1825.

**SUPPLEMENTARY INFORMATION:**

**Background**

The U.S. Fish and Wildlife Service is the Federal agency delegated the primary responsibility for managing migratory birds. This delegation is authorized by the Migratory Bird Treaty Act (MBTA) (16 U.S.C. 703 *et seq.*), which implements conventions with Great Britain (for Canada), Mexico, Japan, and the Soviet Union (Russia). Part 21 of title 50 of the Code of Federal Regulations covers migratory bird permits. Subpart D deals specifically with the control of depredating birds and presently includes eight depredation orders. A depredation order is a regulation that allows the take of specific species of migratory birds, at specific locations, and for specific purposes without a depredation permit. The depredation order at 50 CFR 21.43 for blackbirds, cowbirds, grackles, crows, and magpies allows take when individuals of an included species are ''found committing or about to commit depredations upon ornamental or shade trees, agricultural crops, livestock, or wildlife, or when concentrated in such numbers and manner as to constitute a health hazard or other nuisance.''

*Rusty Blackbird*

The Rusty Blackbird is highly dependent upon wooded wetlands and breeds further north than any other blackbird in North America. It breeds mainly in Alaska and Canada and occurs in the contiguous United States during migration and winter. For a map of the species' geographic distribution, go to: *http://www.birds.cornell.edu/AllAboutBirds/BirdGuide/Rusty_Blackbird_dtl.html#range.* Estimates of the Rusty Blackbird's global breeding population have varied and continue to vary considerably. A good recent estimate is perhaps 1.3 million (P. Blancher, Environment Canada, unpublished data).

Greenberg and Droege (1999) wrote, ''All of the evidence to date indicates that the Rusty Blackbird was once abundant but has been experiencing a chronic decline since the mid-1800s. This decline may be accelerating, with total decreases estimated at

approximately 90 percent by three independent population surveys.'' This evidence of sharp decline, coupled with the species' low population density, has made it a conservation concern; the Rusty Blackbird is included on both Audubon's WatchList (National Audubon Society 2008) and the Partners In Flight Watch List (where it is labeled as ''moderately abundant or widespread [but] with declines or high threats''; Rich *et al.* 2004). Additionally, it is labeled a species of ''Special Concern'' by the Committee on the Status of Endangered Wildlife in Canada, and as ''Vulnerable'' to extinction in the wild by the World Conservation Union (BirdLife International 2004).

Three lines of evidence have raised concerns about the Rusty Blackbird's population status. First, the species is now rare or absent from at least some boreal forest areas where it was once common (Greenberg and Droege 1999). Second, Breeding Bird Survey (BBS) data indicate that the species has declined dramatically over the past few decades, with the highest rates of decline occurring in the central and eastern portion of the boreal forest. Since 1966, abundance of the Rusty Blackbird has declined by 12.8 percent annually across the BBS survey (Sauer *et al.* 2007). However, BBS survey coverage is concentrated at the southern extent of the Rusty Blackbird's breeding range and thus the BBS trend may not be representative of the entire population. Third, Christmas Bird Count (CBC) data analysis indicates a 5.1 percent annual decline throughout the species' winter range from 1965–66 to 2002–03 (Niven *et al.* 2004). CBC data are considered more reliable for detecting changes in Rusty Blackbird abundance than are BBS data since only a small area of the species' breeding range is covered by BBS routes, whereas a large portion of its winter range is covered by CBC surveys (Machtans *et al.* 2007, Niven *et al.* 2004).

Conversion of wooded wetland habitats on both breeding and wintering grounds is a compelling explanation for the species' decline. However, acid precipitation in the boreal forest (Greenberg and Droege 1999) and dessication of boreal wetlands (Greenberg *et al.* unpublished data) are other suspected contributing factors.

Avery (1995) reported that Rusty Blackbirds make up less than 1 percent of mixed-species winter roost concentrations, and that the effects of roost control on populations are unknown. However, Greenberg and Droege (1999) seemed to believe that bird control programs are not an important cause of the species' decline.

Despite uncertainty about the significance of blackbird control in the Rusty Blackbird's decline, given the long-term downward trend and special conservation status of the species, we have decided that we should remove the Rusty Blackbird from the list of species that may be controlled under the depredation order at 50 CFR 21.43. After this change, any take of this species would require a depredation permit (50 CFR 21.41) or other applicable MBTA permit.

*Tamaulipas Crow*

In 50 CFR 10.13, the List of Migratory Birds (the bird species protected under the MBTA), *Corvus imparatus* is the ''Mexican Crow.'' However, the species is currently recognized by the common name ''Tamaulipas Crow'' by the American Ornithologists' Union Committee on Classification and Nomenclature. We consider ''Tamaulipas Crow'' to be synonymous with ''Mexican Crow.''

The Tamaulipas Crow is a small glossy crow of northeast Mexico, with a total distribution limited to about 350 miles from the Texas/Mexico border area south to northern Veracruz, Mexico (Howell and Webb 1995). The species frequents semiarid brushlands and can be found in association with humans in villages, ranches, and garbage dumps (Oberholser 1974). The Tamaulipas Crow was first discovered in the United States in August 1968 when three birds were observed near the mouth of the Rio Grande in Cameron County, Texas; a week later, approximately 1,000 birds were seen in the same vicinity (Oberholser 1974, Arvin *et al.* 1975). Breeding in the United States was first documented in Brownsville, Texas, in 1989, and the species has bred sporadically in that area since then (Brush 2005). Lockwood and Freeman (2004) described the Tamaulipas Crow as a ''Very rare to casual visitor to southern Cameron County, primarily in the vicinity of the Brownsville Sanitary Landfill. Although formerly a common winter resident and very rare summer resident, this species now barely maintains a toe-hold in southern Texas.''

Recent observations by ornithologists indicate that the total distribution (and possibly the population) of the Tamaulipas Crow have declined considerably since the late 20th century, although quantitative data are lacking. The species is listed in the ''yellow'' category on Audubon's WatchList, due to its limited range (National Audubon Society 2008), but has the rank of ''Least Concern'' on the World Conservation Union's Red List (BirdLife International 2004). However, concerns about rapid population decline in the northern part of its range are too recent to be reflected in the Red List. In the Partners in Flight species assessment database, the Tamaulipas Crow is listed as a Species of Regional Importance, and it needs ''Management Attention,'' according to the Rocky Mountain Bird Observatory (2005).

Because of the extremely limited distribution of this species in the United States, and its apparent rapid decline in numbers, we propose to remove the Tamaulipas Crow from the list of species that may be controlled under the depredation order at 50 CFR 21.43. After this change, any take of this species would require a depredation permit (50 CFR 21.41) or other applicable MBTA permit.

## Additional Regulatory Changes

We also propose to require the use of nontoxic ammunition for all take of migratory birds under this depredation order to prevent toxicity hazards to other wildlife. Further, we propose to require reporting of control actions taken under the order to give us data on the number of each species taken each year to better monitor the effects of such take on populations of those species. We expect the respondents to be mostly State and Federal wildlife damage management personnel who undertake blackbird control to protect crops. We also propose to make the list of species to which the depredation order applies more precise by listing each species that may be controlled under the order.

## Public Comments

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We will not accept comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

If you submit a comment via *http://www.regulations.gov*, your entire comment, including any personal identifying information, will be posted on the Web site. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on *http://www.regulations.gov*.

## Required Determinations

*Regulatory Planning and Review (Executive Order 12866)*

The Office of Management and Budget (OMB) has determined that this

proposed rule is not significant under Executive Order 12866. OMB bases its determination upon the following four criteria:

(a) Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(b) Whether the rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the rule raises novel legal or policy issues.

*Regulatory Flexibility Act (5 U.S.C. 601 et seq.)*

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (Pub. L. 104–121)), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions).

SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule would not have a significant economic impact on a substantial number of small entities. We have examined this rule's potential effects on small entities as required by the Regulatory Flexibility Act, and have determined that this action would not have a significant economic impact on a substantial number of small entities because neither the Rusty Blackbird nor the Tamaulipas Crow are species that frequently cause depredation problems and, where they might do so, depredation permits could be issued to alleviate such problems. There are no costs associated with this regulations change except that persons needing a depredation permit to take Rusty Blackbirds or Tamaulipas Crows will have to pay the $100 application fee for a depredation permit. We estimate the number of people likely to apply for such a permit to be no more than 25 per year. We certify that because this proposed rule would not have a significant economic effect on a substantial number of small entities, a regulatory flexibility analysis is not required.

This proposed rule is not a major rule under the SBREFA (5 U.S.C. 804(2)).

a. This proposed rule would not have an annual effect on the economy of $100 million or more.

b. This proposed rule would not cause a major increase in costs or prices for consumers; individual industries; Federal, State, Tribal, or local government agencies; or geographic regions.

c. This proposed rule would not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

*Unfunded Mandates Reform Act*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we have determined the following:

a. This proposed rule would not ''significantly or uniquely'' affect small governments. A small government agency plan is not required. Actions under the proposed regulation would not affect small government activities in any significant way.

b. This proposed rule would not produce a Federal mandate of $100 million or greater in any year. It would not be a ''significant regulatory action'' under the Unfunded Mandates Reform Act.

*Takings*

In accordance with Executive Order 12630, this proposed rule does not have significant takings implications. A takings implication assessment is not required. This proposed rule does not contain a provision for taking of private property.

*Federalism*

This proposed rule does not have sufficient Federalism effects to warrant preparation of a Federalism assessment under Executive Order 13132. It would not interfere with the ability of States to manage themselves or their funds. No significant economic impacts are expected to result from the proposed change in the depredation order.

*Civil Justice Reform*

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the proposed rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of E.O. 12988.

*Paperwork Reduction Act*

This proposed rule contains a collection of information that we are submitting to the Office of Management and Budget (OMB) for review and approval under Sec. 3507(d) of the Paperwork Reduction Act (PRA). We are proposing to require that any person or agency acting under the depredation order provide an annual report to the appropriate Regional Migratory Bird Permit Office. We plan to collect the following information for each species taken:

(1) Number of birds taken,

(2) Months and years in which the birds were taken,

(3) State(s) and county(ies) in which the birds were taken, and

(4) The purpose for which birds were taken (such as for protection of agriculture; human health and safety, property, or natural resources).

We propose to collect this information so that we will be able to determine how many birds of each species are taken each year and whether the control actions are likely to affect the populations of those species.

*Title:* Depredation Order for Certain Migratory Birds, 50 CFR 21.43.

*OMB Control Number:* None. This is a new collection.

*Service Form Number(s):* None.

*Type of Request:* New collection.

*Affected Public:* State and Federal wildlife damage management personnel, perhaps farmers.

*Respondent's Obligation:* Required to obtain or retain a benefit.

*Frequency of Collection:* Annually.

*Estimated Annual Number of Respondents:* 250.

*Estimated Total Annual Responses:* 250.

*Estimated Time per Response:* 2 hours.

*Estimated Total Annual Burden Hours:* 500.

As part of our continuing effort to reduce paperwork and respondent burdens, we invite the public and other Federal agencies to comment on any aspect of the reporting burden, including:

(1) Whether or not the collection of information is necessary, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information;

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

(4) Ways to minimize the burden of the collection of information on respondents.

Send your comments and suggestions on this information collection to the Desk Officer for the Department of the Interior at OMB–OIRA at (202) 395–6566 (fax) or *OIRA_DOCKET@OMB.eop.gov* (e-mail). Please provide a copy of your comments

to Hope Grey, Information Collection Clearance Officer, Fish and Wildlife Service, MS 222–ARLSQ, 4401 North Fairfax Drive, Arlington, VA 22203 (mail); (703) 358–2269 (fax); or *hope_grey@fws.gov* (e-mail).

The PRA provides that an agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. Until OMB approves this collection of information and assigns an OMB control number and the regulations become effective, you are not required to respond. The OMB is required to make a decision concerning the collection of information of this proposed regulation between 30 to 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it by January 7, 2009. This does not affect the deadline for the public to comment on the proposed regulations.

*National Environmental Policy Act*

We have completed a Draft Environmental Assessment (DEA) on this proposed regulations change. The DEA is a part of the administrative record for this proposed rule. In accordance with the National Environmental Policy Act (NEPA, 42 U.S.C. 4332(C)) and Part 516 of the U.S. Department of the Interior Manual (516 DM), removal of the Rusty Blackbird and Tamaulipas Crow from the depredation order and adding requirements for nontoxic shot or bullets will not have a significant effect on the quality of the human environment, nor would it involve unresolved conflicts concerning alternative uses of available resources.

*Government-to-Government Relationship With Tribes*

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations With Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, and 512 DM 2, we have evaluated potential effects on federally recognized Indian Tribes and have determined that there are no potential effects. This proposed rule would apply to Tribes and any control actions that Tribes carry out on their lands, but it would not interfere with the ability of Tribes to manage themselves or their funds.

*Energy Supply, Distribution, or Use (Executive Order 13211)*

On May 18, 2001, the President issued Executive Order 13211 addressing regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule change would not be a significant regulatory action under E.O. 12866, nor would it significantly affect energy supplies, distribution, or use. This action would not be a significant energy action and no Statement of Energy Effects is required.

*Compliance With Endangered Species Act Requirements*

Section 7 of the Endangered Species Act (ESA) of 1973, as amended (16 U.S.C. 1531 *et seq.*), requires that ''The Secretary [of the Interior] shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter'' (16 U.S.C. 1536(a)(1)). It further states that the Secretary must ''insure that any action authorized, funded, or carried out * * * is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat'' (16 U.S.C. 1536(a)(2)). We have concluded that the proposed regulation change would not affect listed species.

*Clarity of This Regulation*

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

**Literature Cited**


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**List of Subjects in 50 CFR Part 21**

Exports, Hunting, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

For the reasons stated in the preamble, we propose to amend part 21

of subchapter B, chapter I, title 50 of the Code of Federal Regulations, as follows:

## PART 21—MIGRATORY BIRD PERMITS

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

**Authority:** Migratory Bird Treaty Act, 40 Stat. 755 (16 U.S.C. 703); Public Law 95–616, 92 Stat. 3112 (16 U.S.C. 712(2)); Public Law 106–108, 113 Stat. 1491, Note following 16 U.S.C. 703.

2. Revise § 21.43 as follows:

### § 21.43 Depredation order for blackbirds, cowbirds, grackles, crows, and magpies.

You do not need a Federal permit to control the species listed in the table below if they are committing or about to commit depredations on ornamental or shade trees, agricultural crops, livestock, or wildlife, or when concentrated in such numbers and manner that they are a health hazard or other nuisance:

| Blackbirds | Cowbirds | Grackles | Crows | Magpies |
|---|---|---|---|---|
| Brewer's (*Euphagus cyanocephalus*). | Bronzed (*Molothrus aeneus*). | Boat-tailed (*Quiscalus major*). | American (*Corvus brachyrhynchos*). | Black-billed (*Pica pica*). |
| Red-winged (*Agelaius phoeniceus*). | Brown-headed (*Molothrus ater*). | Common (*Quiscalus quiscula*). | Fish (*Corvus ossifragus*) ... | Yellow-billed (*Pica nuttalli*). |
| Yellow-headed (*Xanthocephalus xanthocephalus*). | Shiny (*Molothrus bonariensis*). | Great-tailed (*Quiscalus mexicanus*). | Northwestern (*Corvus caurinus*). | |
| | | Greater Antillean (*Quiscalus niger*). | | |

(a) If you use a firearm to kill migratory birds under the provisions of this section, you must use nontoxic shot or nontoxic bullets to do so. *See* § 20.21(j) of this chapter for a listing of approved nontoxic shot types.

(b) If you exercise any of the privileges granted by this section, you must allow any Federal, State, tribal, or territorial wildlife law enforcement officer unrestricted access at all reasonable times (including during actual operations) over the premises on which you are conducting the control. You must furnish the officer whatever information he or she may require about your control operations.

(c) You may kill birds under this order only in a way that complies with all State, tribal, or territorial laws or regulations. You must have any State, tribal, or territorial permit required to conduct the activity.

(d) You may not sell, or offer to sell, any bird killed pursuant to this section, or any of its plumage, but you may possess, transport, and otherwise dispose of the bird or its plumage.

(e) Any person or agency acting under this depredation order must provide to the appropriate Regional Migratory Bird Permit Office an annual report for each species taken. You can find the addresses for the Regional Migratory Bird Permit Offices in § 2.2 of subchapter A of this chapter. You must submit your report by January 31st of the following year, and you must include the following information:

(1) Your name, address, phone number, and email address;

(2) The species and number of birds taken;

(3) The months in which the birds were taken;

(4) The State(s) and county(ies) in which the birds were taken; and

(5) The general purpose for which the birds were taken (such as for protection of agriculture, human health and safety, property, or natural resources).

(f) The Office of Management and Budget has approved the information collection requirements associated with this depredation order and assigned OMB Control No. 1018–XXXX. We may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number. You may send comments on the information collection requirements to the Service's Information Collection Clearance Officer, U.S. Fish and Wildlife Service, MS 222–ARLSQ, 1849 C Street, NW., Washington, DC 20240.

Dated: November 25, 2008.

**David M. Verhey,**

*Acting Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. E8–29017 Filed 12–5–08; 8:45 am]

BILLING CODE 4310–55–P

# Notices

Federal Register

Vol. 73, No. 236

Monday, December 8, 2008

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

**[Docket No. APHIS–2008–0132]**

### Notice of Request for Extension of Approval of an Information Collection; Special Need Requests Under the Plant Protection Act

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Extension of approval of an information collection; comment request.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with regulations to allow States to impose prohibitions or restrictions on specific articles in addition to those required by the Animal and Plant Health Inspection Service to help protect against the introduction and establishment of plant pests.

**DATES:** We will consider all comments that we receive on or before February 6, 2009.

**ADDRESSES:** You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS–2008–0132* to submit or view comments and to view supporting and related materials available electronically.
- *Postal Mail/Commercial Delivery:* Please send two copies of your comment to Docket No. APHIS–2008–0132, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. APHIS–2008–0132.

*Reading Room:* You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

*Other Information:* Additional information about APHIS and its programs is available on the Internet at *http://www.aphis.usda.gov*.

**FOR FURTHER INFORMATION CONTACT:** For information on special need requests under the Plant Protection Act, contact Dr. Osama El Lissy, Director, Emergency Management, Emergency and Domestic Programs, PPQ, APHIS, 4700 River Road Unit 137, Riverdale, MD 20737; (301) 734–8247. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

**SUPPLEMENTARY INFORMATION:**

*Title:* Special Need Requests Under the Plant Protection Act.

*OMB Number:* 0579–0291.

*Type of Request:* Extension of approval of an information collection.

*Abstract:* As authorized by the Plant Protection Act (7 U.S.C. 7701 *et seq.*) (PPA), the Secretary of Agriculture may prohibit or restrict the importation, entry, exportation, or movement in interstate commerce of any plant, plant product, biological control organism, noxious weed, means of conveyance, or other article if the Secretary determines that the prohibition or restriction is necessary to prevent a plant pest or noxious weed from being introduced into or disseminated within the United States. This authority has been delegated to the Animal and Plant Health Inspection Service (APHIS), which administers regulations to implement the PPA. Regulations governing the interstate movement of plants, plant products, and other articles are contained in 7 CFR part 301, ''Domestic Quarantine Notices.''

The regulations in ''Subpart-Special Need Requests'' allow States or political subdivisions of States to request approval from APHIS to impose prohibitions or restrictions on the movement in interstate commerce of specific articles that pose a plant health risk that are in addition to the prohibitions and restrictions imposed by APHIS. This process requires information collection activities, including a pest data detection survey with a pest risk analysis showing that a pest is not present in a State, or, if already present, the current distribution in the State, and that the pest would harm or injure the environment and/or agricultural resources of the State or political subdivision.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

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

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

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; e.g., permitting electronic submission of responses.

*Estimate of burden:* The public reporting burden for this collection of information is estimated to average 160 hours per response.

*Respondents:* State Governments.

*Estimated annual number of respondents:* 10.

*Estimated annual number of responses per respondent:* 1.

*Estimated annual number of responses:* 10.

*Estimated total annual burden on respondents:* 1,600 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 2nd day of December 2008.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. E8–28966 Filed 12–5–08; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

**[Docket No. APHIS–2008–0094]**

### Pioneer Hi-Bred International, Inc.; Availability of Petition and Environmental Assessment for Determination of Nonregulated Status for Corn Genetically Engineered for Tolerance to Glyphosate and Acetolactate Synthase-Inhibiting Herbicides

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Notice.

**SUMMARY:** We are advising the public that the Animal and Plant Health Inspection Service has received a petition from Pioneer Hi-Bred International, Inc., seeking a determination of nonregulated status for corn designated as transformation event 98140, which has been genetically engineered for tolerance to glyphosate and acetolactate synthase-inhibiting herbicides. The petition has been submitted in accordance with our regulations concerning the introduction of certain genetically engineered organisms and products. In accordance with those regulations, we are soliciting comments on whether this genetically engineered corn is likely to pose a plant pest risk. We are also making available for public comment an environmental assessment for the proposed determination of nonregulated status.

**DATES:** We will consider all comments we receive on or before February 6, 2009.

**ADDRESSES:** You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS–2008–0094* to submit or view comments and to view supporting and related materials available electronically.
- *Postal Mail/Commercial Delivery:* Please send two copies of your comment to Docket No. APHIS–2008–0094, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. APHIS–2008–0094.

*Reading Room:* You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

*Other Information:* Additional information about APHIS and its programs is available on the Internet at *http://www.aphis.usda.gov*.

**FOR FURTHER INFORMATION CONTACT:** Dr. Natalia Weinsetel, Biotechnology Regulatory Services, APHIS, 4700 River Road Unit 147, Riverdale, MD 20737–1236; (301) 734–0809, *e-mail: natalia.a.weinsetel@aphis.usda.gov*. To obtain copies of the petition or the draft environmental assessment, contact Ms. Cindy Eck at (301) 734–0667, *e-mail: cynthia.a.eck@aphis.usda.gov*. The petition and the draft environmental assessment are also available on the Internet at *http://www.aphis.usda.gov/brs/aphisdocs/07_15201p.pdf* and *http://www.aphis.usda.gov/brs/aphisdocs/07_15201p_ea.pdf*.

**SUPPLEMENTARY INFORMATION:**

#### Background

The regulations in 7 CFR part 340, ''Introduction of Organisms and Products Altered or Produced Through Genetic Engineering Which Are Plant Pests or Which There Is Reason to Believe Are Plant Pests,'' regulate, among other things, the introduction (importation, interstate movement, or release into the environment) of organisms and products altered or produced through genetic engineering that are plant pests or that there is reason to believe are plant pests. Such genetically engineered organisms and products are considered ''regulated articles.''

The regulations in § 340.6(a) provide that any person may submit a petition to the Animal and Plant Health Inspection Service (APHIS) seeking a determination that an article should not be regulated under 7 CFR part 340. Paragraphs (b) and (c) of § 340.6 describe the form that a petition for a determination of nonregulated status must take and the information that must be included in the petition.

On June 1, 2007, APHIS received a petition seeking a determination of nonregulated status (APHIS Petition Number 07–152–01p) from Pioneer Hi-Bred International, Inc., of Johnston, IA (Pioneer), for corn (*Zea mays* L.) designated as transformation event 98140, which has been genetically engineered for tolerance to glyphosate and acetolactate synthase (ALS)-inhibiting herbicides, stating that corn line 98140 is unlikely to pose a plant pest risk and, therefore, should not be a regulated article under APHIS' regulations in 7 CFR part 340.

As described in the petition, the 98140 corn line has been genetically engineered to express modified glyphosate acetyltransferase (GAT4621) and modified maize acetolactate synthase (ZM–HRA) proteins. The GAT4621 protein, encoded by the *gat4621* gene, confers tolerance to glyphosate-containing herbicides by acetylating glyphosate and thus rendering it non-phytotoxic. The ZM–HRA protein, encoded by the *zm-hra* gene, confers tolerance to the ALS-inhibiting class of herbicides (e.g., sulfonylureas and imidazolinones). Expression of the *zm-hra* gene is controlled by the maize ALS (acetolactate synthase) promoter. ALS is the enzyme required for the production of essential branched-chain amino acids such as valine, leucine, and isoleucine. The *gat4621* gene is based on the sequences of three *gat* genes from *Bacillus licheniformis*, a common soil bacterium. Expression of the *gat4621* gene is driven by the corn ubiquitin promoter (*ubi*ZM1). The *zm-hra* gene was made by isolating the herbicide sensitive maize *ALS* gene and introducing two specific changes known to confer herbicide tolerance to tobacco ALS.

The genetic insert also contains the terminator sequence from *Solanum tuberosum* (potato) and two sequences from two prevalent plant pests, cauliflower mosaic virus (enhancer) and *Agrobacterium tumefaciens* (border region). All of these sequences are well-characterized and are non-coding regulatory regions only. Therefore, these sequences will not cause the 98140 corn line to promote plant disease.

A single copy of these genes and other DNA regulatory sequences were introduced into the corn genome with the transformation vector PHP24279 using disarmed (non-plant pest causing) *A. tumefaciens* transformation of immature embryos. Plant cells containing the introduced DNA were selected by culturing in the presence of glyphosate. After the initial transformation, the antibiotic carbenicillin was included in the culture medium to kill any remaining

*Agrobacterium*. Therefore, no part of the plant pest *A. tumefaciens* remained in Pioneer HT corn due to the transformation method.

Pioneer's 98140 corn line has been considered a regulated article under the regulations in 7 CFR part 340 because it contains gene sequences from plant pathogens. The 98140 corn line has been field tested in the United States since 2005 as authorized by APHIS notifications and permits. In the process of reviewing the permits for field trials of the subject corn, APHIS determined that the vectors and other elements used to introduce the new genes were disarmed and that the trials, which were conducted under conditions of reproductive and physical confinement or isolation, would not present a risk of plant pest introduction or dissemination. Field tests conducted under APHIS regulatory oversight allowed for evaluation in a natural agricultural setting while imposing measures to minimize the risk of persistence in the environment after completion of the test. Data are gathered on multiple parameters and used by the applicant to evaluate agronomic characteristics and product performance. These field test data, in turn, are used by APHIS to determine if the regulated corn event poses a plant pest risk. Pioneer has petitioned APHIS to make a determination that the 98140 corn line and the progeny derived from its crosses with other nonregulated corn will no longer be considered regulated articles under 7 CFR part 340.

APHIS has prepared an environmental assessment (EA) in which it presents two alternatives for the determination of nonregulated status based on its analyses of data submitted by Pioneer, a review of other scientific data, and field tests conducted under APHIS oversight. APHIS is considering the following alternatives: (1) Take no action, i.e., APHIS would not change the regulatory status of the 98140 corn line and it would continue to be a regulated article, or (2) grant nonregulated status to corn line 98140 in whole.

In section 403 of the Plant Protection Act (7 U.S.C. 7701 *et seq.*), ''plant pest'' is defined as any living stage of any of the following that can directly or indirectly injure, cause damage to, or cause disease in any plant or plant product: A protozoan, a nonhuman animal, a parasitic plant, a bacterium, a fungus, a virus or viroid, an infectious agent or other pathogen, or any article similar to or allied with any of the foregoing. APHIS views this PPA definition to cover direct or indirect injury, disease, or damage not just to agricultural crops, but also to other plants, for example, native species, as well as to plant parts and plant products whether natural, manufactured, or processed.

The 98140 corn line and any pesticides contained in or added to it are also subject to regulation by other Federal agencies. The U.S. Environmental Protection Agency (EPA) is responsible for the regulation of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended (7 U.S.C. 136 *et seq.*). FIFRA requires that all pesticides, including herbicides, be registered prior to distribution or sale, unless exempt from EPA regulation. In order to be registered as a pesticide under FIFRA, it must be demonstrated that when used with common practices, a pesticide will not cause unreasonable adverse effects in the environment. Under the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended (21 U.S.C. 301 *et seq.*), pesticides added to (or contained in) raw agricultural commodities generally are considered to be unsafe unless a tolerance or exemption from tolerance has been established. Residue tolerances for pesticides are established by EPA under the FFDCA, and the U.S. Food and Drug Administration (FDA) enforces the tolerances set by EPA. Pioneer submitted the appropriate regulatory package to EPA in 2007 to amend the corn tolerance for glyphosate to include the degradation by-product of glyphosate, N-acetylglyphosate; the assessment is currently under review. Conditions for the safe use of glyphosate (EPA, 1993) and a number of ALS-inhibiting herbicides (*http://www.epa.gov/pesticides/reregistration/status.htm*) have been established by the EPA through their registration of those pesticides for use on corn and the setting of tolerances.

The FDA's policy statement concerning regulation of products derived from new plant varieties, including those genetically engineered, was published in the **Federal Register** on May 29, 1992 (57 FR 22984–23005). Under this policy, FDA uses what is termed a consultation process to ensure that human and animal feed safety issues or other regulatory issues (*e.g.*, labeling) are resolved prior to commercial distribution of a bioengineered food. In compliance with the FDA policy, Pioneer submitted a food and feed safety and nutritional assessment summary to FDA for their 98140 corn line in 2007; the assessment is currently under FDA review.

## National Environmental Policy Act

A draft EA has been prepared to inform the public of, and provide the APHIS decisionmaker with, a review and analysis of potential environmental impacts associated with the proposed determination of nonregulated status for the 98140 corn line. The draft EA was prepared in accordance with (1) the National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

In accordance with § 340.6(d) of the regulations, we are publishing this notice to inform the public that APHIS will accept written comments regarding the petition for a determination of nonregulated status from interested or affected persons for a period of 60 days from the date of this notice. We are also soliciting written comments from interested or affected persons on the draft EA prepared to examine potential environmental impacts of the proposed determination for the deregulation of the subject corn line. The petition and the draft EA are available for public review, and copies of these documents are available as indicated under **ADDRESSES** and **FOR FURTHER INFORMATION CONTACT** above.

After the comment period closes, APHIS will evaluate all written comments received during the comment period and any other relevant information. All public comments received regarding the petition and draft EA will be available for public review. After reviewing and evaluating the comments on the petition and the draft EA and other data, APHIS will furnish a response to the petitioner, either approving or denying the petition. APHIS will then publish a notice in the **Federal Register** announcing the regulatory status of Pioneer's 98104 corn line and the availability of APHIS' written regulatory and environmental decision.

**Authority:** 7 U.S.C. 7701–7772 and 7781–7786; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 2nd day of December 2008.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. E8–28968 Filed 12–5–08; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Intermountain Region, Boise, Payette, and Sawtooth National Forests; ID; Amendment to the 2003 Land and Resource Management Plans: Wildlife Conservation Strategy (Forested Biological Community)

**AGENCY:** Forest Service, USDA.

**ACTION:** Correction of notice of intent (NOI) to prepare an environmental impact statement (EIS).

**SUMMARY:** On September 14, 2007, the Forest Service published an NOI to prepare an EIS to disclose the environmental effects of proposed nonsignificant amendments to the three Southwest Idaho Ecogroup (SWIE) 2003 Land and Resource Management Plans (Forest Plans). The September 2007 NOI noted that amendments to the 2003 Forest Plans for the Boise, Payette, and Sawtooth National Forests (NFs) will add, and/or modify existing, management direction, as needed, to implement a comprehensive, Forest Plan-level, wildlife conservation strategy (WCS). This NOI is being corrected to reflect a delay of more than a year in filing the draft EIS. This corrected NOI also provides notice of a change in the approach to the amendment process, in that the amendment process now has been tentatively divided into four phases, each supported by its own environmental impact statement.

**DATES:** Comments concerning this first proposed environmental analysis must be received within 30 days following the date of publication of this NOI. The draft ETS is expected to be available in spring 2009 for a 45-day public comment period. The final EIS and three Records of Decision (RODs), one for each Forest Plan, are expected to be completed by summer 2009.

**ADDRESSES:** Send written comments to Randall Hayman, Forest Planner, Boise National Forest; 1249 South Vinnell Way, Suite 200; Boise, Idaho 83709; or by fax at 208 373–4111; or you may hand-deliver your comments to the Boise Forest Supervisor's Office, located at 1249 South Vinnell Way, Suite 200, Boise, during normal business hours from 7:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. Electronic comments must be submitted in a format such as an e-mail message, plain text (.txt), rich text format (.rtf), or Word (.doc) to: *comments-intermtn-boise@fs.fed.us.*

Comments received in response to this solicitation, including names and addresses of those who comment, will be part of the public record for this proposed action. Comments submitted anonymously will be accepted and considered; however, anonymous comments will not provide the respondent with standing to appeal the subsequent decision.

**FOR FURTHER INFORMATION CONTACT:** Randall Hayman, Forest Planner, Boise National Forest at the address above. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday.

**SUPPLEMENTARY INFORMATION:** Separate RODs for revised Forest Plans were issued in July 2003 for the Boise, Payette, and Sawtooth NFs. The RODs implemented Alternative 7, as identified in the single 2003 final EIS that disclosed the environmental effects of the seven alternatives. Forest Implementation of the three revised Forest Plans began in September 2003.

On September 14, 2007, the Forest Service published an NOT to prepare an EIS to disclose the environmental effects of proposed nonsignificant amendments to the three SWIE 2003 Forest Plans (**Federal Register**, Vol. 72, No. 178, pp. 52540–52542). In late 2007, following a long summer of wildfire, the Responsible Officials for the proposed amendments recognized that, since the Forest Plans were first implemented in 2003, all three Forests have experienced extensive wildfires that may have substantially changed vegetative conditions in many areas from those that existed in 2003. Because this change could affect the type of amendments needed, the three Forests decided to delay preparation of the proposed Forest Plan amendments and EIS so that vegetation baseline conditions could be updated and incorporated in the WCS and amendment process.

This vegetative baseline update and integration into the WCS analysis processes will be completed in the winter of 2009 and incorporated into the draft EIS for the forested biological community, to be released spring 2009, along with important new information concerning wildlife species and their habitat relationships. Consequently, this NOT is being corrected to reflect a delay of more than a year in filing the draft EIS, which was originally expected to be available in mid- to late-winter 2008 (FSH 1909.15, 21.2).

The September 14, 2007, NOT identified that all habitats across major biological communities on each of the three NFs would be addressed in a single environmental analysis. However, because the WCS and related amendments must address many species and associated habitats and, therefore, be extremely complex, the amendment process has now been divided into four phases, each with an individual environmental impact statement. The first phase will address the forested biological community, with subsequent phases slated to address rangeland; unique combinations of rangeland and forest; and riparian/wetland biological communities. This corrected NOT, which reflects the change in the approach to the amendment process, has been prepared for the EIS addressing the forested biological community in the first phase.

*Purpose and Need for Action:* Assessments supporting Forest Plan revision in 2003 identified more habitat areas in need of restoration for a variety of species within each planning unit than could be moved toward desired conditions by natural processes or management activities within the 10- to 15-year planning period. As a result, the 2003 Forest Plans for the Boise, Payette, and Sawtooth NFs identified that maintaining and restoring habitats for species of concern should be prioritized based upon the greatest risks to the persistence of certain species (Boise and Payette Forest Plans, p. 11–10 and Sawtooth Forest Plan, p. 11–9).

To address this need, each Forest Plan included a wildlife objective, WIOB03, to prioritize wildlife habitat to be restored at a mid- or Forest-scale, using information from sources such as species habitat models and fine scale analyses. The WCS currently being developed includes a prioritization framework for implementation of this forest plan direction that managers can use to help focus limited resources and funds for restoration on areas most important to species of concern.

WCS assessments completed to date indicate that most species of concern associated with the forested biological community are linked to habitats found in late-seral multi- or singlestoried montane and lower montane forests, including in some cases ''old forest'' habitat. Historically, these habitats contained an abundance of large diameter trees and snags (>20 inches diameter at breast height [d.b.h.]) with cavities important to species nesting, foraging or both.

Preliminary findings suggest there has been an overall reduction in the abundance of large trees and snags across most habitats, and the subsequent quality of these habitats, over the last 100 years. Of particular concern is the

extent of reductions in single-storied late-seral and old forest habitats within the lower montane forests over the last 100 years that were previously dominated by large ponderosa pine trees and snags. These changes over the last 100 years are largely due to stand replacement wildfires, historical timber harvest, fire exclusion and increases in human occupancy and use.

There is a need to reconsider Forest Plan direction in response to new information and changed resource conditions:

- Forestwide and management area objectives need to consider the WCS habitat prioritization framework currently being developed.
- Management prescription MPC 5.2 allocations may need to be reallocated to management prescriptions with desired conditions consistent with habitat conservation, maintenance and restoration.
- Forest plan standards and guidelines pertaining to large tree-dominated habitat (*e.g.*, wildlife standard WIST01) and large snags need to be reviewed to assure that these habitat components are conserved, maintained or restored, especially in lower montane and montane forests.
- There is a need to evaluate whether Forest Plan direction should be added that specifically addresses conservation of the subset of large tree-dominated habitat in lower montane forests called ''old forest'' habitat.

Impacts resulting from increases in human occupancy and use in priority habitat areas for species of concern need to be considered.

*Proposed Action:* The Proposed Action is threefold:

(1) Develop a Forest Plan Wildlife Conservation Strategy (WCS) that provides the information needed to improve Forest Plan strategies in a way that focuses limited funds and resources toward the highest priority habitats and species of concern, while minimizing threats to those species or habitats;

(2) Determine if amendments to Forest Plan management direction and/or other components of the three Forest Plans are needed to reflect findings and priorities identified in the WCS; and

(3) Update the wildlife assessments pertaining to 36 CFR 219.19 (1982), as needed, to reflect findings in updated analyses supporting the WCS, as well as outcomes anticipated from implementing the amended Forest Plans.

*Responsible Officials:* The Responsible Officials are the three Forest Supervisors for the Boise, Payette, and Sawtooth NFs.

*Nature of Decision To Be Made:* The Responsible Officials will review the final ETS and determine if the 2003 Plan for her respective Forest should be amended and/or modified, or if the current Forest Plan should remain unchanged.

*Scoping Process:* This corrected notice of intent continues the scoping process, which guides development of the ETS. Written comments must be received within 30 days following publication of this NOI in the Federal Register. Providing comments within this time period ensures that they will be available to the Forest Service at a time when it can meaningfully consider them during preparation of the specific proposed amendments and Draft EIS.

Beginning in December 2008, information about and status updates of this amendment process will be available on the Web site, *http://fs.usda.gov/boise* (click on ''Wildlife Conservation Strategy'').

It is important that reviewers provide their comments at such times and in such manner that they are useful to the agency's preparation of the EIS. Therefore, comments should be provided prior to the close of the comment period and should clearly articulate the reviewer's concerns and contentions. The submission of timely and specific comments can affect a reviewer's ability to participate in subsequent administrative appeal or judicial review.

Dated: December 2, 2008.

**Cecilia R. Seesholtz,**

*Forest Supervisor, Boise National.*

[FR Doc. E8–28915 Filed 12–5–08; 8:45 am]

**BILLING CODE 3410–11–M**

## DEPARTMENT OF COMMERCE

### Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

*Agency:* Bureau of Economic Analysis (BEA).

*Title:* Direct Transactions of U.S. Reporter with Foreign Affiliate.

*OMB Control Number:* 0608–0004.

*Form Number:* BE–577.

*Type of Request:* Regular submission.

*Burden Hours:* 62,000.

*Number of Respondents:* 15,500 respondents (4 responses each per year).

*Average Hours per Response:* 1 hour.

*Needs and Uses:* The survey, BE–577, is conducted under the authority of the International Investment and Trade in Services Survey Act and obtains quarterly data on transactions and positions between U.S.-owned foreign business enterprises and their U.S. parent companies. The survey is a sample survey that covers all foreign affiliates above a size-exemption level. The data are used to derive universe estimates in nonbenchmark years by extrapolating forward similar data reported in the BE–10, Benchmark Survey of U.S. Direct Investment Abroad, which is taken every five years. It is also used in the preparation of the U.S. international transactions accounts, the input-output accounts, and the national income and product accounts. The data are needed to measure the size and economic significance of direct investment abroad, measure changes in such investment, and assess its impact on the U.S. and foreign economies.

The data from the survey are primarily intended as general purpose statistics. They should be readily available to answer any number of research and policy questions related to U.S. direct investment abroad.

*Affected Public:* Business or other for-profit organizations.

*Frequency:* Quarterly.

*Respondent's Obligation:* Mandatory.

*OMB Desk Officer:* Paul Bugg, (202) 395–3093.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 7845, 14th Street and Constitution Avenue, NW., Washington, DC 20230 or via the e-mail at *dhynek@doc.gov.*

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Paul Bugg, OMB Desk Officer, FAX number (202) 395–7245 or via e-mail at *pbugg@omb.eop.gov.*

Dated: December 3, 2008.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. E8–28910 Filed 12–5–08; 8:45 am]

**BILLING CODE 3510–EA–P**

## DEPARTMENT OF COMMERCE

### Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the

following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

*Agency:* U.S. Census Bureau.

*Title:* 2010 Census Coverage Measurement Independent Listing Operation.

*OMB Control Number:* None.

*Form Number(s):* D–1302, D–1302(PR).

*Type of Request:* New collection.

*Burden Hours:* 38,563.

*Number of Respondents:* 1,000,000.

*Average Hours per Response:* 2 minutes.

*Needs and Uses:* The U.S. Census Bureau requests authorization from the Office of Management and Budget to conduct the Census Coverage Measurement (CCM) Independent Listing Operation as part of the 2010 Census. The 2010 CCM Independent Listing Operation will be conducted in the U.S. (excluding remote Alaska) and in Puerto Rico, in selected CCM sampled areas. As in the past, the CCM operations and activities will be conducted separate from and independent of the 2010 Census operations.

CCM will be conducted for the 2010 Census to provide estimates of *net coverage error* and *components of coverage error* (omissions and erroneous enumerations) for housing units and persons in housing units to improve future censuses. The data collection and matching methodologies for previous coverage measurement programs were designed only to measure *net coverage error*, which reflects the difference between omissions and erroneous inclusions.

The Independent Listing Operation is the first step in the CCM process. It will be conducted to obtain a complete inventory of all housing unit addresses within the CCM sample block clusters before the 2010 Census enumeration commences. In those block clusters throughout the 50 states (excluding remote Alaska), the District of Columbia, and Puerto Rico, listers will canvass every street, road, or other place where people might live in their assigned block clusters and construct a list of housing units. Listers will contact a member of each housing unit (or proxy, as a last resort) to ensure all units at a given address are identified. They will also identify the location of each housing unit by assigning map spots on block maps provided with their assignment materials.

Completed Independent Listing Books are subject to Dependent Quality Control (DQC) wherein DQC listers return to the field to check 12 housing units per block cluster from a pre-specified random start to ensure that the work performed is of acceptable quality and to verify that the correct blocks were visited. If the block cluster fails the DQC, then the DQC lister reworks the entire block cluster. The completed listing books are keyed for matching against the census Decennial Master Address File for the same areas.

There will be two Independent Listing Forms, D–1302 and D–1302 (PR). The D–1302 is the English version of the listing form and will be used in CCM sample areas in the 50 states (excluding remote Alaska) and the District of Columbia. The D–1302 (PR) is the Spanish version of the listing form and will be used only in the CCM sample areas in Puerto Rico.

*Affected Public:* Individuals or households.

*Frequency:* One time.

*Respondent's Obligation:* Mandatory.

*Legal Authority:* Title 13, United States Code, Section 141 authorizes the Secretary of Commerce to conduct a decennial census of the population, and Section 193 authorizes the Secretary to conduct tests to gather supplementary information related to the census.

*OMB Desk Officer:* Brian Harris-Kojetin, (202) 395–7314.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 7845, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dhynek@doc.gov).*

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Brian Harris-Kojetin, OMB Desk Officer either by fax (202–395–7245) or e-mail (*bharrisk@omb.eop.gov*).

Dated: December 3, 2008.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. E8–28911 Filed 12–5–08; 8:45 am]

BILLING CODE 3510–07–P

## DEPARTMENT OF COMMERCE

### International Trade Administration

**A–570–848**

### Crawfish Tail Meat from the People's Republic of China: Amended Final Results of the Administrative Review Pursuant to Final Court Decision

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**EFFECTIVE DATE:** December 8, 2008.

**FOR FURTHER INFORMATION CONTACT:** Scott Lindsay, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–0780.

**SUPPLEMENTARY INFORMATION:**

**Background**

This matter arose from a challenge to *Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review*, 68 FR 19504 (April 21, 2003) (Final Results) and accompanying *Issues and Decision Memorandum (Issues and Decision Memo)* covering the period of review September 1, 2000, through August 31, 2001. In the *Final Results*, the Department of Commerce (the Department) assigned China Kingdom Import & Export Co., Ltd. (China Kingdom) an antidumping duty assessment rate based on total adverse facts available because the evidence gathered at verification established that China Kingdom failed to report its total tail meat production and eight of its eleven factors of production for the period of review. *See Final Results*. Following publication of the *Final Results*, China Kingdom filed a lawsuit with the United States Court of International Trade (CIT) challenging the Department's *Final Results*.

The CIT overturned the Department's determination in the *Final Results* to assign to China Kingdom an antidumping duty assessment rate based on total adverse facts available. *See China Kingdom Import & Export Co. Ltd. v. United States*, Consol. Ct. No. 03–00302, Slip Op. 07–135 (CIT September 4, 2007) (*Remand Order*). In the *Remand Order*, the CIT directed the Department to calculate and assign China Kingdom a new antidumping duty assessment rate in full compliance with the CIT's directives, and that the Department support all its findings with substantial record evidence and include

a reasoned explanation for its determination. Specifically, first, the CIT ordered the Department to make a determination as to the practicability of allowing China Kingdom to explain the deficient responses, that is required by section 782(d) of the Tariff Act of 1930, as amended (the Act), and, in doing so, to afford China Kingdom a reasonable opportunity to explain the deficiency affecting the information on Chaohu Daxin Foodstuff Co., Ltd.'s (Daxin) total production and the calculated data for eight of the eleven factors of production. Second, the CIT specified that once China Kingdom has provided its explanation regarding the deficient information, the Department must make the determinations required by either section 782(d)(1) or (2) of the Act, or both, with respect to the substitute information. Third, the CIT ordered that the Department may use facts otherwise available solely to determine the total amount of Daxin's production of subject merchandise, and to calculate and determine the eight incorrectly reported factors of production during the period of review. Lastly, the CIT instructed that the Department may use adverse inferences only to a limited extent, and must demonstrate that the use of adverse inferences is not punitive, aberrational, or uncorroborated.

On February 1, 2008, the Department released the draft final results of redetermination for comment. No party submitted comments by the February 11, 2008, deadline. On March 4, 2008, the Department filed its final results of redetermination pursuant to the CIT's order. *See Results of Redetermination on Remand Pursuant to China Kingdom Import & Export Co., Ltd. v. United States*. In the remand results, pursuant to the CIT's order, the Department recalculated China Kingdom's margin using adverse facts available only to a limited extent. Specifically, the Department only applied adverse facts available to those factors which China Kingdom incorrectly reported in its responses. Therefore, for the remand results, the Department utilized China Kingdom's correctly reported factors in its margin calculation. On September 12, 2008, the CIT issued its judgment affirming the Department's remand results.

On October 17, 2008, consistent with the decision in *Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990), the Department notified the public that the CIT's decision was not in harmony with Department's final results. *See Crawfish Tail Meat from the People's Republic of China: Notice of Court Decision Not in Harmony with Final Results of Administrative Review*, 73 FR 61782 (October 17, 2008). There was no appeal of the CIT's decision to the U.S. Court of Appeals for the Federal Circuit filed within the appeal period. Therefore, the CIT's decision is now final and conclusive.

**Amended Final Results of the Review**

As the litigation in this case has concluded, the Department is amending the *Final Results* to reflect the results of our remand redetermination. The revised dumping margin in the amended final results is as follows:

| Exporter/Manufacturer | Weighted–Average Margin (Percent) |
|---|---|
| China Kingdom Import & Export Co. Ltd. ..... | 90.66 |

The Department will instruct U.S. Customs and Border Protection (CBP) to liquidate entries of freshwater crawfish tail meat from the People's Republic of China during the review period at the assessment rate the Department calculated for the final results of review as amended. We intend to issue assessment instructions to CBP 15 days after the date of publication of these amended final results of review.

This notice is published in accordance with sections 751(a)(1) and 777(i) of the Act.

November 24, 2008.

**David M. Spooner,**

*Assistant Secretary for Import Administration.*

[FR Doc. E8–29015 Filed 12–5–08; 8:45 am]

**BILLING CODE 3510–DS–S**

## DEPARTMENT OF COMMERCE

### International Trade Administration

### Exporters' Textile Advisory Committee

**ACTION:** Notice.

**SUMMARY:** Renewal of the Exporters' Textile Advisory Committee (ETAC): The ETAC is renewed for the period October 1, 2008 - September 30, 2010.

**FOR FURTHER INFORMATION CONTACT:** Janet E. Heinzen, Acting Deputy Assistant Secretary for Textiles and Apparel, U.S. Department of Commerce, 14th and Constitution Avenue, NW, Room 3100, Washington, DC 20230 telephone: (202) 482-3737, e-mail: matt.priest@mail.doc.gov.

**SUPPLEMENTARYINFORMATION:** In accordance with the provisions of the Federal Advisory Committee Act, 5 U.S.C. App. 2, and the General Services Administration (GSA) rule on Federal Advisory Committee Management, 41 CFR 102-3.65, and after consultation with GSA, the Secretary of Commerce has determined that the renewal of the Exporters' Textile Advisory Committee is in the public interest in connection with the performance of duties imposed on the Department by law.

The Committee shall provide advice and guidance to Department officials on the identification and surmounting of barriers to the expansion of textile exports, and on methods of encouraging textile firms to participate in export expansion.

The Committee shall consist of approximately 40 members appointed by the Secretary of Commerce to ensure a balanced representation of textile and apparel products. Representatives of small, medium and large firms with broad geographical distribution in exporting shall be included on the Committee.

The Committee shall function solely as an advisory body in compliance with the provisions of the Federal Advisory Committee Act.

Dated: December 2, 2008.

**Janet E. Heinzen,**

*Acting Deputy Assistant Secretary for Textiles and Apparel.*

[FR Doc. E8–28980 Filed 12–5–08; 8:45 am]

**BILLING CODE 3510–DS**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–549–813]**

### Canned Pineapple Fruit From Thailand: Final Results of Antidumping Duty Administrative Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** On August 6, 2008, the Department of Commerce (the Department) published the preliminary results of its administrative review of the antidumping duty order on canned pineapple fruit (CPF) from Thailand. *See Canned Pineapple Fruit from Thailand: Preliminary Results of Antidumping Duty Administrative Review,* 73 FR 45695 (August 6, 2008) (Preliminary Results). This review covers one producer/exporter of the subject merchandise to the United States, Vita Food Factory (1989) Co., Ltd. (Vita). The period of review (POR) is July 1, 2006 through June 30, 2007. Subsequent to the *Preliminary Results,* we provided parties with an opportunity to comment. No parties submitted any comments. Therefore, the final results do not differ from those

presented in the Preliminary Results. The final weighted-average dumping margin for Vita is listed below in the section entitled ''Final Results of Review.''

**DATES:** *Effective Date:* December 8, 2008.

**FOR FURTHER INFORMATION CONTACT:** Paul Matino or Douglas Kirby, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; *telephone:* (202) 482–4146 or (202) 482–3782.

### Scope of the Order

The product covered by this order is canned pineapple fruit defined as pineapple processed and/or prepared into various product forms, including rings, pieces, chunks, tidbits, and crushed pineapple, that is packed and cooked in metal cans with either pineapple juice or sugar syrup added. CPF is currently classifiable under subheadings 2008.20.0010 and 2008.20.0090 of the Harmonized Tariff Schedule of the United States (''HTSUS''). HTSUS 2008.20.0010 covers CPF packed in a sugar-based syrup; HTSUS 2008.20.0090 covers CPF packed without added sugar (*i.e.*, juice-packed). Although these HTSUS subheadings are provided for convenience and for customs purposes, the written description of the scope is dispositive. There have been no scope rulings for the subject order.

### Period of Review

This review covers the period July 1, 2006 through June 30, 2007.

### Final Results of Review

Following the preliminary results of this review, we discovered an error in the calculation of U.S. price related to domestic inland freight incurred on U.S. sales. We have corrected this error for these final results. *See Antidumping Duty Administrative Review of Canned Pineapple Fruit from Thailand: Changes Since the Preliminary Results,* dated concurrently with this notice. Accordingly, we determine that the following weighted-average margin percentage exists for the period July 1, 2006, through June 30, 2007:

| Manufacturer/exporter | Margin |
|---|---|
| Vita Food Factory (1989) Co., Ltd. | 3.02% |

### Assessment

The Department shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries, pursuant to section 771(a)(1)(B) of the Tariff Act of 1930 (the Act), and 19 CFR 351.212(b). We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review if the importer-specific assessment rate calculated in the final results of this review is above *de minimis* (*i.e.*, at or above 0.50 percent). Pursuant to 19 CFR 351.106(c)(2), we will instruct CBP to liquidate without regard to antidumping duties any entries for which the assessment rate is *de minimis* (*i.e.*, less than 0.50 percent). The Department intends to issue assessment instructions to CBP 15 days after the date of publication of these final results of review.

### Cash Deposit Requirements

Pursuant to section 751(d)(2) of the Act and 19 CFR 351.222(i)(2)(i), the Department revoked this order effective October 31, 2007. *See Canned Pineapple Fruit from Thailand: Notice of Final Results of Changed Circumstances Review of the Antidumping Duty Order and Revocation of Antidumping Duty Order,* 73 FR 21311 (April 21, 2008). The Department notified CBP to discontinue suspension of liquidation on entries of the subject merchandise entered or withdrawn from warehouse on or after October 31, 2007, the effective date of revocation of the antidumping duty order. Therefore, cash deposits of estimated antidumping duties are no longer required.

### Certificate on Reimbursement

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred, and in the subsequent assessment of double antidumping duties.

### Notification Regarding Administrative Protective Orders

This notice is the only reminder to parties subject to the administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under the APO in accordance with 19 CFR 351.305(a)(3) of the Department's regulations. Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing these final results and this notice in accordance with sections 51(a)(1) and 777(i)(1) of the Act.

Dated: December 1, 2008.

**David M. Spooner,**

*Assistant Secretary for Import Administration.*

[FR Doc. E8–28972 Filed 12–5–08; 8:45 am]

BILLING CODE 3510–DS–P

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## DEPARTMENT OF COMMERCE

### International Trade Administration

**A–337–806**

### Individually Quick Frozen Red Raspberries from Chile: Final Results of Antidumping Duty Administrative Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** On August 4, 2008, the Department of Commerce published the preliminary results of the administrative review of the antidumping duty order on individually quick frozen red raspberries from Chile. The period of review is July 1, 2006, through June 30, 2007. This review covers sales of individually quick frozen red raspberries with respect to Sociedad Agroindustrial Valle Frio Ltda (''Valle Frio''). We provided interested parties with an opportunity to comment on the preliminary results of this review but received no comments. The final results do not differ from the preliminary results of this review.

**EFFECTIVE DATE:** December 8, 2008.

**FOR FURTHER INFORMATION CONTACT:** Yasmin Nair, Alexander Montoro, or Nancy Decker, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone (202) 482–3813, (202) 482–0238, or (202) 482–0196, respectively.

**SUPPLEMENTARY INFORMATION:**

### Background

In the preliminary results of this review (*see Notice of Preliminary Results of Antidumping Duty Administrative Review: Certain Individually Quick Frozen Red Raspberries from Chile*, 73 FR 45212 (August 4, 2008) (''Preliminary Results'')), the Department of Commerce (''the Department'') invited interested

parties to comment on the *Preliminary Results*. On August 20, 2008, we extended the deadline for parties to submit comments on the *Preliminary Results* until October 14, 2008, and we extended the deadline for parties to submit rebuttal comments until October 20, 2008. *See* Memorandum from Yasmin Nair to File: ''Fifth Administrative Review of Certain Individually Quick Frozen Red Raspberries from Chile, Briefing and Hearing Schedules,'' dated August 20, 2008. No comments were received. In the *Preliminary Results*, we noted that we continued to have outstanding issues with Valle Frio's responses and that we needed to ask for further information. On August 28, 2008, we issued a supplemental questionnaire to Valle Frio. We received Valle Frio's response on September 11, 2008, which resolved the outstanding issues from the *Preliminary Results* related to this respondent. We note that the information submitted by Valle Frio did not result in any changes to the *Preliminary Results*.

## Scope of the Order

The products covered by this order are imports of individually quick frozen (''IQF'') whole or broken red raspberries from Chile, with or without the addition of sugar or syrup, regardless of variety, grade, size or horticulture method (*e.g.*, organic or not), the size of the container in which packed, or the method of packing. The scope of the order excludes fresh red raspberries and block frozen red raspberries (*i.e.*, puree, straight pack, juice stock, and juice concentrate).

The merchandise subject to this order is currently classifiable under subheading 0811.20.2020 of the Harmonized Tariff Schedule of the United States (''HTSUS''). Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the merchandise under the order is dispositive.

## Period of Review

The period of review (''POR'') is July 1, 2006, through June 30, 2007.

## Final Results of the Review

These final results remain unchanged from the *Preliminary Results*. Therefore, as a result of our review, we determine that the following percentage weighted–average margin exists for the period July 1, 2006, through June 30, 2007:

| Exporter/manufacturer | Weighted–average margin percentage |
|---|---|
| Sociedad Agroindustrial Valle Frio Ltda./ Agricola Framparque | 0.28 (*de minimis*) |

## Assessment Rates

The Department shall determine, and U.S. Customs and Border Protection (''CBP'') shall assess, antidumping duties on all appropriate entries. Pursuant to 19 CFR 351.212(b)(1), we have calculated importer–specific assessment rates. Because Valle Frio did not report the entered value for its U.S. sales, we have calculated importer–specific assessment rates for the merchandise in question by aggregating the dumping margins calculated for all U.S. sales to each importer and dividing this amount by the total quantity of those sales.

To determine whether the duty assessment rates were *de minimis*, in accordance with the requirement set forth in 19 CFR 351.106(c)(2), we calculated importer–specific *ad valorem* rates based on the estimated entered value. Where the assessment rate is above *de minimis*, we will instruct CBP to assess duties on all entries of subject merchandise by that importer. Pursuant to 19 CFR 351.106(c)(2), we will instruct CBP to liquidate without regard to antidumping duties any entries for which the assessment rate is *de minimis* (*i.e.*, less than 0.50 percent).

The Department clarified its ''automatic assessment'' regulation on May 6, 2003. *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003). This clarification will apply to entries of subject merchandise during the POR produced by the respondent for which it did not know its merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all–others rate of 6.33 percent[1] if there is no rate for the intermediate company(ies) involved in the transaction. For a full discussion of this clarification, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003). The Department intends to issue appropriate assessment instructions to CBP 15 days after publication of the final results of review.

[1] The ''all others'' rate was established in Notice of Amended Final Determination of Sales at Less Than Fair Value: IQF Red Raspberries from Chile, 67 FR 40270, 40271 (June 12, 2002).

## Cash Deposit Requirement

On July 20, 2007, the Department published a **Federal Register** notice that, *inter alia*, revoked this order, effective July 9, 2007. *See IQF Red Raspberries from Chile: Final Results of Sunset Review and Revocation of Order*, 72 FR 39793 (July 20, 2007). As a result, CBP is no longer suspending liquidation for entries of subject merchandise occurring on or after July 9, 2007. Therefore, there is no need to issue new cash deposit instructions pursuant to the final results of this administrative review.

## Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

## Notification Regarding APOs

This notice also serves as the only reminder to parties subject to the administrative protective order (''APO'') of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of return/destruction of APO material or conversion to judicial protective order is hereby requested. Failure to comply with the regulation and the terms of an APO is a sanctionable violation.

This administrative review and notice are published in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.221(b)(5).

Dated: December 1, 2008.

**David M. Spooner,**

*Assistant Secretary for Import Administration.*

[FR Doc. E8–28974 Filed 12–5–08; 8:45 am]

BILLING CODE 3510–DS–S

## DEPARTMENT OF COMMERCE

### International Trade Administration

**A–821–808**

### Certain Cut–to-Length Carbon Steel Plate from Russia; Final Results of Expedited Sunset Review of the Suspension Agreement

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**ACTION:** Notice of Final Results of the Expedited Sunset Review of the Suspension Agreement on Certain Cut–to-Length Carbon Steel Plate from Russia.

**SUMMARY:** On August 1, 2008, the Department of Commerce (''the Department'') initiated a sunset review of the suspended antidumping duty investigation on certain cut–to-length carbon steel plate (''CTL plate'') from the Russian Federation (''Russia'') pursuant to section 751(c) of the Tariff Act of 1930, as amended (''the Act''). *See Initiation of Five-year (''Sunset'') Review*, 73 FR 44968 (August 1, 2008) (''Initiation Notice''). On the basis of notices of intent to participate and adequate substantive comments filed on behalf of domestic interested parties, as well as no response from respondent interested parties, the Department is conducting an expedited (120-day) review. As a result of this review, the Department finds that termination of the suspension agreement and the underlying antidumping duty investigation on CTL plate from Russia would likely lead to continuation or recurrence of dumping at the levels indicated in the Final Results of Review section of this notice.

**EFFECTIVE DATE:** December 8, 2008.

**FOR FURTHER INFORMATION CONTACT:** Sally C. Gannon or Maureen Price, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, DC 20230, telephone: (202) 482–0162 or (202) 482–4271.

**SUPPLEMENTARY INFORMATION:**

### History of the Suspension Agreement

On December 3, 1996, the Department initiated an antidumping duty investigation under section 732 of the Act on certain CTL plate from Russia. *See Initiation of Antidumping Duty Investigations: Certain Cut–To-Length Carbon Steel Plate from the People's Republic of China, Ukraine, the Russian Federation, and the Republic of South Africa*, 61 FR 64051 (December 3, 1996). On June 11, 1997, the Department preliminarily determined that CTL plate from Russia was being, or was likely to be, sold in the United States at less than fair value. *See Preliminary Determination of Sales at Less Than Fair Value; Certain Cut–to-Length Carbon Steel Plate from the Russian Federation*, 62 FR 31967 (June 11, 1997). The Department suspended the antidumping duty investigation on October 24, 1997, on the basis of an agreement by the Russian Government to restrict the volume of direct and indirect exports of CTL plate to the United States in order to prevent the suppression or undercutting of price levels of U.S. domestic like products. *See Suspension of Antidumping Duty Investigation: Certain Cut–to-Length Carbon Steel Plate From the Russian Federation*, 62 FR 61780 (November 19, 1997). Thereafter, upon the request of the petitioners, the Department continued its investigation and published in the **Federal Register** its final determination of sales at less than fair market value. In the final determination, the Department calculated a weighted–average dumping margin of 53.81 percent for JSC Severstal, and 185.00 for ''all other'' Russian manufacturers, producers, and exporters of the subject merchandise. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut–to-Length Carbon Steel Plate From the Russian Federation*, 62 FR 61787 (November 19, 1997). On December 20, 2002, a revised suspension agreement was signed by representatives of Russian CTL plate producers pursuant to section 734(b) of the Act. This agreement became effective January 23, 2003, and replaced the previous non–market economy agreement that had been in effect since 1997. *See Suspension of Antidumping Duty Investigation of Certain Cut–to-Length Carbon Steel Plate from the Russian Federation*, 68 FR 3859 (January 27, 2003) (''Suspension Agreement'').

On May 14, 2008, the Department concluded an administrative review of the Suspension Agreement with respect to CTL Plate from Russia. We found that JSC Severstal (''Severstal'') was in compliance with the agreement. *See Certain Cut–to-Length Carbon Steel Plate from the Russian Federation; Final Results of Administrative Review of the Suspension Agreement*, 73 FR 27795 (May 14, 2008).

The Suspension Agreement remains in effect for the signatory producers/exporters of CTL plate from Russia: Severstal, JSC Magnitogorsk Iron and Steel Works and JSC NOSTA Integrated Iron–Steel Works.

### Background

On August 1, 2008, the Department initiated a sunset review of the suspended antidumping duty investigation on CTL plate from Russia, pursuant to section 751(c) of the Act. *See Initiation Notice*, 73 FR 44968. The Department received a timely notice of intent to participate in this sunset review from Nucor Corporation on August 5, 2008, from SSAB North America Division (''SSAB N.A.D.''), Evraz S.A. Oregon Steel Mills (''OSM'') and Evraz S.A. Claymont (''Claymont'') on August 15, 2008, and from ArcelorMittal USA, Inc. on August 18, 2008 (collectively, ''domestic interested parties''), within the applicable deadline specified in section 351.218(d)(1)(i) of the Department's regulations. Domestic interested parties claimed interested–party status under section 771(9)(C) of the Act as producers of the domestic like products. In addition, domestic interested parties assert that they are not related to a foreign producer/exporter and are not importers, or related to importers, of the subject merchandise. At the request of the Department, on September 11, 2008, SSAB N.A.D., OSM and Claymont submitted a clarification to their notice of intent to participate. Respondent interested parties did not submit notices of intent to participate.

The Department also received a complete, collective substantive response from the domestic interested parties within the 30-day deadline specified in the Department's regulations under section 351.218(d)(3)(i). After examining the substantive response from the domestic interested parties, on September 22, 2008, the Department determined that the response was adequate, consistent with the requirements of 19 CFR 351.218(e). *See* Memorandum from Maureen Price, Senior Policy Analyst, Office of Policy, Import Administration, to Sally C. Gannon, Director for Bilateral Agreements, Office of Policy, Import Administration, regarding ''Sunset Review of the Agreement Suspending the Antidumping Investigation of Certain Cut–to-Length Carbon Steel Plate from the Russian Federation: Adequacy Determination'' (September 15, 2008). *See also* Letter from Edward C. Yang, Director, AD/CVD Operations, China/NME Group, Import Administration, to Robert Carpenter, Director, Office of Investigations, International Trade Commission (September 22, 2008). Because the response of the domestic interested parties constituted an adequate response to the notice of initiation and there was no response from the respondent

interested parties, the Department is conducting an expedited (120-day) sunset review in accordance with 19 CFR 351.218(e)(1)(ii)(c)(2).

**Scope of Review**

The products covered by the Suspension Agreement include hot–rolled iron and non–alloy steel universal mill plates (*i.e.*, flat–rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm but not exceeding 1250 mm and of a thickness of not less than 4 mm, not in coils and without patterns in relief), of rectangular shape, neither clad, plated nor coated with metal, whether or not painted, varnished, or coated with plastics or other nonmetallic substances; and certain iron and non–alloy steel flat–rolled products not in coils, of rectangular shape, hot–rolled, neither clad, plated, nor coated with metal, whether or not painted, varnished, or coated with plastics or other nonmetallic substances, 4.75 mm or more in thickness and of a width which exceeds 150 mm and measures at least twice the thickness. Included as subject merchandise in the Suspension Agreement are flat–rolled products of nonrectangular cross-section where such cross-section is achieved subsequent to the rolling process (i.e., products which have been ''worked after rolling'') for example, products which have been beveled or rounded at the edges. This merchandise is currently classified in the Harmonized Tariff Schedule of the United States (HTS) under item numbers 7208.40.3030, 7208.40.3060, 7208.51.0030, 7208.51.0045, 7208.51.0060, 7208.52.0000, 7208.53.0000, 7208.90.0000, 7210.70.3000, 7210.90.9000, 7211.13.0000, 7211.14.0030, 7211.14.0045, 7211.90.0000, 7212.40.1000, 7212.40.5000, and 7212.50.0000. Although the HTS subheadings are provided for convenience and customs purposes, the written description of the scope of the Agreement is dispositive. Specifically excluded from subject merchandise within the scope of this Agreement is grade X–70 steel plate.

**Analysis of Comments Received**

All issues raised by parties to this sunset review are addressed in the ''Issues and Decision Memorandum for the Final Results of the Expedited Sunset Review of the Agreement Suspending the Antidumping Duty Investigation of Certain Cut–to-Length Carbon Steel Plate from the Russian Federation,'' from Ronald K. Lorentzen, Deputy Assistant Secretary for Policy and Negotiations, Import Administration, to David M. Spooner, Assistant Secretary, Import Administration (December 1, 2008) (''Decision Memorandum''), which is adopted by this notice. The issues discussed in the Decision Memorandum include the likelihood of continuation or recurrence of dumping and the magnitude of the margins likely to prevail were the suspended antidumping duty investigation to be terminated. Parties may find a complete discussion of all issues raised in this review and the corresponding recommendations in this public memorandum, which is on file in the Central Records Unit, room B–1117, of the main Commerce building. In addition, a complete version of the Decision Memorandum can be accessed directly on the Web at http://ia.ita.doc.gov/frn. The paper copy and electronic version of the Decision Memorandum are identical in content.

**Final Results of Review**

We determine that termination of the Suspension Agreement and the underlying antidumping duty investigation on CTL plate from Russia would likely lead to a continuation or recurrence of dumping at the following percentage weighted–average margins:

| Manufacturer/producer/exporter | Weighted-average margin percentage |
|---|---|
| Severstal | 53.81 |
| Russia–wide | 185.00 |

We are issuing and publishing this notice in accordance with sections 751(c), 752(c), and 777(i)(1) of the Tariff Act.

Dated: December 1, 2008.

**David M. Spooner,**

*Assistant Secretary for Import Administration.*

[FR Doc. E8–29014 Filed 12–5–08; 8:45 am]

BILLING CODE 3510–DS–S

## DEPARTMENT OF COMMERCE

### International Trade Administration

**A–570–831**

### Fresh Garlic from the People's Republic of China: Preliminary Results of the Antidumping Duty Administrative and New Shipper Reviews and Intent to Rescind, In Part, the Antidumping Duty Administrative and New Shipper Reviews

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (Department) is conducting administrative and new shipper reviews of the antidumping duty order on fresh garlic from the People's Republic of China (PRC) covering the period of review (POR) of November 1, 2006 through October 31, 2007. As discussed below, we preliminarily determine that sales have been made in the United States at prices below normal value (NV) with respect to certain exporters who participated fully and are entitled to a separate rate in the administrative or new shipper reviews (NSR). In addition, we are preliminarily rescinding the NSR for Anqiu Haoshun Trade Co., Ltd. (Haoshun). Finally, the Department intends to rescind the antidumping duty administrative reviews of three companies that had no shipments of subject merchandise to the United States during the POR. If these preliminary results are adopted in our final results of review, we will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on entries of subject merchandise during the POR for which importer–specific assessment rates are above *de minimis*.

**EFFECTIVE DATE:** December 8, 2008.

**FOR FURTHER INFORMATION CONTACT:** Scott Lindsay, Nicholas Czajkowski, or Summer Avery, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington DC 20230; telephone: (202) 482–0780, (202) 482–1395, and (202) 482–4052, respectively.

**SUPPLEMENTARY INFORMATION:**

**Background**

On November 16, 1994, the Department published in the **Federal Register** the antidumping duty order on fresh garlic from the PRC. *See Antidumping Duty Order: Fresh Garlic From the People's Republic of China*, 59 FR 59209 (November 16, 1994) (Order). On November 1, 2007, the Department published a notice of opportunity to request an administrative review of the antidumping duty order on fresh garlic from the PRC for the period November 1, 2006 through October 31, 2007. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 72 FR 61859 (November 1, 2007).

**New Shipper Reviews**

On November 20, 2007 and November 30, 2007, pursuant to section 751(a)(2)(B)(i) of the Tariff Act of 1930, as amended (the Act), and 19 CFR

351.214(c), the Department received three NSR requests from Haoshun, Ningjin Ruifeng Foodstuff Co., Ltd. (Ningjin), and Zhengzhou Yuanli Trading Co., Ltd. (Yuanli). On December 21, 2007, the Department initiated NSRs for all three companies. *See Fresh Garlic From the People's Republic of China: Initiation of Antidumping Duty New Shipper Reviews*, 73 FR 161 (January 2, 2008).

On March 31, 2008, the Department placed on the record of the new shipper review copies of CBP documents pertaining to each shipment of garlic from the PRC and exported to the United States by these three companies during the POR.[1]

On July 21, 2008, the three respondents in the NSR agreed to waive the new shipper review time limits align the instant NSR with the instant administrative review. Therefore, on July 23, 2008, in accordance with 19 CFR 351.214(j), we aligned the deadlines for the NSRs for Yuanli, Ningjin, and Haoshun with the deadlines for the 13th administrative review. *See* the Memorandum to All Interested Parties from the Department Re: The Alignment of the New Shipper Reviews with the 13th Antidumping Duty Administrative Review of Fresh Garlic from the People's Republic of China (July 23, 2008).

Since the initiation of these reviews, the Department issued original and supplemental questionnaires to Haoshun, Ningjin, and Yuanli. All three companies have responded to the Department's questionnaires in a timely manner. The Fresh Garlic Producers Association (FGPA) and its individual members (Christopher Ranch L.L.C., the Garlic Company, Valley Garlic, and Vessey and Company, Inc.) (collectively, petitioners) have also submitted comments regarding the NSRs. *See* Letter to the Department from Petitioners Re: 13th Administrative Review and 13th New Shipper Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China (October 16, 2008) (Petitioners' October 16, 2007 Comments) and Letter to the Department from Petitioners Re: 13th New Shipper Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China (November 7, 2008).

**Administrative Review**

On November 30, 2007, we received requests from the petitioners and certain PRC companies to conduct administrative reviews for certain companies. *See* Letter from Petitioners to the Department Re: 13th Administrative Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China Request for Review (November 30, 2007). On December 27, 2007, the Department initiated administrative reviews for 63 producers/exporters of subject merchandise from the PRC. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 72 FR 73315 (December 27, 2007) (*Initiation Notice*). On March 28, 2008, the Department selected the following two companies as mandatory respondents: Anqiu Friend Food Co., Ltd. (Anqiu Friend) and Weifang Shennong Foodstuff Co., Ltd. (Weifang Shennong) (collectively, mandatory administrative review respondents). See Memorandum from Irene Gorelik, Senior International Trade Analyst, Office 9, Re: Antidumping Administrative Review of Fresh Garlic from the People's Republic of China: Respondent Selection Memorandum (March 28, 2008) (Respondent Selection Memorandum).

On June 24, 2008, petitioners timely withdrew their request for review for certain companies in this administrative review. On June 26, 2008, petitioners timely submitted an amended partial withdrawal of request for review. On November 21, 2008, in accordance with 19 CFR 351.213(d)(1), we rescinded the administrative review with respect to 30 companies. *See Fresh Garlic from the People's Republic of China: Partial Rescission of the 13th Antidumping Duty Administrative Review*, 73 FR70621 (November 21, 2008) (*Rescission Notice*). Furthermore, the Department intends to rescind the review of three additional companies (*see* the ''Preliminary Partial Rescission of Administrative Review'' section below).

Therefore, this review covers the 31 producers/exporters of the subject merchandise listed in Attachment 1 to this notice.[2]

On August 4, 2008, the Department extended the deadline for the preliminary results of this administrative review until December 1, 2008. *See Fresh Garlic from the People's Republic of China: Extension of Time Limit for the Preliminary Results of Administrative Review*, 73 FR 45211 (August 4, 2008).

Following the initiation, the Department issued original and supplemental questionnaires to Anqiu Friend and Weifang Shennong. Both companies responded to the Department's questionnaires in a timely manner. During the course of this review, petitioners submitted comments regarding the administrative review. *See* Letter to the Department from Petitioners Re: 13th Administrative Review of Fresh Garlic from the People's Republic of China Comments on Supplemental Section A Questionnaire Responses of Anqiu Friend and Weifang Shennong (October 6, 2008); Letter to the Department from Petitioners Re: 13th Administrative Review and 13th New Shipper Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China (October 16, 2008); and Letter to the Department from Petitioners Re: 13th Administrative Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China (November 7, 2008).

**Scope of the Order**

The products covered by this order are all grades of garlic, whole or separated into constituent cloves, whether or not peeled, fresh, chilled, frozen, provisionally preserved, or packed in water or other neutral substance, but not prepared or preserved by the addition of other ingredients or heat processing. The differences between grades are based on color, size, sheathing, and level of decay. The scope of this order does not include the following: (a) garlic that has been mechanically harvested and that is primarily, but not exclusively, destined for non–fresh use; or (b) garlic that has been specially prepared and cultivated prior to planting and then harvested and otherwise prepared for use as seed. The subject merchandise is used principally as a food product and for seasoning. The subject garlic is currently classifiable under subheadings 0703.20.0010, 0703.20.0020, 0703.20.0090, 0710.80.7060, 0710.80.9750, 0711.90.6000, and 2005.90.9700 of the

[1] *See* the Memorandum from Blaine H. Wiltse, Case Analyst Office 9, Re: New Shipper Review of Fresh Garlic from the People's Republic of China: Customs Data (March 31, 2008).

[2] In their November 30, 2007 request for review, petitioners requested that the Department initiate an administrative review of Haoshun. *See* Letter from Petitioners to the Department re: 13th Administrative Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China-Request for Review. However, the Department initiated a new shipper review of the company instead. Although we did not initiate an administrative review of Haoshun, petitioners' partial withdrawal request for the administrative review of certain companies included Haoshun and we in turn included Haoshun in the list of companies for whom the administrative review was rescinded in the *Rescission Notice*. Therefore, the Department formally initiated review of only 29 of the 30 companies named in the *Rescission Notice*. Thus, after rescinding the review of the additional three companies for no sales, there are 31 companies remaining in this review.

Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this order is dispositive. In order to be excluded from the Order, garlic entered under the HTSUS subheadings listed above that is (1) mechanically harvested and primarily, but not exclusively, destined for non–fresh use or (2) specially prepared and cultivated prior to planting and then harvested and otherwise prepared for use as seed must be accompanied by declarations to CBP to that effect.

**Separate Rates**

In proceedings involving non–market economy (NME) countries, the Department begins with a rebuttable presumption that all companies within the country are subject to government control, and thus, should be assigned a single antidumping duty deposit rate. It is the Department's policy to assign all exporters of subject merchandise subject to review in an NME country a single rate unless an exporter can demonstrate that it is sufficiently independent of government control to be entitled to a separate rate. *See, e.g., Honey from the People's Republic of China: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review*, 70 FR 74764, 74766 (December 16, 2005) (unchanged in the final results).

In the administrative review, for companies who were previously assigned a separate rate in a previous segment of this proceeding, the Department normally requires entities to submit a separate–rate certification stating that they continue to meet the criteria for obtaining a separate rate. For entities that were not assigned a separate rate in the previous segment of a proceeding, to demonstrate eligibility for such, the Department requires a separate–rate application. In this administrative review, Jinxiang Dongyun Freezing Storage Co., Ltd. (Jinxiang Dongyun), Qingdao Saturn International Trade Co., Ltd. (Qingdao Saturn), Qufu Dongbao Import & Export Trade Co., Ltd. (Qufu Dongbao), and Shanghai LJ International Trading Co., Ltd. (Shanghai LJ) (collectively, separate–rate respondents), each submitted a separate–rate certification. Anqiu Friend and Weifang Shennong and the four separate–rate respondents each provided company–specific information and each stated that it met the criteria for the assignment of a separate rate. Ningjin, and Yuanli each also provided company–specific information and each stated that it met the criteria for the assignment of a separate rate. We considered whether Anqiu Friend, Weifang Shennong, Ningjin, and Yuanli were eligible for a separate rate.[3]

The Department's separate–rate status test to determine whether the exporter is independent from government control does not consider, in general, macroeconomic/border–type controls (*e.g.*, export licenses, quotas, and minimum export prices), particularly if these controls are imposed to prevent dumping. The test focuses, rather, on controls over the investment, pricing, and output decision–making process at the individual firm level.[4]

To establish whether an exporter is sufficiently independent of government control to be entitled to a separate rate, the Department analyzes the exporter in light of select criteria, discussed below. *See Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China*, 56 FR 20588, 20589 (May 6, 1991) (*Sparklers*); and *Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China*, 59 FR 22585, 22586–87 (May 2, 1994) (*Silicon Carbide*). Under this test, exporters in NME countries are entitled to separate, company–specific margins when they can demonstrate an absence of government control over exports, both in law (*de jure*) and in fact (*de facto*).

1. Absence of *De Jure* Control

The Department considers the following *de jure* criteria in determining whether an individual company may be granted a separate rate: (1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; or (3) any other formal measures by the government decentralizing control of companies. *See Sparklers*, 56 FR at 20589. Anqiu Friend, Weifang Shennong, Ningjin, and Yuanli placed on the administrative records documents to demonstrate an absence of *de jure* control (*i.e.*, the Company Law of the People's Republic of China (revised in 2005), Regulations of PRC on Administration of Registration of Companies (revised in 2005), the Foreign Trade Law of the People's Republic of China (revised in 2004), the Regulations of the People's Republic of China on the Import and Export of Goods, and the Regulations of the People's Republic of China for Controlling the Registration of Enterprises as Legal Persons). As in prior cases, we analyzed the laws presented to us and found them to establish sufficiently an absence of *de jure* control. *See, e.g., Honey from the People's Republic of China: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review*, 72 FR 102, 105 (January 3, 2007) (unchanged in final results); *Hand Trucks and Certain Parts Thereof from the People's Republic of China; Preliminary Results and Partial Rescission of Administrative Review and Preliminary Results of New Shipper Review*, 72 FR 937, 944 (January 9, 2007) (unchanged in final results). We find that evidence on the record supports a preliminary finding of an absence of *de jure* government control with regard to the export activities of Anqiu Friend, Weifang Shennong, Ningjin, and Yuanli.

The four separate–rate respondents, Jinxiang Dongyun, Qingdao Saturn, Qufu Dongbao, and Shanghai LJ each certified that, as with the previous period where each company was granted a separate rate, there is an absence of *de jure* government control of its exports. Each of the four separate–rate respondents' separate–rate certifications, stated, where applicable, that it had no relationship with any level of the PRC government with respect to ownership, internal management, and business operations. In this segment, we have no new information on the record that would cause us to reconsider the previous period's de jure control determination with regard to Jinxiang Dongyun, Qingdao Saturn, Qufu Dongbao, and Shanghai LJ.

2. Absence of *De Facto* Control

3.As stated in previous cases, there is evidence that certain enactments of the PRC central government have not been implemented uniformly among different sectors and/or jurisdictions in the PRC. *See Silicon Carbide*, 59 FR at 22586–87. Therefore, the Department has determined that an analysis of *de facto* control is critical in determining whether the respondents are, in fact, subject to a degree of government control which would preclude the Department from assigning separate rates.

[3] The Department has determined that Haoshun's sale was not bona fide and is preliminarily rescinding Haoshun's NSR. Therefore, we are not determining whether Haoshun qualifies for a separate rate, and it will remain part of the PRC-entity.

[4] *See Certain Cut-to-Length Carbon Steel Plate from Ukraine: Final Determination of Sales at Less than Fair Value*, 62 FR 61754, 61758 (November 19, 1997), and *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 62 FR 61276, 61279 (November 17, 1997).

The Department typically considers four factors in evaluating whether each respondent is subject to *de facto* government control of its export functions: (1) whether the export prices are set by, or subject to the approval of, a government authority; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding the disposition of profits or financing of losses. *See Silicon Carbide*, 59 FR at 22586–87; *see also Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol from the People's Republic of China*, 60 FR 22544, 22544–45 (May 8, 1995).

The Department conducted a separate–rate analysis for companies subject to the administrative review that submitted separate rate applications. In their separate–rate applications, the companies requesting separate rates submitted evidence indicating an absence of *de facto* governmental control over their export activities. Specifically, for Anqiu Friend, Weifang Shennong, Ningjin, and Yuanli, the evidence we reviewed indicates that: (1) each company sets its own export prices independent of the government and without the approval of a government authority; (2) each company retains the proceeds from its sales and makes independent decisions regarding the disposition of profits or financing of losses; (3) each company has a general manager, branch manager or division manager with the authority to negotiate and bind the company in an agreement; (4) the general manager is selected by the board of directors or company employees, and the general manager appoints the deputy managers and the manager of each department; and (5) there is no restriction on each company's use of export revenues. The separate–rate applications of each company do not suggest that pricing is coordinated among exporters. During our analysis of the information on the record, we found no information indicating the existence of government control.

The four separate–rate respondents, Jinxiang Dongyun, Qingdao Saturn, Qufu Dongbao, and Shanghai LJ each certified that, as with the previous period where each company was granted a separate rate, there is an absence of *de facto* government control of each company's exports. Each of the four separate–rate respondent's separate–rate certifications, stated, where applicable, that it had no relationship with any level of the PRC government with respect to ownership, internal management, and business operations. In this segment, we have no new information on the record that would cause us to reconsider the previous period's *de facto* control determination with regard to Jinxiang Dongyun, Qingdao Saturn, Qufu Dongbao, and Shanghai LJ.

Therefore, the Department preliminarily finds that Anqiu Friend, Weifang Shennong, Ningjin, and Yuanli have established, *prima facie*, that they qualify for separate rates under the criteria established by *Silicon Carbide* and *Sparklers*.

The remaining companies subject to this antidumping administrative review (*see* Attachment 2) did not apply for a separate rate and thus will be assigned the PRC–wide rate for their imports of subject merchandise during the POR.

**Preliminary Partial Rescission of Administrative Review**

On January 14, 2008, Hebei Golden Bird Trading Co., Ltd. (Hebei Golden Bird), Jining Yongjia Trade Co. (Jining Yongjia), Ltd., Jinan Farmlady Trading Co., Ltd. (Jinan Farmlady), Qingdao Tiantaixing Foods Co., Ltd. (Qingdao Tiantaixing), and Qingdao Xintianfeng Foods Co., Ltd. (Qingdao Xintianfeng) each certified that they made no shipments of subject merchandise to the United States during the POR. As noted above, the requests for review were withdrawn with respect to Hebei Golden Bird and Jining Yongjia. Therefore, in accordance with 19 CFR 351.213(d)(1), we rescinded the antidumping duty administrative review with respect to these two companies on November 21, 2008. *See Rescission Notice*. The Department's examination of shipment data from CBP for Jinan Farmlady, Qingdao Tiantaixing, and Qingdao Xintianfeng confirmed that there were no entries of subject merchandise from these three companies during the POR. Consequently, because there is no evidence on the record to indicate that these three companies had sales of subject merchandise under this order during the POR, pursuant to 19 CFR 351.213(d)(3), the Department is preliminarily rescinding the review with respect to Jinan Farmlady, Qingdao Tiantaixing, and Qingdao Xintianfeng.

**Bona Fide Analysis**

Consistent with the Department's practice, we investigated the bona fide nature of the sale made by each new shipper, *i.e.*, Haoshun, Ningjun, and Yuanli, for these reviews. In evaluating whether or not a single sale in a new shipper review is commercially reasonable, and therefore *bona fide*, the Department considers, *inter alia*, such factors as: (1) the timing of the sale; (2) the price and quantity; (3) the expenses arising from the transaction; (4) whether the goods were resold at a profit; and (5) whether the transaction was made on an arm's–length basis. *See Tianjin Tiancheng Pharmaceutical Co., Ltd. v. United States*, 366 F. Supp. 2d 1246, 1250 (CIT 2005). Accordingly, the Department considers a number of factors in its *bona fides* analysis, ''all of which may speak to the commercial realities surrounding an alleged sale of subject merchandise.'' *See Hebei New Donghua Amino Acid Co., Ltd. v. United States*, 374 F. Supp. 2d 1333, 1342 (CIT 2005) (citing *Fresh Garlic From the People's Republic of China: Final Results of Antidumping Administrative Review and Rescission of New Shipper Review*, 67 FR 11283 (March 13, 2002) and accompanying Issues and Decision Memorandum: New Shipper Review of Clipper Manufacturing Ltd.).

Haoshun: We have preliminarily concluded that the single sale made by Haoshun during the POR is not a *bona fide* commercial transaction based on the totality of circumstances, namely: (a) the high price and low quantity of Haoshun's single POR sale; and (b) other evidence of a non–*bona fide* transaction. Since much of our analysis regarding the evidence of the *bona fides* of the transaction involves business proprietary information, a full discussion of the bases for our preliminary result is set forth in the Memorandum from Scott Lindsay, Senior Case Analyst, Office 6, Re: Antidumping Duty New Shipper Review of Fresh Garlic from the People's Republic of China: *Bona Fide* Nature of the Sale Under Review for Haoshun Trade Co. Ltd. (December 1, 2008) (Haoshun *Bona Fides* Memorandum). In sum, the totality of the circumstances of this sale leads the Department to find that Haoshun's POR sale is not a *bona fide* commercial transaction. Therefore, this sale does not provide a reasonable or reliable basis for calculating a dumping margin. For further information, *see* Haoshun *Bona Fides* Memorandum. As Haoshun had no other sales of subject merchandise during the instant POR, the Department is preliminarily rescinding the NSR with respect to Haoshun.

Yuanli: We preliminarily find that the sale made by Yuanli was a *bona fide* commercial transaction. Specifically, we found that: (1) the price and quantity of the sale was within the range of the

prices and quantities of other entries of subject merchandise from the PRC into the United States during the POR; (2) Yuanli and its customer did not incur any extraordinary expenses arising from the transaction; (3) the sale was made between unaffiliated parties at arm's length; and (4) the timing of the sale does not indicate that this sale was not *bona fide*. However, we note that there is other evidence on the record that call into question whether Yuanli's sale was *bona fide*. Since much of our analysis regarding the evidence of the *bona fides* of the transaction involves business proprietary information, a full discussion of the bases for our preliminary result is set forth in the Memorandum from Summer Avery, Case Analyst, Office 6, Re: *Bona Fide* Nature of the Sale in the Antidumping Duty New Shipper Review of Fresh Garlic from the People's Republic of China (''PRC''): Zhengzhou Yuanli Trading Co., Ltd. (December 1, 2008). Accordingly, we will continue to examine Yuanli's sale after the preliminary results.

Based on our investigation into the *bona fide* nature of Yuanli's reviewed sale, its questionnaire responses, as well as its eligibility for a separate rate (*see* the ''Separate Rates'' section above) and the Department's determination that Yuanli was not affiliated with any exporter or producer that had previously shipped subject merchandise to the United States, we preliminarily determine that Yuanli has met the requirements to qualify as a new shipper during the POR. Therefore, for purposes of these preliminary results, we are treating Yuanli's sale of subject merchandise to the United States as an appropriate transaction for this review.

Ningjin: We preliminarily find that the new shipper sale made by Ningjin was a *bona fide* commercial transaction. Specifically, we found that: (1) the price of the sale was within the range of the prices of other entries of subject merchandise from the PRC into the United States during the POR; (2) neither Ningjin nor its customer incurred any extraordinary expenses arising from the transaction; (3) the sale was made between unaffiliated parties at arm's length; and (4) the timing of the sale does not indicate that this sale was not *bona fide*. However, we note that there is other evidence on the record that call into question whether Ningjin sale was *bona fide*. Since much of our analysis regarding the evidence of the bona fides of the transaction involves business proprietary information, a full discussion of the bases for our preliminary result is set forth in the Memorandum from Nicholas Czajkowski, Case Analyst, Office 6, Re: *Bona Fide* Nature of the Sale in the Antidumping Duty New Shipper Review of Fresh Garlic from the People's Republic of China (''PRC''): Ningjin Ruifeng Foodstuff Co., Ltd. (December 1, 2008). Accordingly, we will continue to examine Ningjin's sale after the preliminary results.

Based on our investigation into the *bona fide* nature of Ningjin's reviewed sale, its questionnaire responses, as well as its eligibility for a separate rate (*see* the ''Separate Rates'' section above) and the Department's determination that Ningjin was not affiliated with any exporter or producer that had previously shipped subject merchandise to the United States, we preliminarily determine that Ningjin has met the requirements to qualify as a new shipper during the POR. Therefore, for purposes of these preliminary results, we are treating Ningjin's new shipper sale of subject merchandise to the United States as an appropriate transaction for its review.

**Non–Market Economy Country**

In every case conducted by the Department involving the PRC, the PRC has been treated as an NME country. In the investigation of certain lined paper products from the PRC, the Department examined the PRC's market status and determined that NME status should continue for the PRC. *See* the Department's memorandum Re: Antidumping Duty Investigation of Certain Lined Paper Products from the People's Republic of China (''China'') China's status as a non–market economy (NME), (August 30, 2006). This document is available online at: http://ia.ita.doc.gov/download/prc–nme-status/prc–lined-paper–memo–08302006.pdf. In accordance with section 771(18)(C)(i) of the Act, any determination that a foreign country is an NME country shall remain in effect until revoked by the administering authority. *See, e.g.*, Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review, 71 FR 7013 (February 10, 2006). The presumption of the NME status of the PRC has not been revoked by the Department and, therefore, remains in effect for purposes of these administrative and new shipper reviews. Accordingly, we calculated NV in accordance with section 773(c) of the Act, which applies to NME countries.

**Surrogate Country**

When the Department investigates imports from an NME country, section 773(c)(1) of the Act directs it to base NV, in most circumstances, on the NME producer's factors of production (FOPs), valued in a surrogate market economy country or countries considered to be appropriate by the Department. In accordance with section 773(c)(4) of the Act, in valuing the FOPs, the Department shall utilize, to the extent possible, the prices or costs of FOPs in one or more market economy countries that are: (1) at a level of economic development comparable to that of the NME country; and (2) significant producers of comparable merchandise. Moreover, it is the Department's practice to select an appropriate surrogate country based on the availability and reliability of data from the countries. *See Department Policy Bulletin No. 04.1: Non–Market Economy Surrogate Country Selection Process* (March 1, 2004) (*Policy Bulletin*).

As discussed in the ''Non–Market Economy Country'' section above, the Department considers the PRC to be an NME country. Pursuant to section 773(c)(4) of the Act, the Department determined that India, Colombia, Indonesia, the Philippines, and Thailand are countries comparable to the PRC in terms of economic development. *See* the Memorandum to All Interested Parties Re: The Administrative Review of Fresh Garlic from the People's Republic of China (April 24, 2008) at Attachment 1 and the Memorandum to All Interested Parties Re: New Shipper Review of Fresh Garlic from the People's Republic of China (July 23, 2008) at Attachment 1. Also in accordance with section 773(c)(4) of the Act, the Department has found that India is a significant producer of comparable merchandise. Moreover, the Department finds India to be a reliable source for surrogate values because India is at a similar level of economic development pursuant to 773(c)(4) of the Act, is a significant producer of comparable merchandise, and has publicly available and reliable data. Furthermore, the Department notes that India has been the primary surrogate country in past segments of this proceeding, and the only surrogate value data based submitted on the record are from Indian sources. Given the above facts, the Department has selected India as the primary surrogate country for this review. *See* the Memorandum from Scott Lindsay, Case Analyst, Office 6, Re: Selection of a Surrogate Country for the Preliminary Results of the 13th Administrative Review (December 1, 2008). The sources of the surrogate factor values are discussed under the ''Normal Value'' section below and in the Memorandum

from Nicholas Czajkowski, Case Analyst, Office 6, Re: Preliminary Results of the 13th Administrative Review and New Shipper Review of Fresh Garlic from the People's Republic of China: Surrogate Values (December 1, 2008) (Surrogate Values Memorandum).

**U.S. Price**

In accordance with section 772(a) of the Act, we calculated the export price (EP) for sales to the United States for the two administrative review respondents and the three NSR respondents because each company made its sale to an unaffiliated party before the date of importation and the use of constructed EP was not otherwise warranted. We calculated each company's EP based on its price to unaffiliated purchasers in the United States. In accordance with section 772(c) of the Act, as appropriate, we deducted from the starting price to unaffiliated purchasers the expenses for foreign inland freight, international freight, brokerage and handling, marine insurance, warehousing, and U.S. customs duties. For the expenses that were either provided by an NME vendor or paid for using an NME currency, we used surrogate values as appropriate. Where expenses were incurred using a market economy supplier or in a market economy currency, we deducted these expenses directly. *See* the ''Factor Valuations'' section below for details regarding the surrogate values for movement expenses.

**Normal Value**

1. Methodology

Section 773(c)(1)(B) of the Act provides that the Department shall determine NV using an FOP methodology if the merchandise is exported from an NME and the information does not permit the calculation of NV using home–market prices, third–country prices, or constructed value under section 773(a) of the Act. The Department calculates NV using each of the FOPs that a respondent consumes in the production of a unit of the subject merchandise because the presence of government controls on various aspects of NMEs renders price comparisons and the calculation of production costs invalid under the Department's normal methodologies. However, there are circumstances in which the Department will modify its standard FOP methodology, choosing to apply a surrogate value to an intermediate input instead of the individual FOPs used to produce that intermediate input. In some cases, a respondent may report factors used to produce an intermediate input that accounts for an insignificant share of total output. When the potential increase in accuracy to the overall calculation that results from valuing each of the FOPs is outweighed by the resources, time, and burden such an analysis would place on all parties to the proceeding, the Department has valued the intermediate input directly using a surrogate value. *See Notice of Final Determination of Sales at Less Than Fair Value: Polyvinyl Alcohol from the People's Republic of China*, 68 FR 47538 (August 11, 2003), and accompanying Issues and Decision Memorandum at Comment 1 (*PVA*) (citing to *Final Results of First New Shipper Review and First Antidumping Duty Administrative Review: Certain Preserved Mushrooms from the People's Republic of China*, 66 FR 31204 (June 11, 2001)).

For the final results of the 11th and 12th administrative reviews, and for the final results of the 11th and 12th NSRs, the Department found that garlic industry producers in the PRC do not generally track actual labor hours incurred for growing, tending, and harvesting activities and, thus, do not maintain appropriate records which would allow most, if not all, respondents to quantify, report, and substantiate this information. *See* the Memorandum from Scott Lindsay, International Trade Compliance Analyst, Office 6, Re: 13th New Shipper Review of Fresh Garlic from the People's Republic of China Intermediate Methodology Source Documents (December 1, 2008). In the 11th administrative review and NSR, the Department also stated that ''should a respondent be able to provide sufficient factual evidence that it maintains the necessary information in its internal books and records that would allow us to establish the completeness and accuracy of the reported FOPs, we will revisit this issue and consider whether to use its reported FOPs in the calculation of NV.'' *See Fresh Garlic from the People's Republic of China: Partial Rescission and Preliminary Results of the Eleventh Administrative Review and New Shipper Reviews*, 71 FR 71510, 71520 (December 11, 2006) (unchanged in the final results). In the course of these reviews, one company, Haoshun, reported its growing FOPs.[5] Based on our analysis of the information on the record and for the reasons outlined in the Memorandum from Scott Lindsay, Senior Case Analyst, Office 6, Re: 13th New Shipper Review of Fresh Garlic From the People's Republic of China: Intermediate Input Methodology (December 1, 2008) (Intermediate Input Memorandum), the Department has found that Haoshun was not able to accurately record and substantiate the complete costs of growing garlic during the POR.[6]

Thus, in the preliminary results for these reviews, in order to eliminate the distortions in our calculation of NV, for all of the reasons identified above and described in the Intermediate Input Memorandum, the Department applied an ''intermediate–product valuation methodology'' to the mandatory administrative review respondents and the NSR respondents for which we are calculating an antidumping duty margin in these preliminary results. Using this methodology, the Department calculated NV by starting with a surrogate value for the garlic bulb (*i.e.*, the ''intermediate product''), adjusted for yield losses during the processing stages, and adding the respondents' processing costs, which were calculated using their reported usage rates for processing fresh garlic. For a complete explanation of the Department's analysis with respect to Haoshun, *see* Intermediate Input Memorandum.

2. Factor Valuations

In accordance with section 773(c) of the Act, the Department calculated NV based on the intermediate product value and processing FOPs reported by the respondents for the POR. To calculate NV, the Department multiplied the reported per–unit factor quantities by publicly available surrogate values in India with the exception of the surrogate value for ocean freight, which we obtained from an international freight company. In selecting the surrogate values, the Department considered the quality, specificity, and contemporaneity of the data. As appropriate, the Department adjusted input prices by including freight costs to make them delivered prices. The Department calculated these freight costs based on the shorter of the reported distance from the domestic supplier to the factory or the distance from the port in accordance with the decision in *Sigma Corporation v. United States*, 117 F.3d 1401 (Fed. Cir. 1997) (*Sigma*). For more information regarding

[5] Ningjin, Yuanli, Anqiu Friend, and Weifang Shennong did not report FOPs related to growing whole garlic bulbs.

[6] Therefore, the Department would apply an intermediate-product valuation methodology to Haoshun if the Department were to calculate a company-specific margin for Haoshun in this proceeding. However, we are not calculating a company-specific margin for Haoshun for these preliminary results since we have found its sale to be not *bona fide*. *See ''Bona Fide Analysis''* section, above.

the Department's valuation for the various FOPs, *see* Surrogate Values Memorandum.

*Garlic Bulb Valuation*

The Department's practice when selecting the ''best available information'' for valuing FOPs, in accordance with section 773(c)(1) of the Act, is to select, to the extent practicable, surrogate values which are publicly available, product–specific, representative of a broad market average, tax–exclusive and contemporaneous with the POR. *See Final Determination of Sales at Less Than Fair Value: Certain Artist Canvas from the People's Republic of China*, 71 FR 16116 (March 30, 2006) and accompanying Issues and Decision Memorandum at Comment 2.

The Department has applied an intermediate input methodology for respondents. Therefore, we sought to identify the best available surrogate value for the garlic bulb input to production, as opposed to identifying a surrogate value for garlic seed. *See* Petitioners' October 16, 2007 Comments at 3. For the preliminary results of these reviews we find that data from the Azadpur APMC's ''Market Information Bulletin'' is the most appropriate information available to value the respondents' garlic bulb input.

In their FOP databases, respondents reported garlic bulb input size ranges for each type of garlic produced and sold to the U.S. during the POR. Respondents reported garlic bulb input sizes ranging between 40 mm and 60 mm. Petitioners submitted data to the Department stating that garlic bulb sizes that range from 55 mm and above are Grade Super–A and garlic bulb sizes that range between 40 mm and 55 mm are Grade A and Grade Super–A. *See* Petitioners' October 16, 2007 Comments at 3. Therefore, for this preliminary determination, we have used Grade Super–A values for bulb input sizes that range from 55 mm and above, and an average of Grade A and Super–A values for bulb input sizes that are in ranges from 40 mm to 55 mm.

To calculate the surrogate value for garlic bulbs, we first averaged all data points from November 2006 to October 2007 for: (1) Grade Super–A; and (2) Grade A. We then subtracted a 7% fee (6% commission fee plus 1% market fee) charged on transactions at the Azadpur APMC from the Grade A and Grade Super–A averages. *See* Surrogate Values Memorandum at Exhibit 3. We then averaged the Grade A and Grade Super–A values for garlic inputs in ranges from 40 mm to 55 mm.

**Currency Conversion**

We made currency conversions into U.S. dollars, in accordance with section 773A(a) of the Act, based on the exchange rates in effect on the dates of the U.S. sales, as certified by the Federal Reserve Bank. *See* http://www.ia.ita.doc.gov/exchange/index.html.

**Verification**

Following the publication of these preliminary results, we intend to verify, as provided in section 782(i)(3) of the Act, sales and FOP information submitted by respondents, as appropriate. At verification, we will use standard verification procedures, including on–site inspection of the manufacturer's facilities, the examination of relevant sales and financial records, and the selection of original source documentation containing relevant information. We will prepare verification reports outlining our verification results and place these reports on file in the Central Records Unit, room 1117 of the main Commerce building.

**Preliminary Results of Reviews**

As a result of our reviews, we preliminarily determine that the following margins exist for the period November 1, 2006 through October 31, 2007:

FRESH GARLIC FROM THE PRC 2006–2007 ADMINISTRATIVE REVIEW

| Manufacturer/Exporter | Weighted–Average Margin (Percent) |
|---|---|
| Anqiu Friend Food Co., Ltd. | 3.97 |
| Weifang Shennong Foodstuff Co., Ltd. | 10.17 |
| Jinxiang Dongyun Freezing Storage Co., Ltd. | 7.07 |
| Qingdao Saturn International Trade Co., Ltd. | 7.07 |
| Qufu Dongbao Import & Export Trade Co., Ltd. | 7.07 |
| Shanghai LJ International Trading Co., Ltd. | 7.07 |
| PRC–wide Rate (see Attachment 2) | 376.67 |

FRESH GARLIC FROM THE PRC 2006–2007 NEW SHIPPER REVIEW

| | |
|---|---|
| Exported and Produced by Zhengzhou Yuanli Trading Co., Ltd. | 26.05 |
| Exported and Produced by Ningjin Ruifeng Foodstuff Co., Ltd. | 20.39 |

FRESH GARLIC FROM THE PRC 2006–2007 NEW SHIPPER REVIEW—Continued

| | |
|---|---|
| PRC–wide Rate | 376.67 |

**Disclosure**

We will disclose the calculations used in our analysis to parties to these proceedings within five days of the date of publication of this notice. *See* 19 CFR 351.224(b).

**Comments**

Interested parties are invited to comment on the preliminary results and may submit case briefs and/or written comments within 30 days of the date of publication of this notice. *See* 19 CFR 351.309(c)(ii). Rebuttal briefs, limited to issues raised in the case briefs, will be due five days later, pursuant to 19 CFR 351.309(d). Parties who submit case or rebuttal briefs in these proceedings are requested to submit with each argument: (1) a statement of the issue, and (2) a brief summary of the argument. Parties are requested to provide a summary of the arguments not to exceed five pages and a table of statutes, regulations, and cases cited. Additionally, parties are requested to provide its case brief and rebuttal briefs in electronic format (*e.g.*, WordPerfect, Microsoft Word, Adobe Acrobat, etc.). Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration within 30 days of the date of publication of this notice. Requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. *See* 19 CFR 351.310(c). Issues raised in the hearing will be limited to those raised in case and rebuttal briefs. The Department will issue the final results of these reviews, including the results of its analysis of issues raised in any such written briefs or at the hearing, if held, not later than 120 days after the date of publication of this notice.

**Assessment Rates**

Consistent with the final results of the 12th NSR review of Fresh Garlic from the PRC, we will direct CBP to assess importer–specific assessment rates based on the resulting per–unit (*i.e.*, per kilogram) amount on each entry of the subject merchandise during the POR. *See Fresh Garlic from the People's Republic of China: Final Results and Rescission, In Part, of Twelfth New Shipper Reviews*, 73 FR 56550, 56552 (September 29, 2008) (*12th NSR of*

*Fresh Garlic from the PRC*). Therefore, the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries. The Department will issue appropriate assessment instructions directly to CBP 15 days after publication of the final results of this review. For assessment purposes, we will calculate importer–specific assessment rates for fresh garlic from the PRC. Specifically, we will divide the total dumping margins for each importer by the total quantity of subject merchandise sold to that importer during the POR to calculate a per–unit assessment amount. We will direct CBP to assess importer–specific assessment rates based on the resulting per–unit (*i.e.*, per kilogram) amount on each entry of the subject merchandise during the POR if any importer–specific assessment rate calculated in the final results of this review is above *de minimis*.

**Cash Deposit Requirements**

Consistent with the final results of the *12th NSR of Fresh Garlic from the PRC*, we will establish and collect a per–kilogram cash–deposit amount which will be equivalent to the company–specific dumping margin published in the final results of these reviews. Specifically, the following cash deposit requirements will be effective upon publication of the final results of these reviews for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results, as provided by section 751(a)(1) of the Act: (1) for subject merchandise exported by Anqiu Friend and exported by Weifang Shennong the cash deposit rates will be the rates determined in the final results of the administrative review (except that if a rate is *de minimis, i.e.*, less than 0.50 percent, a zero cash deposit will be required); (2) for subject merchandise produced and exported by Yuanli or produced and exported by Ningjin, the cash deposit rates will be the rates determined in the final results of the new shipper review (except that if a rate is *de minimis, i.e.*, less than 0.50 percent, a zero cash deposit will be required); (3) for subject merchandise exported by but not produced by Yuanli or exported by but not produced by Ningjin, the cash deposit rate will be the PRC–wide rate of 376.67 percent; (4) for subject merchandise exported by Jinxiang Dongyun, Qingdao Saturn, Qufu Dongbao, and Shanghai LJ, the cash deposit rates will be the rates determined in the final results of the administrative review (except that if a rate is *de minimis, i.e.*, less than 0.50 percent, a zero cash deposit will be required); (5) for previously–investigated or previously–reviewed PRC and non–PRC exporters who received a separate rate in a prior segment of the proceeding (which were not reviewed in this segment of the proceeding), the cash deposit rate will continue to be the rate assigned in that segment of the proceeding; (6) for subject merchandise exported by Haoshun and all other PRC exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be the PRC–wide rate of 376.67 percent; and (7) the cash deposit rate for non–PRC exporters of subject merchandise which have not received their own rate will be the rate applicable to the PRC exporter that supplied that non–PRC exporter. These requirements, when imposed, shall remain in effect until further notice.

**Notification to Importers**

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

These administrative and new shipper reviews and notice are in accordance with sections 751(a)(1), 751(a)(2)(B), and 777(i) of the Act and 19 CFR 351.213 and 351.214.

Dated: December 1, 2008.

**David M. Spooner,**

*Assistant Secretary for Import Administration.*

**ATTACHMENT 1**

Companies currently subject to the administrative review
(Preliminarily rescinded companies are not included in this list)

1. Anqiu Friend Food Co., Ltd.
2. Weifang Shennong Foodstuff Co., Ltd.
3. APS Qingdao
4. American Pioneer Shipping
5. Beijing Jim International Food Co., Ltd.
6. Burgeon International Inc.
7. Fujian Meitan Import & Export Xiamen Corporation
8. Jining Meiya Foods Co., Ltd.
9. Jining Trans–High Trading Co., Ltd.
10. Jinxian County Huaguang Food Import & Export Co., Ltd.
11. Jinxiang Dongyun Freezing Storage Co., Ltd.
(a/k/a Jinxiang Eastward Shipping Import and Export Limited Company)
12. Junan Auto Imp and Exp Co., Ltd.
13. Linyi Futai Foodstuff Co., Ltd.
14. Marnex (HongKong) Company
15. New Future International Trading Co.
16. Omni Decor China Ltd.
17. Qingdao Rock–It Sports Inc.
18. Qingdao Saturn International Trade Co., Ltd.
19. Qufu Dongbao Import & Export Trade Co., Ltd.
20. Sea Trade International Incorporated
21. Shandong Chengshun Farm Produce Trading Co., Ltd.
22. Shandong Chenhe Int'l Trading Co., Ltd.
23. Shandong Dongsheng Eastsun Foods Co., Ltd.
24. Shandong Garlic Company
25. Shanghai LJ International Trading Co., Ltd.
26. Shanghai New Long March International Trade Co., Ltd.
27. Shenzhen Greening Trading Co., Ltd.
28. Shenzhen Imp & Exp. Ltd.
29. T&S International, LLC
30. Taiwan Wachine Co., Ltd.
31. Taizhou Overseas Int'l Ltd.

**ATTACHMENT 2**

(Companies subject to the PRC–wide rate)

1. APS Qingdao
2. American Pioneer Shipping
3. Beijing Jim International Food Co., Ltd.
4. Burgeon International Inc.
5. Fujian Meitan Import & Export Xiamen Corporation
6. Jining Meiya Foods Co., Ltd.
7. Jining Trans–High Trading Co., Ltd.
8. Jinxian County Huaguang Food Import & Export Co., Ltd.
9. Junan Auto Imp and Exp Co., Ltd.
10. Linyi Futai Foodstuff Co., Ltd.
11. Marnex (HongKong) Company
12. New Future International Trading Co.
13. Omni Decor China Ltd.
14. Qingdao Rock–It Sports Inc.
15. Sea Trade International Incorporated
16. Shandong Chengshun Farm Produce Trading Co., Ltd.
17. Shandong Chenhe Int'l Trading Co., Ltd.
18. Shandong Dongsheng Eastsun Foods Co., Ltd.
19. Shandong Garlic Company
20. Shanghai New Long March International Trade Co., Ltd.
21. Shenzhen Greening Trading Co., Ltd.
22. Shenzhen Imp & Exp. Ltd.
23. T&S International, LLC.
24. Taiwan Wachine Co., Ltd.
25. Taizhou Overseas Int'l Ltd.

[FR Doc. E8–28973 Filed 12–5–08; 8:45 am]

BILLING CODE 3510–DS–S

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[Docket No. 0811051417–81418–01]**

### Ernest F. Hollings Undergraduate Scholarship Program

**AGENCY:** Office of Education (OEd), Office of the Undersecretary of Commerce for Oceans and Atmosphere (USEC), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice of Scholarship Opportunity.

**SUMMARY:** NOAA announces the Ernest F. Hollings Scholarship Program for FY 2009, and sets forth eligibility criteria and selection guidelines for the program. The Ernest F. Hollings Scholarship Program was established through the Consolidated Appropriations Act, 2005 (Pub. L. 108–447). This Scholarship Program will provide approximately 100 undergraduate applicants selected for the program with scholarships to participate in oceanic and atmospheric science, research, technology, and education. There is no guarantee that funds will be available to make awards to all qualified applicants.

**DATES:** Completed applications must be received by January 30, 2009, at 5 p.m. eastern standard time.

**ADDRESSES:** Applications for the Ernest F. Hollings Scholarship Program will be available at *http://www.oesd.noaa.gov/Hollings_info.html*. If an applicant does not have Internet access, hardcopy applications may be requested by contacting NOAA Office of Education, Hollings Scholarship Program, 1315 East-West Highway, Room 10703, Silver Spring, Maryland 20910.

**FOR FURTHER INFORMATION CONTACT:** NOAA Hollings Scholarship at *StudentScholarshipPrograms@noaa.gov* or call 301–713–9437 x150.

**SUPPLEMENTARY INFORMATION:**

#### Background

The Ernest F. Hollings Scholarship Program was established through the Consolidated Appropriations Act, 2005 (Pub. L. 108–447). The purposes of the program include: (1) To increase undergraduate training in oceanic and atmospheric science, research, technology, and education and to foster multidisciplinary training opportunities; (2) to increase public understanding and support for stewardship of the ocean and atmosphere and to improve environmental literacy; (3) to recruit and prepare students for public service careers with the National Oceanic and Atmospheric Administration and other natural resource and science agencies at the Federal, state, local and tribal levels of government; and, (4) to recruit and prepare students for careers as teachers and educators in oceanic and atmospheric science and to improve scientific and environmental education in the United States.

The Hollings Scholarship Program will provide successful undergraduate applicants with awards that include academic assistance (up to a maximum of $8,000 per year) for full-time study during the 9-month academic year; a 10-week, full-time internship position ($650/week) during the summer at a NOAA facility; and, if reappointed, academic assistance (up to a maximum of $8,000) for full-time study during a second 9-month academic year. The internship between the first and second years of the award provides the scholars with ''hands-on'' practical educational training experience in NOAA-related scientific, research, technology, policy, management, and education activities. Awards will also include travel expenses to attend a mandatory Hollings Scholarship Program orientation, approved conferences where students present a paper or poster, and a housing subsidy for scholars who do not reside at home during the summer internship.

#### Authority

The Ernest F. Hollings Undergraduate Scholarship Program is established by the Administrator of the National Oceanic and Atmospheric Administration under authority of the Consolidated Appropriations Act, 2005 (Pub. L. 108–447).

#### Funding Availability

Approximately $3.5 million will be available for the award of a maximum of 100 two-year scholarships, dependent on the availability of appropriations. There is no guarantee that funds will be available to provide scholarships for all qualified students.

#### Eligibility

Any undergraduate student who is a U.S. citizen; enrolled as a full-time student in the Fall 2008 as a sophomore, at an accredited college or university within the United States or U.S. Territories; possesses a minimum 3.0 grade point average per academic term and cumulative on a 4.0 scale (or equivalent on other identified scale) in all completed undergraduate courses and in their major field of study; and has declared a major in a NOAA-related discipline, including, but not limited to, oceanic, environmental, and atmospheric sciences, mathematics, engineering, remote sensing technology, marine policy, physical and social sciences including, geography, physics, hydrology, meteorology, oceanography, or teacher education, that support NOAA's programs and mission, may apply to this notification.

The Hollings Scholarship Program will consider applications from all students that meet the above eligibility requirements.

#### Evaluation Criteria

Application will be evaluated based on the following criteria:

1. Relevant coursework (30%).
2. Education plan and statement of career interest (40%).
3. Recommendations and/or endorsements (reference forms) (20%).
4. Additional relevant experience related to diversity of education; extracurricular activities; honors and awards; non-academic and volunteer work; written and oral communications skills (10%).

#### Selection Process

An initial administrative review of applications is conducted to determine compliance with requirements and completeness of applications. Only complete applications in compliance with the requirements will be considered for review. Applications identified as incomplete or not in compliance with the requirements will be destroyed. All applications that meet the requirements and are complete will be evaluated and scored individually in accordance with the assigned weights of the evaluation criteria by an independent peer review panel, comprised of Federal and nonfederal employees. No consensus advice or recommendations will be given. A numerical ranking will be assigned to each application based on the average of the panelist's ratings. The Program Officer will conduct a review of the rank order and make recommendations to the Selecting Official based on the panel ratings and the selection factors listed below. The Selecting Official, the Director of Education, NOAA, will consider merit reviews and recommendations and award in rank order unless the application is justified to be selected out of rank order based on one or more of the following selection factors:

#### Selection Factors

In determining final awards, the selecting official reserves the right to consider the following selection factors:

1. Availability of funds.
2. Balance/distribution of funds:
a. Geographically.
b. By type of institutions.
c. Across academic disciplines.
3. Program-specific objectives.
4. Degree in scientific area and type of degree sought.

**Repayment Requirement**

A Hollings Scholarship recipient shall be required to repay the full amount of the scholarship to the National Oceanic and Atmospheric Administration if it is determined that the individual, in obtaining or using the scholarship, engaged in fraudulent conduct or failed to comply with any term or condition of the scholarship.

**Cost-Sharing Requirements**

There are no cost-sharing requirements.

**Intergovernmental Review**

Applications under this program are not subject to Executive Order 12372, ''Intergovernmental Review of Federal Programs.''

**Limitation of Liability**

In no event will NOAA or the Department of Commerce be responsible for proposal preparation costs if this program is cancelled because of other agency priorities. Publication of this notice does not oblige NOAA to award any specific project or to obligate any available funds. Applicants are hereby given notice that funding for the Fiscal Year 2009 program is contingent upon the availability of Fiscal Year 2009 appropriations.

**National Environmental Policy Act (NEPA)**

As defined in sections 5.05 and Administrative or Programmatic Functions of NAO 216–6, 6.03.c.3, this is an undergraduate scholarship and internship program for which there are no cumulative effects. Thus, it has been categorically excluded from the need to prepare an Environmental Assessment.

**Paperwork Reduction Act**

Notwithstanding any other provision of the 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 (PRA), unless that collection displays a currently valid Office of Management and Budget (OMB) control number. The Hollings Undergraduate Scholarship application form has been approved under OMB Control No. 0648–0568.

**Executive Order 12866**

This notice has been determined to be not significant for purposes of Executive Order 12866.

**Executive Order 13132 (Federalism)**

It has been determined that this notice does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

*Administrative Procedure Act/ Regulatory Flexibility Act*

Prior notice and an opportunity for public comment are not required by the Administrative Procedure Act or any other law for rules concerning public property, loans, grants, benefits, and contracts (5 U.S.C. 553(a)(2)). Because notice and opportunity for comment are not required pursuant to 5 U.S.C. 553 or any other law, the analytical requirements for the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis has not been prepared.

**Louisa Koch,**

*Director of Education, NOAA.*

[FR Doc. E8–28991 Filed 12–5–08; 8:45 am]

BILLING CODE 3510–12–P

## DEPARTMENT OF DEFENSE

### Department of the Air Force

**[Docket ID USAF–2008–0042]**

### Privacy Act of 1974; System of Records

**AGENCY:** Department of the Air Force, DOD.

**ACTION:** Notice to Add a New System of Records.

**SUMMARY:** The Department of the Air Force proposes to add a new system of records to its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

**DATES:** The proposed action will be effective on January 7, 2009 unless comments are received that would result in a contrary determination.

**ADDRESSES:** Send comments to the Air Force Privacy Act Officer, Office of Warfighting Integration and Chief Information Officer, SAF/XCX, 1800 Air Force Pentagon, Suite 220, Washington, DC 20330–1800.

**FOR FURTHER INFORMATION CONTACT:** Mr. Kenneth Brodie at (703) 696–7557.

**SUPPLEMENTARY INFORMATION:** The Department of the Air Force's notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The proposed systems reports, as required by 5 U.S.C. 552a(r) of the Privacy Act, were submitted on November 26, 2008, to the House Committee on Oversight and Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, ''Federal Agency Responsibilities for Maintaining Records About Individuals,'' dated February 8, 1996, (February 20, 1996, 61 FR 6427).

Dated: December 2, 2008.

**Morgan E. Frazier,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

**F033 AFCA C**

**SYSTEM NAME:**

USAF Information Technology E-Learning System.

**SYSTEM LOCATION:**

SkillSoft: c/o VeriCenter/Sunguard; 20 Overland Street; Boston, MA 02215–3309.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Air Force military and civilian personnel, Reserves, Air National Guard, and contractor personnel.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Individual's full name, Social Security Number (SSN), address, telephone number, student registrations and history of learning assets (courses, test preparations, mentoring, books, skillbriefs) accessed and completed and other related documents.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

10 U.S.C. 8013, Secretary of Air Force; DoD 8570.01–M, Information Assurance Workforce Improvement Program; and Air Force Instruction 33–115, Volume 2, Licensing Network Users and Certifying Network Professionals and E.O. 9397 (SSN).

**PURPOSE(S):**

To provide interactive, self-paced, web-based training and reference material anytime, anywhere to users' desktops to keep Air Force personnel skilled in the technology and knowledge they need to carry out their missions. Used as a management tool in support of Air Force information technology training requirements.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD 'Blanket Routine Uses' published at the beginning of the Air Force's compilation of record system notices apply to this system.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Electronic storage media.

**RETRIEVABILITY:**

By individual's full name and/or Social Security Number (SSN).

**SAFEGUARDS:**

Individual users, Air Force report administrators and personnel may only access the system by using reduced sign-on capability available through the Air Force Portal. System is contractor owned and operated and can only access the system by using an individual specific unique User ID and password to access the system for servicing the record system in performance of their official duties. Typical industry standard software/hardware applications/appliances (audit logs, virus detection, intrusion detection, firewalls, encryption of data in transmission) are utilized to protect the system. Data Center where system area network resides has onsite personnel, 24x7; electronic and physical security, video surveillance, man-trap entry, and badge-only access. Student data collected is encrypted.

**RETENTION AND DISPOSAL:**

Destroy by shredding or burning 4 months after individual retires or separates.

**SYSTEM MANAGER(S) AND ADDRESS:**

Program Manager, Department of the Air Force, AF Information Technology Electronic-Learning; Cyber Force Training; Air Force Communications Agency (HQ AFCA/CAFT), 203 West Losey Street, Scott Air Force Base, IL 62225–5212.

**NOTIFICATION PROCEDURE:**

Individuals seeking to determine whether information about themselves is contained in this system of records may contact the Program Manager, Department of the Air Force, Air Force Information Technology Electronic-Learning; Cyber Force Training; Air Force Communications Agency (HQ AFCA/CAFT), 203 West Losey Street, Scott Air Force Base, IL 62225–5212.

Written request must include individual's complete name, address, daytime contact telephone number, and signature on request.

**RECORD ACCESS PROCEDURES:**

Individuals seeking to access records about themselves contained in this system of records may also contact the Program Manager, AF Information Technology Electronic-Learning; Cyber Force Training; Air Force Communications Agency (HQ AFCA/CAFT), 203 West Losey Street, Scott Air Force Base, IL 62225–5212.

Written request must include individual's complete name, address, daytime contact telephone number, and signature on request.

**CONTESTING RECORD PROCEDURES:**

The Air Force rules for accessing records, and for contesting contents and appealing initial agency determinations are published in Air Force Instruction 33–332 Privacy Act Program; 32 CFR part 806b; or may be obtained from the system manager.

**RECORD SOURCE CATEGORIES:**

Information obtained from Air Force Portal, Air Force Directory Services, and individually registered users of the system.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

[FR Doc. E8–28935 Filed 12–5–08; 8:45 am]

BILLING CODE 5001–06–P

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## DEPARTMENT OF DEFENSE

### Department of the Air Force

**[Docket ID USAF–2008–0043]**

### Privacy Act of 1974; System of Records

**AGENCY:** Department of the Air Force, DoD.

**ACTION:** Notice to Alter a System of Records.

**SUMMARY:** The Department of the Air Force is proposing to alter a system of records notice in its existing inventory of record systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

**DATES:** This proposed action will be effective without further notice on January 7, 2009 unless comments are received which result in a contrary determination.

**ADDRESSES:** Send comments to the Air Force Privacy Act Officer, Office of Warfighting Integration and Chief Information Officer, SAF/XCPPI, 1800 Air Force Pentagon, Washington, DC 20330–1800.

**FOR FURTHER INFORMATION CONTACT:** Mr. Kenneth Brodie at (703) 696–7557.

**SUPPLEMENTARY INFORMATION:** The Department of the Air Force systems of records notices subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on November 26, 2008, to the House Committee on Oversight and Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, 'Federal Agency Responsibilities for Maintaining Records About Individuals,' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: December 2, 2008.

**Morgan E. Frazier,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

**F051 AF JA F**

**SYSTEM NAME:**

Courts Martial and Article 15 Records (November 23, 2005, 70 FR 70790).

**CHANGES:**

* * * * *

**SYSTEM NAME:**

Delete entry and replace with ''Courts-martial and Article 15 Records''.

**SYSTEM LOCATION:**

Delete entry and replace with ''Primary Location: The Judge Advocate General, Headquarters United States Air Force, 1420 Air Force Pentagon, Washington, DC 20330–1420.

**SECONDARY LOCATIONS:**

Headquarters Air Force Personnel Center, 550 C Street W, Randolph Air Force Base, TX 78150–4746.

Washington National Records Center, 4205 Suitland Road, Suitland, MD 20746–8001.

Headquarters of Air Force major commands and all levels down to and including Air Force installations. Official mailing addresses are published as an appendix to the Air Force's compilation of systems of records notices.''

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Delete entry and replace with ''Individuals subject to the Uniform Code of Military Justice (10 U.S.C. 802, Art. 2. Persons subject).''

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Delete entry and replace with ''Individual's name, Social Security Number (SSN), records of trial by courts-martial; records of Article 15 punishment; discharge proceedings; documents received or prepared in anticipation of administrative nonjudicial and judicial proceedings; witness statements; police reports; other reports and records from local, state, or federal agencies.''

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

Delete entry and replace with ''10 U.S.C. 8013, Secretary of the Air Force; 10 U.S.C. 8037, Judge Advocate General; 10 U.S.C. 815, Art. 15 Commanding officer's nonjudicial punishment; 10 U.S.C. 854, Record of Trial; 10 U.S.C. 938, Art. 138. Complaints of wrongs; Air Force Instruction 51–201, Administration of Military Justice; Air Force Instruction 51–202, Law—Nonjudicial Punishment; and E.O. 9397 (SSN).''

**PURPOSE(S):**

Delete entry and replace with ''Records are used to investigate, adjudicate and prosecute adverse action cases, Article 138 complaints, and for other investigations, as necessary. For review by appellate and other authorities; for use for official purposes by Department of Defense personnel. Also used as source documents for collection of statistical information and used to manage cases and case processing.''

* * * * *

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Delete entry and replace with ''Paper records in file folders and electronic storage media.''

**RETRIEVABILITY:**

Delete entry and replace with ''Individual's name, Social Security Number (SSN) or Military Service Number.''

**SAFEGUARDS:**

Delete entry and replace with ''Records are accessed by person(s) responsible for servicing the record system in performance of their official duties and by authorized personnel who are properly screened and cleared for need-to-know. Records are stored in locked rooms and cabinets. Those in computer storage devices are protected by computer system software. Computers must be accessed with a password.''

**RETENTION AND DISPOSAL:**

Delete entry and replace with ''Courts-martial records are retained in office files for 2 years following date of final action and then retired as permanent.

General and special courts-martial records are retired to the Washington National Records Center, Washington, DC 20409–0002.

Summary courts-martial and Article 15 records are retained in office files for 3 years or until no longer needed, whichever is later, and then retired as permanent.

Summary courts-martial and Article 15 records are forwarded to the Air Force Personnel Center for filing in the individual's permanent master personnel record.

Records received or prepared in anticipation of judicial and non-judicial Uniform Code of Military Justice or discharge proceedings, and data maintained on Judge Advocate's computer storage are maintained until action is final or no longer needed.

Paper records are disposed of by tearing into pieces, shredding, pulping, macerating or burning. Computer records are destroyed by deleting, erasing, degaussing, or by overwriting.''

* * * * *

**F051 AF JA F**

**SYSTEM NAME:**

Courts-martial and Article 15 Records.

**SYSTEM LOCATION:**

**PRIMARY LOCATION:**

The Judge Advocate General, Headquarters United States Air Force, 1420 Air Force Pentagon, Washington, DC 20330–1420.

**SECONDARY LOCATIONS:**

Headquarters Air Force Personnel Center, 550 C Street W, Randolph Air Force Base, TX 78150–4746.

Washington National Records Center, 4205 Suitland Road, Suitland, MD 20746–8001.

Headquarters of Air Force major commands and all levels down to and including Air Force installations. Official mailing addresses are published as an appendix to the Air Force's compilation of systems of records notices.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Individuals subject to the Uniform Code of Military Justice (10 U.S.C. 802, Art. 2. Persons subject).

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Individual's name, Social Security Number (SSN), records of trial by courts-martial; records of Article 15 punishment; discharge proceedings; documents received or prepared in anticipation of administrative non-judicial and judicial proceedings; witness statements; police reports; other reports and records from local, state, or federal agencies.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

10 U.S.C. 8013, Secretary of the Air Force; 10 U.S.C. 8037, Judge Advocate General; 10 U.S.C. 815, Art. 15 Commanding officer's non judicial punishment; 10 U.S.C. 854, Record of Trial; 10 U.S.C. 938, Art. 138. Complaints of wrongs; Air Force Instruction 51–201, Administration of Military Justice; Air Force Instruction 51–202, Law—Nonjudicial Punishment; and E.O. 9397 (SSN).

**PURPOSE(S):**

Records are used to investigate, adjudicate and prosecute adverse action cases, Article 138 complaints, and for other investigations, as necessary. For review by appellate and other authorities; for use for official purposes by Department of Defense personnel. Also used as source documents for collection of statistical information and used to manage cases and case processing.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records, or information contained therein, may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

Records from this system may be disclosed to other federal agencies and federal courts for official purposes, to include a determination of rights and entitlements of individuals concerned or the government.

The records may also be disclosed to a governmental board or agency or health care professional society or organization if such record or document is needed to perform licensing or professional standards monitoring; to medical institutions or organizations for official purposes, wherein the individual has applied for or been

granted authority or employment to provide health care services if such record or document is needed to assess the professional qualifications of such member.

To victims and witnesses of a crime for the purposes of providing information consistent with the requirements of the Victim and Witness Assistance Program and the Victims' Rights and Restitution Act of 1990.

The DoD 'Blanket Routine Uses' set forth at the beginning of the Air Force's compilation of systems of records notices apply to this system.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Paper records in file folders and electronic storage media.

**RETRIEVABILITY:**

Individual's name, Social Security Number (SSN) or Military Service Number.

**SAFEGUARDS:**

Records are accessed by person(s) responsible for servicing the record system in performance of their official duties and by authorized personnel who are properly screened and cleared for need-to-know. Records are stored in locked rooms and cabinets. Those in computer storage devices are protected by computer system software. Computers must be accessed with a password.

**RETENTION AND DISPOSAL:**

Courts-martial records are retained in office files for 2 years following date of final action and then retired as permanent.

General and special courts-martial records are retired to the Washington National Records Center, Washington, DC 20409–0002.

Summary courts-martial and Article 15 records are retained in office files for 3 years or until no longer needed, whichever is later, and then retired as permanent.

Summary courts-martial and Article 15 records are forwarded to the Air Force Personnel Center for filing in the individual's permanent master personnel record.

Records received or prepared in anticipation of judicial and non-judicial Uniform Code of Military Justice or discharge proceedings, and data maintained on Judge Advocate's computer storage are maintained until action is final or no longer needed.

Paper records are disposed of by tearing into pieces, shredding, pulping, macerating or burning. Computer records are destroyed by deleting, erasing, degaussing, or by overwriting.

**SYSTEM MANAGER(S) AND ADDRESS:**

The Judge Advocate General, Headquarters United States Air Force, 1420 Air Force Pentagon, Washington, DC 20330–1420.

**NOTIFICATION PROCEDURE:**

Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries to The Judge Advocate General, Headquarters United States Air Force, 1420 Air Force Pentagon, Washington, DC 20330–1420.

Individuals should provide their full name, Social Security Number (SSN), Unit of assignment, date of trial and type of court, date of discharge action, and date of punishment imposed in the case of Article 15 action may also be necessary, as appropriate.

**RECORD ACCESS PROCEDURES:**

Individuals seeking to access records about themselves contained in this system of records should address written inquiries to The Judge Advocate General, Headquarters United States Air Force, 1420 Air Force Pentagon, Washington, DC 20330–1420.

Individuals should provide their full name, Social Security Number (SSN), Unit of assignment, date of trial and type of court, date of discharge action, and date of punishment imposed in the case of Article 15 action may also be necessary, as appropriate.

**CONTESTING RECORD PROCEDURES:**

The Air Force rules for accessing records and for contesting contents and appealing initial agency determinations are published in Air Force Instruction 33–332; 32 CFR part 806b; or may be obtained from the system manager.

**RECORD SOURCE CATEGORIES:**

Information from almost any source can be included if it is relevant and material to the proceedings. These include, but are not limited to witness statements; police reports; reports from local, state, and federal agencies; information submitted by an individual making an Article 138 complaint; Inspector General investigations; and commander directed inquiries.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

Portions of this system may be exempt pursuant to 5 U.S.C. 552a(j)(2) if the information is compiled and maintained by a component of the agency that performs as its principal function any activity pertaining to the enforcement of criminal laws from the following subsections of 5 U.S.C. 552a(c)(3), (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G), (H) and (I), (e)(5), (e)(8), (f), and (g).

Records compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of the information, the individual will be provided access to the information except to the extent that disclosure would reveal the identify of a confidential source from the following subsections of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H) and (I), and (f). NOTE: When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions.

An exemption rule for this record system has been promulgated in accordance with the requirements of 5 U.S.C. 553(b)(1), (2), and (3), (c) and (e) and published in 32 CFR part 806b. For additional information contact the system manager.

[FR Doc. E8–28936 Filed 12–5–08; 8:45 am]

**BILLING CODE 5001–06–P**

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## DEPARTMENT OF DEFENSE

### Department of the Navy

**[Docket ID: USN–2008–0063]**

### Privacy Act of 1974; System of Records

**AGENCY:** United States Marine Corps, DoD.

**ACTION:** Notice to Add a System of Records.

**SUMMARY:** The U.S. Marine Corps is proposing to add a new system of records notice to its existing inventory of records systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

**DATES:** This proposed action will be effective without further notice on January 7, 2009 unless comments are received which result in a contrary determination.

**ADDRESSES:** Send comments to Headquarters, U.S. Marine Corps, FOIA/PA Section (ARSF), 2 Navy Annex, Room 3134, Washington, DC 20380–1775.

**FOR FURTHER INFORMATION CONTACT:** Ms. Tracy Ross at (703) 614–4008.

**SUPPLEMENTARY INFORMATION:** The U.S. Marine Corps system of records notices

subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The proposed system report, as required by 5 U.S.C. 552a(r), of the Privacy Act of 1974, as amended, was submitted on November 26, 2008, to the House Committee on Oversight and Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, ''Federal Agency Responsibilities for Maintaining Records About Individuals,'' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: December 2, 2008.

**Morgan E. Frazier,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

**M06320–X**

**SYSTEM NAME:**

Marine Corps Total Information Management Records.

**SYSTEM LOCATION:**

United States Marine Corps Systems Command, Office of the Command Information Officer, 2200 Lester Street, Quantico, VA 22143–6050.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Marine Corps Systems Command active duty, reservists, civilians, and contractors personnel.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

The system contains personnel data which includes, but is not limited to individuals' name, rank/grade, Social Security Number (SSN), current address, contact information, duty status, component code, sex, security investigation date/type, education, training information to include military occupational specialties, and related data.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

10 U.S.C. 5013, Secretary of the Navy; 10 U.S.C. 5041, United States Marine Corps; 5 U.S.C. 301, Departmental Regulations; E.O. 10450, Security Requirements for Government Employment; and E.O. 9397 (SSN).

**PURPOSE(S):**

The Total Information Gateway-Enterprise Resources System is a system of records that serves as a controlled repository for information needed by personnel necessary for performance of duties and other DoD-related functions. It supports the following strategically essential business processes: Facilities Management, Knowledge Management, Task Management, Document Management, Personnel Management and additional Business support functions such as Security services. It is an ongoing, growing, flexible system that encompasses a number of strategic applications including: Online all hands messages, knowledge centers, calendars, the command tasker system, and other workflow applications. As a management tool, statistical data, with all personal identifiers removed, may be used for system efficiency, workload calculation, or reporting purposes.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD 'Blanket Routine Uses' set forth at the beginning of the Marine Corps' compilation of systems of records notices apply to this system.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Electronic storage media.

**RETRIEVABILITY:**

Individual's name and/or Social Security Number (SSN).

**SAFEGUARDS:**

Access is restricted only by authorized persons who are properly screened. This system is password and/or System software uses Primary Key Infrastructure (PKI)/Common Access Card (CAC) protected. Based on user profiles, there are different levels of access. Full access to information maintained in the database is available only to authorized Agency personnel with established official need-to-know. Records are maintained in secure, limited access, or monitored work areas accessible only to authorized personnel.

**RETENTION AND DISPOSAL:**

Records are retained for three years and then destroyed.

**SYSTEM MANAGER(S) AND ADDRESS:**

Marine Corps Systems Command, Office of the Command Information Officer, 2200 Lester Street, Quantico, VA 22134–6050.

**NOTIFICATION PROCEDURE:**

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to U.S. Marine Corps System Command, Office of the Command Information Officer, Information Systems Management Team, 2200 Lester Street, Quantico, VA 22134–6050.

Requests should contain individual's name, Social Security Number (SSN), current mailing address, and must be signed.

**RECORD ACCESS PROCEDURES:**

Individuals seeking access to information about themselves contained in this system should address written inquiries to U.S. Marine Corps System Command, Office of the Command Information Officer, Information Systems Management Team, 2200 Lester Street, Quantico, VA 22134–6050.

Requests should contain individual's name, Social Security Number (SSN), current mailing address, and must be signed.

**CONTESTING RECORD PROCEDURES:**

The USMC rules for contesting contents and appealing initial agency determinations are published in Secretary of the Navy Instruction 5211.5E; 32 CFR part 701; or may be obtained from the system manager.

**RECORD SOURCE CATEGORIES:**

Individuals.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

[FR Doc. E8–28932 Filed 12–5–08; 8:45 am]

BILLING CODE 5001–06–P

## DEPARTMENT OF EDUCATION

### Submission for OMB Review; Comment Request

**AGENCY:** Department of Education.

**SUMMARY:** The IC Clearance Official, Regulatory Information Management Services, Office of Management invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

**DATES:** Interested persons are invited to submit comments on or before January 7, 2009.

**ADDRESSES:** Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, Washington, DC 20503. Commenters are encouraged to submit responses electronically by e-mail to *oira_submission@omb.eop.gov* or via fax to (202) 395–6974. Commenters should

include the following subject line in their response ''Comment: [insert OMB number], [insert abbreviated collection name,'' e.g., ''Upward Bound Evaluation'']. Persons submitting comments electronically should not submit paper copies.

**SUPPLEMENTARY INFORMATION:** Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The IC Clearance Official, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: December 2, 2008.

**Angela C. Arrington,**

*IC Clearance Official, Regulatory Information Management Services, Office of Management.*

### Federal Student Aid

*Type of Review:* Extension.

*Title:* Application for Approval To Participate in the Federal Student Financial Aid Programs.

*Frequency:* Prior to expiration.

*Affected Public:* Businesses or other for-profit; Not-for-profit institutions; State, Local, or Tribal Gov't, SEAs or LEAs.

*Reporting and Recordkeeping Hour Burden:*

Responses: 4,485.

Burden Hours: 21,181.

*Abstract:* The Higher Education Act of 1965 (HEA), as amended requires postsecondary institutions to complete and submit this application as a condition of eligibility for any of the Title IV student financial assistance programs and for the other postsecondary programs authorized by the HEA. The institution must submit the form (1) Initially when it first seeks to become eligible for the Title IV programs; (2) when its program participation agreement expires (recertification); (3) when it changes ownership, merges, or changes structure; (4) to be reinstated to participate in the Title IV programs; (5) to notify the Department when it makes certain changes, e.g., name or address; and (6) if it wishes to have a new program (outside its current scope) or new location approved for Title IV purposes.

Requests for copies of the information collection submission for OMB review may be accessed from *http://edicsweb.ed.gov*, by selecting the ''Browse Pending Collections'' link and by clicking on link number 3852. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E8–28889 Filed 12–5–08; 8:45 am]

BILLING CODE 4000–01–P

## DEPARTMENT OF EDUCATION

### Submission for OMB Review; Comment Request

**AGENCY:** Department of Education.

**SUMMARY:** The IC Clearance Official, Regulatory Information Management Services, Office of Management invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

**DATES:** Interested persons are invited to submit comments on or before January 7, 2009.

**ADDRESSES:** Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, Washington, DC 20503. Commenters are encouraged to submit responses electronically by e-mail to *oira_submission@omb.eop.gov* or via fax to (202) 395–6974. Commenters should include the following subject line in their response ''Comment: [insert OMB number], [insert abbreviated collection name,'' *e.g.*, ''Upward Bound Evaluation'']. Persons submitting comments electronically should not submit paper copies.

**SUPPLEMENTARY INFORMATION:** Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The IC Clearance Official, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: December 2, 2008.

**Angela C. Arrington,**

*IC Clearance Official. Regulatory Information Management Services. Office of Management.*

### Institute of Education Sciences

*Type of Review:* Reinstatement.

*Title:* Teacher Follow-Up Survey.

*Frequency:* One time.

*Affected Public:* Individuals or household.

*Reporting and Recordkeeping Hour Burden:*

*Responses:* 4,910.

*Burden Hours:* 1,831.

*Abstract:* The Teacher Follow Up Survey (TFS) is a follow-up to the School and Staffing Survey (SASS) and it is a survey of teachers with the main purpose of providing a one year teacher attrition rate. The TFS 09 is designed to be used in conjunction with the SASS, and provide necessary information for estimating and analyzing teacher turnover and for updating the turnover estimates used in projections of teacher demand.

Requests for copies of the information collection submission for OMB review may be accessed from *http://edicsweb.ed.gov*, by selecting the ''Browse Pending Collections'' link and by clicking on link number 3856. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E8–28891 Filed 12–5–08; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF ENERGY

### Agency Information Collection Revision and Renewal

**AGENCY:** U.S. Department of Energy.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of Energy (DOE), pursuant to the Paperwork Reduction Act of 1995, intends to revise and renew an information collection request with the Office of Management and Budget (OMB) for its Privacy Act Request Form. Revisions include: Update to agency address, clarification of instructions for respondents, and changes to the part of the form entitled ''For Agency Use Only.''

The Request Form is maintained in a Privacy Act system of records. Personal information is protected and disclosure is governed by provisions of the Privacy Act.

*Comments are invited on:* (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

**DATES:** Comments regarding this proposed information collection must be received on or before February 6, 2009. If you anticipate difficulty in submitting comments within that period, contact the person listed below as soon as possible.

**ADDRESSES:** Written comments may be sent to Verlette L. Gatlin, Deputy Director, Office of Information Resources, MA–90, 1000 Independence Avenue, SW., Washington, DC 20585 or by fax at (202) 586–0575 or e-mail at *verlette.gatlin@hq.doe.gov.*

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument and instructions should be directed to Verlette L. Gatlin at the addresses listed above.

**SUPPLEMENTARY INFORMATION:** This information collection request contains: (1) OMB No. 1910–1700; (2) Information Collection Request Title: Privacy Act Information Request; (3) Type of Review: Revision and Renewal; (4) Purpose: Use of the form to request records from the DOE is voluntary. The information in the form is used to establish the identity of the requester and to authorize agency personnel to locate and review records in a system of records established under the Privacy Act. Submitting a signed form supplements the identification process established in the DOE regulation that implements the Privacy Act at Title 10, Code of Federal Regulations, Section 1008.4, and reduces the burden to the requester to provide copies of identifying documents pursuant to that section. Use of the form also can reduce the processing time by the agency to provide records that may be necessary for claims under the Energy Employees Occupational Illness Compensation Program Act and other employment-related compensation programs; (5) Respondents: 2,500 annually; (6) Estimated Number of Burden Hours: .25 hour per response for respondents or 625 hours annually, including the time for reviewing instructions.

**Statutory Authority:** The Privacy Act of 1974, Title 5, United States Code, Section 552a; the Paperwork Reduction Act of 1995, Title 44, United States Code, Section 3501, *et seq.*

Issued in Washington, DC, on November 24, 2008.

**Ingrid Kolb,**

*Director, Office of Management.*

[FR Doc. E8–28939 Filed 12–5–08; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

### Office of Energy Efficiency and Renewable Energy

### Request for Information for Photovoltaic Community Project: Fielded Photovoltaic Systems and Components Data

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy.

**ACTION:** Request for Information (DE–PS36–09GO39002).

**SUMMARY:** The Department of Energy (DOE) today gives notice of a Request for Information (RFI) to invite comment on approaches to address the need for consistently-collected reliability data of fielded photovoltaic systems, data analysis to deduce methods for assessing reliability and to improve accelerated aging tests to create predictive models, improvement in existing tests, more information on best practices for reliability and accelerated aging tests, and assessing the nature and frequency of safety-related issues (arcing, building integration aspects, and ground faults) and their relationship with long-term performance. It is clear that the foundation to address these needs is a database consisting of photovoltaic system and component reliability, as well as performance data, which are collected in a consistent manner. In addition to the database, it is necessary for DOE to collaborate with the national laboratories and others to evaluate the data, develop new or modified tests, assess safety, evaluate system and component interactions, and develop predictive models.

DOE is issuing this RFI for information and feedback from the PV community stakeholders. These include, but are not limited to, system operators and integrators, utilities, project planners, financial planners, manufacturers, third-party data-aggregation companies, universities, testing facilities, and other interested parties.

See the **SUPPLEMENTARY INFORMATION** section of this document, which provides further detail and comments requested.

**DATES:** Written comments must be received by 11:59 p.m. Eastern Time on December 17, 2008.

**ADDRESSES:** Send all responses to this RFI to *PV.CommunityRFI@go.doe.gov* in Microsoft Word format.

**FOR FURTHER INFORMATION CONTACT:** Questions regarding the content of the RFI must be submitted through the

''Submit Question'' feature in the DOE Industry Interactive Procurement System (IIPS) at *http://e-center.doe.gov*. Locate the RFI by going to *http://e-center.doe.gov/*, click on ''Browse Opportunities,'' and scroll down to view DOE Financial Assistance Opportunities (Viewing ''Opportunities by Date Posted'' is recommended). Click on the ''Browse Financial Asst.'' button, and then click on the folder next to ''November 2008.'' Locate and click on Announcement No. RFI DE–PS36–09GO39002, Request for Information (RFI): PV Community Project. Click on the ''Submit Question'' button. Enter required information. You will receive an electronic notification when your question has been answered. Please contact the IIPS Help Desk at 1–800–683–0751 (select Option 1) or at *helpdesk@pr.doe.gov* for questions regarding the operation of IIPS.

**SUPPLEMENTARY INFORMATION:** A major emphasis of the Department of Energy Solar Energy Technology Program (SETP) is achieving cost competitiveness and broad commercialization of solar electric technologies in the United States. The SETP is focusing primarily on two areas: (1) Research and development (R&D) on photovoltaic (PV) component and system designs, including low-cost approaches for manufacturing them; and (2) technology acceptance activities that address marketplace barriers and offer the opportunity for market expansion. Key elements in the market transformation are the ability to evaluate the performance and reliability of solar products and systems.

As noted in the SETP Multi-Year Program Plan [1], system integrators, project planners, and the financial community need more rigorous data about overall system performance. System reliability, including service life prediction, is also essential for investment decisions. Manufacturers are also seeking techniques for quantifying the performance and reliability of their products and systems. During the Second Accelerated Aging Workshop (April 1–2, 2008) [2] specific needs were identified. These inter-related needs include the following:

- Consistently-collected reliability data of fielded systems;
- Data analysis to deduce methods for assessing reliability and to improve accelerated aging tests to create predictive models;
- Improve existing tests and provide more information on best practices for reliability and accelerated aging tests;
- Assessment of the nature and frequency of safety-related issues (arcing, building integration aspects, and ground faults) and their relationship with long-term performance.

Based upon these insights, there is a clear need for data to accomplish the following:

*1. Document degradation rates for PV systems and components deployed in different climates/configurations:*

—With the recent advances and the proliferation of module manufacturers, information is needed to (1) update understanding of degradation and failure rates; (2) link degradation to use environments, and (3) define specialized, feasible measurement approaches to the degradation rates for emerging technologies.

—Minimal data is available on degradation and failure rates for other PV system components, such as inverters, wiring, trackers, etc.

2. *Document failures observed for PV systems and system components deployed in different climates/configurations:*

—Documented, consistent data about system/component performance, maintenance events, and the related cost will establish an understanding about deployed systems or components. System components would include all elements of the system.

*3. Define ''use conditions'':*

—Data may support further categorization of PV system or system component degradation according to ''use conditions,'' which may differ from the climate zones defined in existing standards such as IEC 60721.

*4. Establish technical basis for testing methods and codes and standards.*

—Data collected from fielded systems by a consistent method may improve understanding of use conditions for systems and/or components.

—Consistent data can support the development of appropriate codes and standards for the industry.

## Proposed Strategy

The intent of this RFI is to invite comment on approaches to address the needs described above. The foundation to address these needs is a database consisting of photovoltaic system and component reliability data, as well as performance data, which are collected in a consistent manner. In addition to a database, it is necessary for DOE to collaborate with national laboratories and others to evaluate the data, develop new or modified tests, assess safety, evaluate system and component interactions, and develop predictive models. The following describes a possible approach.

Other ideas are encouraged.

## Proposed Topic

Consistently collect performance and reliability data about fielded systems and their components, in a range of locales over an extended period of time. Large and small systems would be of interest.

- To develop or verify predictive performance and reliability models to better understand system and component interactions in collaboration with the national laboratories and others;
- To evaluate module degradation and failure rates of fielded modules in a range of use conditions in collaboration with the national laboratories and others.

*Proposed Tasks To Accomplish This Topic Are:*

Task 1: System Selection: Systems must be fielded and commercially available. Small-scale systems based on prototypes would be optional. A range of technologies, system sizes, and diverse locales are required. It is also desirable that system owners and site operators will be willing to provide access to research teams to permit on-site measurements. It may be desirable to swap out components for detailed laboratory characterization. In these cases, arrangements for spare components would be necessary to minimize impacts on system operation.

Task 2: Data Monitoring: Use standardized methods for all sites to collect information about system and component performance, reliability, and maintenance.

Task 3: Database: Establish and maintain database.

Task 4: Data Analysis and Reporting. Conduct data review, and periodic consolidation, analysis and reporting of the findings, recommendations and next steps.

## Approach

Three alternative approaches have been identified.

*Alternative 1: Funding Opportunity Announcement (FOA) (for Grants or Cooperative Agreements)*

DOE could issue a competitive FOA for applications, with Applicants providing access to their deployed

[1] SETP Multi-Year Program Plan 2008–2012; *http://www1.eere.energy.gov/solar/pdfs/solar_program_mypp_2008-2012.pdf.*

[2] Proceedings reported in ''*Accelerated Aging Testing and Reliability in Photovoltaics Workshop II Summary Report*'' are found at: *http://www.eere.energy.gov/solar/solar_america/pdfs/accelerated_aging_report_2008.pdf.*

systems and components to collect performance, reliability, and maintenance data according to established protocols. Such a FOA may involve system integrators, operators, or others offering access to systems, possibly a third party for data collection and aggregation, and collaboration with the national laboratories and others for testing, and the national laboratories for data analysis and storage, all accomplished in a consistent, coordinated project.

*Alternative 2: Non-Competitive Collaborative R&D*

The national labs could negotiate individual, non-competitive arrangements with selected participants (companies, test labs, and/or universities) regarding the relative roles and commitments of the various parties to achieve the stated objectives. Negotiations would be on a case-by-case basis, with the national laboratories in the lead coordinating role, based upon their planned work for the DOE SETP in their Annual Operating Plans.

*Alternative 3: DOE/SETP Acquisition*

A DOE acquisition process could be used to acquire access to PV systems for the purpose of installing data collection equipment, collecting system performance, reliability, and maintenance data, and monitoring the system. An acquisition could include services to implement the data collection. Data could be collected by a site custodian, a third party, a national laboratory team, or a combination of options.

In all cases the data collected would be analyzed to establish capabilities by a national laboratory team, in which DOE has already invested. Opportunities would exist for additional collaboration with other testing facilities to participate in achieving the common goals. Results would be made public in a summary form that would not be identifiable by system or manufacturer. Participants in the project would be given the summary information, along with their particular system/component data. This would offer them the benefit of knowing how their specific use condition compares with others under a particular set of criteria. Those not in the program will have access to the summary public information.

**Request for Information Guidelines**

Respondents are asked to specifically comment on the above proposed strategy, and the questions below. Respondents are free to comment on the general concept, potential benefits or obstacles, the overall merits of this idea, other alternatives, and the relative priority of this activity.

DOE will evaluate responses to this RFI to determine the best approach to move forward. If a FOA or an acquisition process is warranted, DOE would formulate the content based on these comments and program needs. DOE may determine that a FOA or an acquisition process is NOT needed, and that companies will make individual arrangements with the national laboratories.

**Questions**

(1) *Motivation:* Would industry be willing to participate in such a program and what would participants expect or require? In addition to the benefits mentioned, are there other useful financial and/or project outcomes?

(2) *Requirements:* Are there any special requirements or considerations an entity must have in order to participate?

(3) *Needs:* Are the stated needs appropriate? Is the list complete, or are there additional needs? What additional needs could be addressed by a consistent performance and reliability database? How long should the data collection project last, e.g., 1 year, 5 years, other?

(4) *Priorities:* Are there other priorities instead of, or in addition to, those identified? How would they be ranked?

(5) *Data:* What are specific suggestions about what data is needed? A continuous data stream consolidated into specific intervals is envisioned. Is this appropriate? Suggestions about the data collection instrumentation and methodology are welcomed.

(6) *Topic:* Is the topic appropriate? Are there other topics that should be included and why?

(7) *Tasks:* Are the tasks appropriate? Are there other tasks that should be included and why?

(8) *Critical Milestones:* What critical milestones are recommended to measure the success of this effort and why?

(9) *Approach:* Of the Alternatives to implement this effort, is there one that would be the most useful? Are there other, more expedient approaches to achieving the objectives? Please describe.

(10) *Confidentiality:* DOE has procedures for maintaining data confidentiality, and creating a firewall so the data is not subject to the Freedom of Information Act (FOIA). Is this essential? Are there specific concerns that could be addressed on an individual basis?

(11) *Costs:* What would be the estimated costs of the different alternatives?

DOE will not pay for information provided under this Request for Information (RFI), and there is no guarantee that a project will be supported as a result of this RFI. This RFI is not accepting applications for financial assistance or financial incentives. Response to the RFI will not be viewed as a binding commitment for the respondent to develop or pursue the project or ideas discussed. DOE may also decide at a later date to issue Funding Opportunity Announcements (FOAs), based on consideration of the input received from this RFI.

Respondents are requested to provide the following information in their submission of comments in response to this RFI.

- Company/institutional name, Company/institutional contact.
- Address, phone number, e-mail address.
- Type of business or institution.

Responses should be limited to 5 pages. However, more than one response is allowed. Please identify your answers by responding to a specific question or topic if possible. We welcome other comments as well. Identifying the comment with the item it refers to will facilitate aggregating all the responses. Any information obtained as a result of this RFI is intended to be used by the Government on a non-attribution basis for program planning and procurement strategy development. Information or data that is restricted in any way or limited for use by the government is not solicited and will not be considered. Please do not respond with any information you deem proprietary or confidential.

The Department will not respond to those who submit comments, and/or give any feedback on any decision made based on the comments received, as there is potential for a future Funding Opportunity relative to this subject, informed by the total comments received.

The Department thanks you for your assistance and comments.

Issued in Golden, CO, on November 21, 2008.

**Matthew A. Barron,**

*Acting Assistant Manager, OAFA, DOE-Golden Field Office.*

[FR Doc. E8–28938 Filed 12–5–08; 8:45 am]

BILLING CODE 6450–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 12775–001]**

### City of Spearfish, SD; Notice of Scoping Meetings and Site Visit and Soliciting Scoping Comments

December 2, 2008.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Major Project.

b. *Project No.:* P–12775–001.

c. *Date filed:* September 10, 2008.

d. *Applicant:* City of Spearfish, South Dakota.

e. *Name of Project:* Spearfish Hydroelectric Project.

f. *Location:* On Spearfish Creek in Lawrence County, South Dakota. The project occupies about 57.3 acres of United States lands within the Black Hills National Forest administered by the U.S. Forest Service.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Ms. Cheryl Johnson, Public Works Administrator, City of Spearfish, 625 Fifth Street, Spearfish, SD 57783; (605) 642–1333; or e-mail at *cherylj@city.spearfish.sd.us.*

i. *FERC Contact:* Steve Hocking at (202) 502–8753; or e-mail at *steve.hocking@ferc.gov.*

j. *Deadline for filing scoping comments:* February 13, 2009.

All documents (original and eight copies) should be filed with: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The Commission's Rules of Practice and Procedures require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

Scoping comments may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the ''e-Filing'' link.

k. This application is not ready for environmental analysis at this time.

l. *The existing Spearfish Project consists of:* (1) A 130-foot-long, 4-foot-high concrete gravity dam; (2) a 0.32-acre reservoir; (3) a gatehouse next to the dam that contains four 2-foot-high, 4-foot-wide steel intake gates; (4) a 4.5-mile-long, 6.5-foot-wide, 9-foot-high concrete-lined rock tunnel; (5) a forebay pond; (6) two 1,200-foot-long, 48-inch diameter, wood stave pipelines; (7) four 36-inch-diameter, 54-foot-high standpipe surge towers; (8) two 4,700-foot-long, 30-to 34-inch diameter steel penstocks; (9) a reinforced concrete powerhouse containing two Pelton turbines and two, 2,000-kilowatt generators; and (10) appurtenant facilities.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h above.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. Scoping Process

The Commission intends to prepare a single (no draft) environmental assessment (EA) for the project in accordance with the National Environmental Policy Act. The EA will consider both site-specific and cumulative environmental impacts and reasonable alternatives to the proposed action.

#### Scoping Meetings

Commission staff will conduct one agency scoping meeting and one public meeting. The agency scoping meeting will focus on resource agency and non-governmental organization (NGO) concerns, while the public scoping meeting is primarily for public input. All interested individuals, organizations, and agencies are invited to attend one or both of the meetings, and to assist the staff in identifying the scope of the environmental issues that should be analyzed in the EA. The times and locations of these meetings are as follows:

*Evening Scoping Meeting*

*Date and Time:* January 13, 2009, from 7 p.m. to 10 p.m.

*Location:* City of Spearfish Council Center, 625 Fifth Street, Spearfish, SD 57783.

*Daytime Scoping Meeting*

*Date and Time:* January 14, 2009, from 10 a.m. to 2 p.m.

*Location:* City of Spearfish Council Center, 625 Fifth Street, Spearfish, SD 57783.

Copies of the Scoping Document (SD1) outlining the subject areas to be addressed in the EA were distributed to the parties on the Commission's mailing list for this project. Copes of SD1 will be available at the scoping meeting or may be viewed on the Web at *http://www.ferc.gov* using the ''eLibrary'' link (see item m above).

#### Site Visit

Commission staff will hold a site visit to the project on January 13, 2009, from 9 a.m. to about 12 noon. Anyone wishing to attend the site visit should meet at the Spearfish Project powerhouse at 9 a.m. located at 520 S. Canyon, Spearfish, South Dakota 57783. We will drive to the dam and stop along the way to view Spearfish Creek; drive to the project's forebay and standpipe facilities; then drive back to the project's powerhouse and take a tour of the powerhouse. All participants are responsible for their own transportation.

The site visit scheduled for January 13, 2009, is weather dependent. If the site visit is cancelled, notice will be placed on the Commission's January 13, 2009, calendar which can be found on the Commission's Web site (*http://www.ferc.gov*). Please check the Commission's January 13, 2009, calendar before leaving in the morning to attend the site visit.

#### Objectives

At the scoping meetings, the staff will: (1) Summarize the environmental issues tentatively identified for analysis in the EA; (2) solicit from the meeting participants all available information, especially quantifiable data, on the resources at issue; (3) encourage statements from experts and the public on issues that should be analyzed in the EA, including viewpoints in opposition to, or in support of, the staff's preliminary views; (4) determine the resource issues to be addressed in the EA; and (5) identify those issues that require a detailed analysis, as well as those issues that do not require a detailed analysis.

#### Procedures

Scoping meetings will be recorded by a stenographer and will become part of

the Commission's formal record for this proceeding.

Individuals, organizations, and agencies with environmental expertise and concerns are encouraged to attend the meeting and to assist the staff in defining and clarifying the issues to be addressed in the EA.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–28923 Filed 12–5–08; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 12611–003]**

### Verdant Power, LLC; Notice of Intent To File License Application, Filing of Draft Application, Request for Waivers of Integrated Licensing Process Regulations Necessary for Expedited Processing of a Hydrokinetic Pilot Project License Application, Extending the Comment Period, and Soliciting Comments

December 1, 2008.

a. *Type of Filing:* Notice of Intent to File a License Application for an Original License for a Hydrokinetic Pilot Project.

b. *Project No.:* 12611–003.

c. *Date Filed:* November 25, 2008.

d. *Submitted By:* Verdant Power, LLC.

e. *Name of Project:* Roosevelt Island Tidal Energy Project.

f. *Location:* In the east channel of the East River, in New York City, New York. The project would not occupy federal lands.

g. *Filed Pursuant to:* 18 CFR 5.3 of the Commission's regulations.

h. *Applicant Contact:* Ronald F. Smith, Verdant Power, LLC, The Octagon, 888 Main Street, New York, NY 10044 (212) 888–8887 ext 601.

i. *FERC Contact:* Tom Dean (202) 502–6041.

j. *Verdant Power, LLC (Verdant Power) has filed with the Commission:* (1) A notice of intent (NOI) to file an application for an original license for a kinetic hydropower pilot project and a draft license application with monitoring plans; (2) a request for waivers of the integrated licensing process regulations necessary for expedited processing of a hydrokinetic pilot project license application, including extending the period to file comments on the draft license application and monitoring plans; (3) a proposed process plan and schedule; (4) a request to be designated as the non-federal representative for section 7 of the Endangered Species Act consultation; and (5) a request to be designated as the non-federal representative for section 106 consultation under the National Historic Preservation Act (collectively the pre-filing materials).

k. With this notice, we are soliciting comments on the pre-filing materials listed in paragraph j above, including the draft license application and monitoring plans. All comments should be sent to the address above in paragraph h. The comment period has been extended 45 days at the request of Verdant Power to take into consideration the holiday season. In addition, all comments (original and eight copies) must be filed with the Commission at the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. All filings with the Commission must include on the first page, the project name (Roosevelt Island Tidal Energy Project) and number (P–12611–003), and bear the heading ''Comments on the proposed Roosevelt Island Tidal Energy Project.'' Any individual or entity interested in submitting comments on the pre-filing materials must do so by January 9, 2009.

Comments may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the ''e-filing'' link.

l. With this notice, we are approving Verdant Power's request to be designated as the non-federal representative for section 7 of the Endangered Species Act (ESA) and its request to initiate consultation under section 106 of the National Historic Preservation Act; and recommending that it begin informal consultation with: (a) the U.S. Fish and Wildlife Service and the National Marine Fisheries Service as required by section 7 of ESA; and (b) the New York State Historic Preservation Officer, as required by section 106, National Historical Preservation Act, and the implementing regulations of the Advisory Council on Historic Preservation at 36 CFR 800.2.

m. This notice does not constitute the Commission's approval of Verdant Power's request to use the Pilot Project Licensing Procedures. Upon its review of the project's overall characteristics relative to the pilot project criteria, the draft license application contents, and any comments filed, the Commission will determine whether there is adequate information to conclude the pre-filing process.

n. The proposed Roosevelt Island Tidal Energy Project would consist of: (1) A field array of thirty 35-kilowatt, 5-meter-diameter axial flow Kinetic Hydropower System (KHPS) turbine-generator units mounted on ten triframe mounts, with a total capacity of about 1 megawatt; (2) underwater cables from each turbine to five shoreline switchgear vaults, that would interconnect to a control room and interconnection points; and (3) appurtenant facilities for navigation safety and operation. The estimated annual generation of the proposed project would be between 1,680 and 2,400 megawatt-hours.

o. A copy of the draft license application and all pre-filing materials are available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site (*http://www.ferc.gov*), using the ''eLibrary'' link. Enter the docket number, excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCONlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in paragraph h.

p. Pre-filing process schedule. The pre-filing process will be conducted pursuant to the following tentative schedule. Revisions to the schedule may be made as appropriate.

| Milestone | Date |
|---|---|
| Comments on pre-filing materials due | January 9, 2009. |
| Issuance of meeting notice (if needed) | January 26, 2009. |
| Public meeting/technical conference (if needed) | February 25, 2009. |
| Issuance of notice concluding pre-filing process and ILP waiver request determination | February 9, 2009 (if no meeting is needed).<br>March 12, 2009 (if meeting is needed). |

q. Register online at *http://ferc.gov/esubscribenow.htm* to be notified via e-mail of new filing and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–28929 Filed 12–5–08; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Algonquin Gas Transmission, LLC; Notice of Availability of the Environmental Assessment for the Proposed J–2 Loop Project

December 2, 2008.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared this environmental assessment (EA) on the natural gas pipeline facilities proposed by Algonquin Gas Transmission, LLC (Algonquin) in the above-referenced docket.

The EA was prepared to satisfy the requirements of the National Environmental Policy Act of 1969. The FERC staff concludes that approval of the proposed project, with appropriate mitigating measures, would not constitute a major federal action significantly affecting the quality of the human environment.

The EA assesses the potential environmental effects of the construction and operation of Algonquin's proposed J–2 Loop Project. This project would involve construction of about 2.3 miles of 14-inch-diameter loop [1] pipeline and associated facilities within the cities of Medford and Somerville in Middlesex County, Massachusetts. The J–2 Loop Project would commence at an existing meter station adjacent to the Mystic Valley Parkway in Medford and travel in a generally southeast direction mostly within road rights-of-way to its terminus at an interconnection with NSTAR Gas Company's (NSTAR) system along the McGrath Highway in Somerville. A meter station and pig [2] launching facility would be constructed in Medford at the existing meter station and a valve would be constructed at the interconnect with NSTAR. A temporary pig launcher would be set at the valve on a temporary basis when pigging would be conducted.

The EA has been placed in the public files of the FERC. A limited number of copies of the EA are available for distribution and public inspection at: Federal Energy Regulatory Commission, Public Reference Room, 888 First Street, NE., Room 2A, Washington, DC 20426, (202) 502–8371.

Copies of the EA have been mailed to Federal, State, and local agencies; public interest groups; interested individuals and affected landowners; local newspapers and libraries; Native American groups; and parties to this proceeding.

Any person wishing to comment on the EA may do so. To ensure consideration prior to a Commission decision on the proposal, it is important that we receive your comments before the date specified below.

Please note that the Commission strongly encourages electronic filing of any comments or interventions or protests to this proceeding. See Title 18 of the Code of Federal Regulations, Part 385.2001(a)(1)(iii) and the instructions on the Commission's Internet Web site at *http://www.ferc.gov* under the link to ''*Documents and Filings*'' and ''eFiling.'' eFiling is a file attachment process and requires that you prepare your submission in the same manner as you would if filing on paper, and save it as a file on your computer's hard drive. New eFiling users must first create an account by clicking on ''*Sign up*'' or ''*eRegister.*'' You will be asked to select the type of filing you are making. This filing is considered a ''Comment on Filing.'' In addition, there is a ''*Quick Comment*'' option available, which is an easy method for interested persons to submit text-only comments on a project. The *Quick Comment User Guide* can be viewed at *http://www.ferc.gov/docs-filing/efiling/quick-comment-guide.pdf.* Quick Comment does not require a FERC eRegistration account; however, you will be asked to provide a valid email address. All comments submitted under either eFiling or the Quick Comment option are placed in the public record for the specified docket.

If you are filing written comments, please carefully follow these instructions to ensure that your comments are received in time and properly recorded:

- Send an original and two copies of your comments to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Room 1A, Washington, DC 20426;
- Reference Docket No. CP08–256–000;
- Label one copy of the comments for the attention of the Gas Branch 1, PJ–11.1; and
- Mail your comments so that they will be received in Washington, DC on or before January 2, 2009.

Comments will be considered by the Commission but will not serve to make the commentor a party to the proceeding. Any person seeking to become a party to the proceeding must file a motion to intervene pursuant to Rule 214 of the Commission's Rules of Practice and Procedures (18 CFR 385.214).[3] Only intervenors have the right to seek rehearing of the Commission's decision.

Affected landowners and parties with environmental concerns may be granted intervenor status upon showing good cause by stating that they have a clear and direct interest in this proceeding which would not be adequately represented by any other parties. You do not need intervenor status to have your comments considered.

Additional information about the project is available from the Commission's Office of External Affairs, at 1–866–208–FERC or on the FERC Internet Web site (*http://www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on ''General Search'' and enter the docket number excluding the last three digits (i.e., CP08–256) in the Docket Number field. Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries and direct links to the documents. To register for this service, go to the eSubscription link on the

[1] A loop is a segment of pipeline installed adjacent and parallel to an existing pipeline system, and connected to the pipeline system at both ends to allow more gas to be moved through the pipeline system or to function as a backup system.

[2] A pipeline ''pig'' is a device designed to internally clean or inspect the pipeline. A pig launcher/receiver is typically an aboveground facility where pigs are inserted or retrieved from the pipeline.

[3] Interventions may also be filed electronically via the Internet in lieu of paper. See the previous discussion on filing comments electronically.

FERC Internet Web site (*http://www.ferc.gov/esubscribenow.htm*).

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–28924 Filed 12–5–08; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER09–312–000]**

### LANXESS Corporation; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

December 2, 2008.

This is a supplemental notice in the above-referenced proceeding of LANXESS Corporation'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 January 2, 2009.

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 docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–28926 Filed 12–5–08; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER09–318–000]**

### Safe Harbor Holding Company, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

December 2, 2008.

This is a supplemental notice in the above-referenced proceeding of Safe Harbor Holding Company, 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 January 2, 2009.

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 docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–28927 Filed 12–5–08; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket Nos. ER01–1710–000; ER01–1710–001]**

### Mill Run Windpower, LLC; Notice of Issuance of Order

December 2, 2008.

Mill Run Windpower, LLC (Mill Run) filed an application for market-based rate authority, with an accompanying tariff. The proposed market-based rate tariff provided for the sale of energy, capacity and ancillary services at market-based rates. Mill Run also requested waivers of various Commission regulations. In particular, Mill Run requested that the Commission grant blanket approval under 18 CFR part 34 of all future issuances of securities and assumptions of liability by Mill Run.

On July 17, 2001, pursuant to delegated authority, the Director, Division of Corporate Applications, granted the requests for blanket approval under part 34 (Director's Order). On December 2, 2008, pursuant to delegated authority, the Director, Division of Tariffs and Market Development—West, issued an errata correcting several omissions from the Director's Order (Errata). Among them,

the Errata stated that the Commission would publish a separate notice in the **Federal Register** establishing a period of time for the filing of protests. Accordingly, any person desiring to be heard concerning the blanket approvals of issuances of securities or assumptions of liability by Mill Run, should file a protest 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, 385.214 (2004). The Commission encourages the electronic submission of protests using the FERC Online link at *http://www.ferc.gov.*

Notice is hereby given that the deadline for filing protests is December 8, 2008.

Absent a request to be heard in opposition to such blanket approvals by the deadline above, Mill Run is authorized to issue securities and assume obligations or liabilities as a guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of Mill Run, compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approvals of Mill Run's issuance of securities or assumptions of liability.

Copies of the full text of the Director's Order are available from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426. The Order may also be viewed on the Commission's Web site at *http://www.ferc.gov*, using the eLibrary link. Enter the docket number excluding the last three digits in the docket number filed to access the document. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–28925 Filed 12–5–08; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. OA08–62–000]**

### California Independent System Operator Corporation; Notice of FERC Staff Attendance

December 2, 2008.

The Federal Energy Regulatory Commission (Commission) hereby gives notice that on December 3, 2008, members of its staff will participate in a teleconference to be conducted by the California Independent System Operator (CAISO) regarding the CAISO's 2009 transmission plan. Further information and documents for the teleconference can be obtained at: *http://www.caiso.com.*

Sponsored by the CAISO, this teleconference is open to all market participants, and Commission staff's participation is part of the Commission's ongoing outreach efforts. This meeting may discuss matters at issue in the above captioned docket.

For further information, contact Saeed Farrokhpay at *saeed.farrokhpay@ferc.gov;* (916) 294–0233 or Maury Kruth at *maury.kruth@ferc.gov,* (916) 294–0275.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–28928 Filed 12–5–08; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket Nos. CP03–75–003 and CP05–361–001]**

### Freeport LNG Development, L.P.; Notice of Petition To Amend

December 2, 2008.

Take notice that on November 19, 2008, Freeport LNG Development, L.P. (Freeport LNG), 333 Clay Street, Suite 5050, Houston, Texas 77002, filed in Docket Nos. CP03–75–003 and CP05–361–001, a petition to amend the orders issued June 18, 2004 in Docket No. CP03–75–000 and September 26, 2006 in Docket No. CP05–361–001, pursuant to section 3 of the Natural Gas Act for authorization to operate its existing liquefied natural gas (LNG) terminal facility located on Quintana Island, Brazoria County, Texas, for the additional purpose of exporting foreign-sourced LNG.

This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676; or for TTY, contact (202) 502–8659.

Any initial questions regarding Freeport LNG's proposal in this petition should be directed to William Henry, Freeport LNG Development, L.P., 333 Clay Street, Suite 5050, Houston, Texas 77002, (713) 980–2888 or Lisa M. Tonery, Fulbright & Jaworski L.L.P., 666 Fifth Avenue, New York, New York 10103, (212) 318–3009, *ltonery@fulbright.com.*

Pursuant to Section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

However, a person does not have to intervene in order to have comments

considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit the original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

*Comment Date:* December 23, 2008.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–28930 Filed 12–5–08; 8:45 am]

BILLING CODE 6717–01–P

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–8748–6]**

## Clean Water Act Section 303(d): Availability of Los Cerritos Channel Total Maximum Daily Loads (TMDLs)

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

**ACTION:** Notice of availability.

**SUMMARY:** This action announces the availability of EPA proposed total maximum daily loads (TMDLs) for the freshwater portion of Los Cerritos Channel to address elevated metals concentrations pursuant to Clean Water Act section 303(d)(1), and requests public comment. Section 303(d)(1) requires that states submit water quality planning documents called total maximum daily loads for impaired waters for which existing technology-based pollution controls are not stringent enough to attain or maintain state water quality standards. EPA must approve or disapprove the State's submitted TMDLs.

EPA is providing the public the opportunity to review proposed TMDLs for Los Cerritos Channel metals. EPA is establishing these TMDLs in lieu of California because of deadlines associated with the consent decree described under **SUPPLEMENTARY INFORMATION**. EPA will prepare a responsiveness summary that demonstrates how public comments were considered in the final TMDL decisions. The responsiveness document will be available when the TMDLs are established.

**DATES:** Comments must be submitted to EPA on or before January 22, 2009.

**ADDRESSES:** Comments on the proposed decisions should be sent to Karen Irwin, Water Division (WTR–2), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105, telephone (415) 947–4116, facsimile (415) 947–3537, email *irwin.karen@epa.gov*. Oral comments will not be considered. Copies of the proposed TMDLs for Los Cerritos Channel will be available on EPA Region 9's Web site at *http://www.epa.gov/region9/water/tmdl/303d.html* or by writing or calling Karen Irwin. Underlying documentation comprising the record for these TMDLs is available for public inspection at the above address.

**FOR FURTHER INFORMATION CONTACT:** Karen Irwin at (415) 947–4116 or *irwin.karen@epa.gov.*

**SUPPLEMENTARY INFORMATION:** Section 303(d) of the Clean Water Act requires states to identify water bodies that do not meet water quality standards and then to establish TMDLs for each water body for each pollutant of concern. TMDLs identify the maximum amount of pollutants that can be discharged to water bodies without causing violations of water quality standards. Los Cerritos Channel is included on the State of California's section 303(d) list of polluted waters due to water quality impacts associated with discharges of metals. EPA will establish TMDLs for metals in Los Cerritos Channel by March 2012 because of deadlines under a consent decree (*Heal the Bay Inc., et al.* v. *Browner* C 98–4825 SBA, entered March 24, 1999).

Dated: November 28, 2008.

**Alexis Strauss,**

*Director, Water Division, Region IX.*

[FR Doc. E8–28981 Filed 12–5–08; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OAR–2006–0922; FRL–8748–5]**

## Final Risk and Exposure Assessment Report for Nitrogen Dioxide ($NO_2$)

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

**ACTION:** Notice of availability of final report.

**SUMMARY:** On November 21, 2008, the Office of Air Quality Planning and Standards (OAQPS) of EPA made available a final report titled, *Risk and Exposure Assessment to Support the Review of the $NO_2$ Primary National Ambient Air Quality Standard: Final Report.* This final report has two primary purposes. The first is to convey the approaches taken to characterize human exposures and health risks associated with ambient $NO_2$ and to present the results of these analyses. The second is to present a discussion of the $NO_2$ scientific evidence and the exposure- and risk-based information specifically as it relates to the current and potential alternative $NO_2$ standards.

**FOR FURTHER INFORMATION CONTACT:** Dr. Scott Jenkins, Office of Air Quality Planning and Standards (Mail Code C504–06), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; e-mail: *Jenkins.scott@epa.gov;* telephone: 919–541–1167; fax: 919–541–0237.

**SUPPLEMENTARY INFORMATION:**

### General Information

*A. 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 No. EPA–HQ–OAR–2006–0922. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public

Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Office of Air and Radiation Docket is (202) 566–1742.

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/.*

Under section 108(a) of the Clean Air Act (CAA), the Administrator identifies and lists certain pollutants which ''cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.'' The EPA then issues air quality criteria for listed pollutants, which are commonly referred to as ''criteria pollutants.'' The air quality criteria are to ''accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of [a] pollutant in the ambient air, in varying quantities.'' Under section 109 of the CAA, EPA establishes national ambient air quality standards (NAAQS) for each listed pollutant, with the NAAQS based on the air quality criteria. Section 109(d) of the CAA requires periodic review and, if appropriate, revision of existing air quality criteria. The revised air quality criteria reflect advances in scientific knowledge on the effects of the pollutant on public health or welfare. The EPA is also required to periodically review and revise the NAAQS, if appropriate, based on the revised criteria.

Air quality criteria have been established for the nitrogen oxides ($NO_X$) and NAAQS have been established for nitrogen dioxide ($NO_2$), an indicator for gaseous $NO_X$. Presently, EPA is in the process of reviewing the NAAQS for $NO_2$. As part of its review of the NAAQS, EPA prepared an assessment of exposures and health risks associated with ambient $NO_2$. A draft plan describing the proposed approaches to assessing exposures and risks is described in the draft document, *Nitrogen Dioxide Health Assessment Plan: Scope and Methods for Exposure and Risk Assessment.* This document was released for public review and comment in September, 2007 and was the subject of a consultation with the Clean Air Scientific Advisory Committee (CASAC) on October 24 and 25, 2007. Comments received from that consultation were considered in developing the document titled, *Risk and Exposure Assessment to Support the Review of the $NO_2$ Primary National Ambient Air Quality Standard: First Draft,* which was released for public review and comment in April 2008. This document was the subject of a CASAC review on May 1 and 2, 2008. Comments received from that review were considered in developing the document titled, *Risk and Exposure Assessment to Support the Review of the $NO_2$ Primary National Ambient Air Quality Standard: Second Draft,* which was released for public review and comment in two parts, the first in August, 2008 and the second in October, 2008. This document was the subject of CASAC reviews on May 1 and 2, 2008 and on October 22, 2008. In preparing the final risk and exposure assessment report, EPA has considered comments received from the CASAC and the public at those meetings.

This final report has two primary purposes. The first is to convey the approaches taken to characterize human exposures and health risks associated with ambient $NO_2$ and to present the results of these analyses. The second is to present a discussion of the $NO_2$ scientific evidence and the exposure- and risk-based information specifically as it relates to the current and potential alternative $NO_2$ standards. This final document is available online at: *http://www.epa.gov/ttn/naaqs/standards/nox/s_nox_cr_rea.html.*

Dated: December 1, 2008.

**Mary E. Henigin,**

*Acting Director, Office of Air Quality Planning and Standards.*

[FR Doc. E8–28984 Filed 12–5–08; 8:45 am]

**BILLING CODE 6560–50–P**

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## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–ORD–2008–0629; FRL–8748–8]**

## Human Studies Review Board (HSRB); Notification of a Public Teleconference To Review Its Draft Report From the October 21–22, 2008 HSRB Meeting

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

**ACTION:** Notice.

**SUMMARY:** The EPA Human Studies Review Board (HSRB) announces a public teleconference meeting to discuss its draft HSRB report from the October 21–22, 2008 HSRB meeting.

**DATES:** The teleconference will be held on December 18, 2008, from 2–5 p.m. (Eastern Time).

*Location:* The meeting will take place via telephone only.

*Meeting Access:* For information on access or services for individuals with disabilities, please contact Paul Lewis prior to the meeting using the information under **FOR FURTHER INFORMATION CONTACT**, so that appropriate arrangements can be made.

*Procedures for Providing Public Input:* Interested members of the public may submit relevant written or oral comments for the HSRB to consider during the advisory process. Additional information concerning submission of relevant written or oral comments is provided in Unit I.D. of this notice.

**FOR FURTHER INFORMATION CONTACT:** Members of the public who wish to obtain the call-in number and access code to participate in the telephone conference, request a current draft copy of the Board's report or who wish further information may contact Paul Lewis, EPA, Office of the Science Advisor (8105), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; or via telephone/voice mail at (202) 564–8381 or via e-mail at *lewis.paul@epa.gov*. General information concerning the EPA HSRB can be on the EPA Web site at *http://www.epa.gov/osa/hsrb/*.

**ADDRESSES:** Submit your written comments, identified by Docket ID No. EPA–HQ–ORD–2008–0629, by one of the following methods: *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.

*E-mail: ORD.Docket@epa.gov.*

*Mail:* ORD Docket, Environmental Protection Agency, Mailcode: 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

*Hand Delivery:* EPA Docket Center (EPA/DC), Public Reading Room, Infoterra Room (Room Number 3334), EPA West Building, 1301 Constitution Avenue, NW., Washington, DC 20460, Attention Docket ID No. EPA–ORD–2008–0629. Deliveries are only accepted from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. Special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA–HQ–ORD–2008–0629. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://*

*www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA, without going through *http://www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

## I. General Information

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

This action is directed to the public in general. This action may, however, be of interest to persons who conduct or assess human studies on substances regulated by EPA or to persons who are or may be required to conduct testing of chemical substances under 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 any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

### *B. How Can I Access Electronic Copies of This Document and Other Related Information?*

In addition to using 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/*.

*Docket:* All documents in the docket are listed in the index under the docket number. Even though it will be listed by title in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Copyright material will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the ORD Docket, EPA/DC, Public Reading Room, Infoterra Room (Room Number 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 ORD Docket is (202) 566–1752.

### *C. What Should I Consider as I Prepare My Comments for EPA?*

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you use that support your views.
4. Provide specific examples to illustrate your concerns and suggest alternatives.
5. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date and **Federal Register** citation.

### *D. How May I Participate in This Meeting?*

You may participate in this meeting by following the instructions in this section. To ensure proper receipt by EPA, it is imperative that you identify docket ID number EPA–HQ–ORD–2008–0629 in the subject line on the first page of your request.

1. *Oral comments*. To the extent that time permits, interested persons who have not pre-registered may be permitted by the Chair of the HSRB to present oral comments at the meeting. Each individual or group wishing to make brief oral comments to the HSRB is strongly advised to submit their request (preferably via e-mail) to Paul Lewis listed under **FOR FURTHER INFORMATION CONTACT** in order to be included on the meeting agenda and to provide sufficient time for the HSRB Chair and HSRB DFO to review the meeting agenda to provide an appropriate public comment period. The request should identify the name of the individual making the presentation and the organization (if any) the individual will represent. Oral comments before the HSRB are limited to 5 minutes per individual or organization. Please note that this includes all individuals appearing either as part of, or on behalf of an organization. While it is our intent to hear a full range of oral comments on the science and ethics issues under discussion, it is not our intent to permit organizations to expand the time limitations by having numerous individuals sign up separately to speak on their behalf. If additional time is available, there may be flexibility in time for public comments.

2. *Written comments*. Please submit your comments using the instructions in Unit 1.C. of this notice. In addition, the Agency also requests that person(s) submitting comments directly to the docket also provide a copy of their comments to Paul Lewis listed under **FOR FURTHER INFORMATION CONTACT**. There is no limit on the length of written comments for consideration by the HSRB.

### *E. Background*

The EPA Human Studies Review Board will be reviewing and approving its draft report from the October 21–22, 2008, HSRB meeting. The October 2008 meeting reviewed six proposed protocols submitted by the Agricultural Handlers' Exposure Task Force (AHETF) that would collect data on the exposures received by handlers who apply liquid pesticides using airblast equipment with open- or closed-cab vehicles. The AHETF indicated that they were planning to conduct research associated with these protocols during the 2009 growing season. In order to allow EPA adequate time to consider the HSRB's advice and to work with the AHETF to make any necessary revisions to the protocols prior to their execution, the Agency asked the HSRB to provide a final report as soon as possible. Thus, based on these expedited and time critical circumstances, the Agency is announcing this teleconference with less than 15 calendar days public notice.

Background on the October 21–22, 2008, HSRB meeting can be found at **Federal Register** 73 180, 53422 (September 16, 2008) and at the HSRB Web site *http://www.epa.gov/osa/hsrb/*. The October 21–22, 2008, meeting draft report is now available. You may obtain electronic copies of this document, and certain other related documents that might be available electronically, from *http://www.regulations.gov* Web site and the HSRB Internet Home Page at *http://www.epa.gov/osa/hsrb/*. For questions on document availability or if you do not have access to the Internet, consult the person listed under **FOR FURTHER INFORMATION**. Finally, the Board may also discuss planning for future HSRB meetings.

Dated: December 2, 2008.

**George Gray,**

*EPA Science Advisor.*

[FR Doc. E8–28983 Filed 12–5–08; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPPT–2008–0758; FRL–8393–6]**

## U.S. Government's Process for Obtaining Stakeholder Information for Chemicals Proposed for Addition to the Stockholm Convention on Persistent Organic Pollutants

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

**ACTION:** Notice.

**SUMMARY:** On behalf of the U.S. government agencies comprising the Interagency Working Group (IWG) on Persistent Organic Pollutants (POPs) (hereafter USG), EPA is issuing this notice to promote transparency, increase awareness of the proposals concerning chemicals for addition to the Stockholm Convention on Persistent Organic Pollutants (hereafter Convention), to make interested persons aware of the process for adding chemicals to the Convention, to indicate at which steps receiving comments or information from interested persons would be useful to the interagency process, and to indicate for those steps the type of information to be submitted and the due date. EPA is issuing this notice to ensure that the process for the review of chemicals proposed for addition to the Convention allows sufficient time for the submission and consideration of public comments on chemicals proposed for addition to the Convention. EPA, on behalf of USG, intends to issue future notices that alert interested persons to additional chemicals proposed for addition to the Convention and for which the approach to commenting described in this notice will be applied. EPA's responsibility with respect to this process will be to ensure that comments received are considered by the Agency as part of its internal process and to ensure that comments received are made available to USG for their consideration.

**DATES:** All comments must be received no later than November 30, 2009. However, specific due dates for earlier responses can be found in Unit II.G.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2008–0758, 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–2008–0758. 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–2008–0758. 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 Lintner, 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*: Amy Breedlove, Chemical Control Division (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 564–9823; e-mail address: *breedlove.amy@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 particular interest to chemical substance and pesticide manufacturers, importers, and processors. Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the 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 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. *Procedures for preparing CBI.* Procedures for preparing CBI information related to pesticides and industrial chemicals are in Unit I.B.1. Send CBI information about industrial chemicals using the submission procedures under **ADDRESSES**. Send CBI information about pesticides to: Kristen Hendricks, Field and External Affairs Division (7506P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001 or hand delivered Monday-Friday, excluding Federal holidays, between 9 a.m. and 5 p.m. to: Kristen Hendricks, Government and International Services Branch, Field and External Affairs Division, Office of Pesticide Programs, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Rm. S11336, Arlington, VA 22202.

3. *CBI to remain in the United States.* Commenters should note that none of the CBI information received by EPA will be forwarded to the Secretariat of the Convention. Information from submissions containing CBI may be considered by relevant agencies in the development of the U.S. response. If commenters wish for USG to consider incorporating information in documents with CBI as part of the U.S. response, commenters should provide a sanitized copy of the documents. Sanitized copies must be complete, except that all information claimed as CBI must be deleted. EPA will place sanitized copies in the public docket.

4. *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. What Action is the Agency Taking?*

Although the United States has not ratified the Convention, it has an opportunity, as an observer, to provide submissions for review. The Agency is issuing this notice on behalf of USG to increase awareness of the proposals concerning chemicals for addition to the Convention, to make interested persons aware of the process for adding chemicals to the Convention, to indicate at which steps receiving comments or information from interested parties would be useful to USG, and to indicate for those steps the type of information sought and the due date. EPA is issuing this notice in order to improve the process used for soliciting comments on chemicals being reviewed for addition to the Convention.

In the future, EPA, on behalf of USG, intends to issue a **Federal Register** notice when a chemical is first proposed by a nominating Party to alert interested persons and to solicit comments from interested persons at the intervals described in this notice. Since several months often elapse between steps in the nomination process, EPA will make a good faith effort to issue e-mail reminders of upcoming due dates to interested parties. Parties interested in receiving such e-mails should send an e-mail with their preferred e-mail address to the technical person listed under **FOR FURTHER INFORMATION CONTACT**. Persons interested in contacting EPA directly to discuss POPs related subject matter, should contact Karissa Taylor Kovner, Senior Policy Advisor for International Affairs (7101M), Office of the Assistant Administrator for Prevention, Pesticides and Toxic Substances, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 564–0564; e-mail address: *kovner.karissa@epa.gov*.

*B. What is the Agency's Authority for Taking this Action?*

On behalf of USG, EPA is requesting comment and information under the authority of section 102(2)(F) of the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, which directs all agencies of the Federal Government to ''[r]ecognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions and programs designed to maximize cooperation in anticipating and preventing a decline in the quality of mankind's world environment.'' Section 17(d)(1) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) also provides additional support in that it directs the Administrator of EPA ''in cooperation with the Department of State and any other appropriate Federal agency, [to] participate and cooperate in any international efforts to develop improved pesticide research and regulations.''

*C. What is the Stockholm Convention Chemical Listing Process?*

The United States signed the Convention in May of 2001 but has not yet ratified it (and thus is not a Party to the Convention). The United States currently participates as an observer in Convention activities. The Convention, which went into force in May of 2004, requires the Parties to reduce or eliminate the production and use of a number of intentionally produced POPs, i.e., those listed in Annex A or B. The Convention also calls upon Parties to take certain specified measures to reduce releases of unintentionally produced POPs listed in Annex C with the goal of their continuing minimization and, where feasible, ultimate elimination. The Convention also imposes controls on the handling of POPs wastes and on trade in POPs chemicals.

In addition, there are certain procedures and science-based criteria that Parties to the Convention use when considering the addition of new chemicals to the Convention's Annexes. Article 8 of the Convention provides the process to be followed for listing new chemicals in Annexes A, B, and/or C, and is described in summary in this unit:

1. A Party to the Convention may submit a proposal to the Secretariat for listing a chemical in Annexes A, B, and/or C. The proposal shall contain the information specified in Annex D of the Convention (''Information Requirements and Screening Criteria'').

2. The Secretariat verifies that the proposal contains the information specified in Annex D, and if the Secretariat is satisfied, the proposal is forwarded to the POPs Review Committee (hereafter POPRC).

3. POPRC examines the proposal, applies the Annex D screening criteria, and determines whether the screening criteria have been fulfilled.

4. If POPRC is satisfied that the criteria have been fulfilled, POPRC, through the Secretariat, will make the proposal and the POPRC's evaluation available to all Parties and observers and invite them to submit the information specified in Annex E (''Information Requirements for the Risk Profiles'').

5. A draft risk profile is prepared by an ad hoc working group under POPRC in accordance with Annex E for consideration by POPRC and made available to all Parties and observers to collect technical comments. The penultimate final draft is distributed to obtain public comment from Parties and observers. The outline to be used in developing the risk profile can be found on the Convention website (*http://www.pops.int*).

6. POPRC reviews the final draft risk profile and technical comments, finalizes the risk profile, includes a determination as to whether the chemical is likely, as a result of its long-range environmental transport, to lead to significant adverse human health and/or environmental effects, such that global action is warranted.

7. If POPRC decides that the chemical is likely as a result of its long-range environmental transport to lead to significant adverse human health and/or environmental effects such that global action is warranted, then POPRC, through the Secretariat, will ask Parties and observers to provide information specified in Annex F (''Information on Socio-Economic Considerations'') to aid in the development of risk management evaluations (that include an analysis of possible control measures).

8. A draft risk management evaluation is prepared by an ad hoc working group under POPRC in accordance with Annex F for consideration by POPRC and made available to Parties and observers to collect technical comments. The penultimate final draft is distributed to obtain public comment from Parties and observers. The outline to be used in developing the risk management evaluation can be found on the Convention website.

9. POPRC reviews the draft risk management evaluation prepared by the ad hoc working group and finalizes it.

10. On the basis of the risk profile and risk management evaluation for each chemical, POPRC recommends whether the chemical should be considered by the Conference of the Parties (COP) for listing in Annexes A, B, and/or C, depending on the control measures.

11. Parties may be asked by the Secretariat, prior to the COP meeting, to provide any specific concerns they have regarding listing a chemical in a particular annex.

12. COP makes the final decision whether to list the chemical in Annexes A, B, and/or C.

*D. What is the Purpose and Content of a Risk Profile?*

Risk profiles, as noted in Annex E of the Convention, ''evaluate whether the chemical is likely, as a result of its long-range environmental transport, to lead to significant adverse human health and/or environmental effects, such that global action is warranted.'' The risk profile also further evaluates and elaborates on the information referred to in Annex D of the Convention and includes, as far as possible, the information listed in Annex E.

*E. What is the Purpose and Content of a Risk Management Evaluation?*

Risk management evaluations include an analysis of possible control measures, which in accordance with Annex F of the Convention (''Information on Socio-Economic Considerations'') should encompass ''the full range of options, including management and elimination.'' The risk management evaluation includes socio-economic considerations associated with possible control measures and reflects due regard for the differing capabilities and conditions among the Parties. Additionally, the document should discuss any specific exemptions or acceptable purposes being considered.

*F. Where can Information on the Convention's Activities be Found?*

1. Previous **Federal Register** notices used to notify interested parties of Convention activities and solicit comments, draft documents for comment, and stakeholder comments can be found in docket EPA–HQ–OPPT–2006–0794.

2. The Convention website is the location of all the chemical proposals, risk profiles, risk management evaluations, information and comments submitted by Parties and observers, meeting documents, etc.

i. Information such as the Secretariat's invitation letters, requests for information, and outlines for the risk profiles and risk management evaluations, can be found on the Convention website by selecting the tab for Convention, selecting POPRC, and then selecting Information Requests.

ii. Meeting documents can be found by selecting:

a. The Convention tab.

b. POPRC (or COP).

c. Meetings.

d. The particular meeting needed.

iii. Submissions from Parties and observers of Annex E information, etc., can be found by selecting:

a. Convention.

b. POPRC.

c. Submissions (yr).

d. The type of information being looked for.

iv. Copies of the risk profiles, risk management evaluations, and new proposals can be found by selecting:

a. Convention.

b. POPRC.

c. Chemicals under review.

*G. At What Stages Would Input or Comments be Useful to USG?*

1. *Annex E and F related information solicitation stage.* Typically, several weeks after the Fall POPRC meeting, the Secretariat invites Parties and observers to submit to POPRC (via the Secretariat) information specified in Annex E and/or Annex F of the Convention, and other relevant information for the chemicals proposed for addition to the Convention. The Secretariat has posted the request for Annex E information, in follow-up to the meeting of POPRC 4 in October 2008, on the website with a due date of January 9, 2009. The information collected will be considered by POPRC in its development of the risk profile and/or risk management evaluation for each chemical. Some Secretariat invitations to submit information are directed only to Parties, other invitations are open to Parties and observers. Often the information being requested by the Secretariat is not readily available to EPA or other relevant agencies, and therefore stakeholder input can be quite useful. USG will consider the information it receives for Annex E and Annex F and use it to inform the U.S. submission to the Secretariat as appropriate, as well as during the review of the resulting draft risk profiles and risk management evaluations. EPA requests that any information be submitted to USG using the instructions in Unit I no later than

20 calendar days prior to the Secretariat's posted due date in order to meet POPRC's deadline for the submission of Annex E/F and related information. Individuals or organizations that wish to submit information directly to POPRC via the Secretariat should work through their respective observer organizations, if any.

2. *Draft risk profile/risk management evaluation stage*. The Secretariat typically posts draft risk profiles and draft risk management evaluations for comment by Parties and observers on the Convention website in April, and invites comments to be submitted within 5–6 weeks of the posting date. In 2009, the Secretariat plans to make the draft documents available on the website in early-to-mid April with comments due back to the Secretariat no later than late May. The risk profile and risk management evaluation documents should contain specifics about production, uses, releases, monitoring data, technical feasibility of alternatives, costs, etc.; consequently, USG finds value in comments from interested persons who can provide, or assess, such information. Also useful are stakeholder comments on the synthesis and conclusion sections of the document. EPA requests that comments or information be submitted through this process no later than 15 calendar days prior to the Secretariat's posted deadline in order to provide time for the relevant agencies to consider the comments before the U.S. government provides its response to the Secretariat.

*3. Prior to POPRC/COP meetings*. The Secretariat posts documents, including the final draft risk profiles and risk management evaluations, on the Convention website to be discussed at upcoming POPRC or COP meetings typically 1–2 months prior to the meeting. In 2009, the Secretariat plans to post documents for POPRC 5 on the website by the end of August. If interested parties wish to submit any written comments regarding those documents to USG, comments should be received by EPA no later than 20 calendar days prior to the meeting. Any comments received will be used to inform the U.S. position on issues to be discussed at the meeting. Separate from the risk profile/risk management evaluation process, EPA expects the Secretariat to post meeting documents for COP 4 by early April 2009.

*H. What Information is Needed for Chemicals Entering the Annex E Stage?*

1. USG seeks information that is supplementary to the information in the proposals and POPRC's evaluation of the proposals against the Annex D screening criteria. The proposals and the evaluations are available on the Convention website.

2. Commenters are invited to provide information they deem relevant to POPRC's development of risk profiles, such as that specified in Annex E of the Convention and other related information, as described in paragraphs i. through v. of this unit:

i. Sources, including as appropriate:

a. Production data, including quantity and location.

b. Uses.

c. Releases, such as discharges, losses, and emissions.

ii. Hazard assessment for the endpoint or endpoints of concern (as identified in the proposals and/or POPRC's evaluation of the proposals against the screening criteria of Annex D), including a consideration of toxicological interactions involving multiple chemicals.

iii. Environmental fate, including data and information on the chemical and physical properties of a chemical as well as its persistence and how they are linked to its environmental transport, transfer within and between environmental compartments, degradation, and transformation to other chemicals. (POPRC is to make a determination of the bioconcentration factor or bio-accumulation factor, based on measured values, available, except when monitoring data are judged to meet this need.)

iv. Monitoring data.

v. Exposure in local areas and, in particular, as a result of long-range environmental transport, and including information regarding bio-availability.

*I. What Information is Needed for Chemicals Entering the Annex F Stage?*

1. For the chemicals entering the risk management stage, USG seeks information that is supplementary to the information provided during previous stages in the review process; i.e., information relevant to Convention Annexes D and E; the proposals, evaluations and risk profiles. These documents, as well as the Secretariat's letter soliciting information, can be found on the Convention website.

2. When providing information, keep in mind that the possible control measures under the Convention include, among others, the prohibition or severe restriction of production and use. The provision of accurate, high quality information is a priority for POPRC's evaluation.

3. Commenters are invited to provide information they deem relevant to POPRC's development of the risk management evaluation, such as that specified in Annex F of the Convention and other related information, as described in paragraphs i. through viii. of this unit. Summary information and relevant references should be provided for:

i. Efficacy and efficiency of possible control measures in meeting risk reduction goals:

a. Describe possible control measures.

b. Technical feasibility.

c. Costs, including environmental and health costs.

ii. Alternatives (products and processes):

a. Describe alternatives.

b. Technical feasibility.

c. Costs, including environmental and health costs.

d. Efficacy.

e. Risk.

f. Availability.

g. Accessibility.

iii. Positive and/or negative impacts on society of implementing possible control measures:

a. Health, including public, environmental and occupational health.

b. Agriculture, including aquaculture and forestry.

c. Biota (biodiversity).

d. Economic aspects.

e. Movement towards sustainable development.

f. Social costs.

iv. Waste and disposal implications (in particular, obsolete stocks of pesticides and clean-up of contaminated sites):

a. Technical feasibility.

b. Cost.

v. Access to information and public education.

vi. Status of control and monitoring capacity.

vii. Any national or regional control actions taken, including information on alternatives, and other relevant risk management information.

viii. Other relevant information for the risk management evaluation.

## III. History of Proposed Chemicals to Date

*A. First Five Chemicals Proposed*

The first meeting of POPRC (POPRC 1) took place November 7–11, 2005, in Geneva, Switzerland. Information about the Convention, POPRC meetings, and the meeting reports are available on the Convention website. Five chemical proposals were submitted for consideration for addition to Annexes A, B, and/or C of the Convention. Three of the five proposals were for industrial chemicals:

- Pentabromodiphenyl ether (PeBDE).

- Hexabromobiphenyl (HBB).
- Perfluorooctane sulfonate (PFOS).

Two of the five proposals were for pesticides:

- Lindane.
- Chlordecone.

With regard to all five chemicals, POPRC decided that it was satisfied that the screening criteria had been fulfilled and that further work should therefore be undertaken to develop risk profiles for the five chemicals. Therefore, POPRC, through the Secretariat, requested that Parties and observers provide information, per Annex E, relevant to POPRC's development of risk profiles for the five chemicals listed in this unit. See the **Federal Register** notice of January 30, 2006 (71 FR 4913) (FRL–7758–9) for additional information.

The second meeting of POPRC (POPRC 2) took place on November 6–10, 2006, in Geneva, Switzerland. See the **Federal Register** notice of October 6, 2006 (71 FR 59108) (FRL–8099–2) for additional information. Information about POPRC 2 is also available on the Convention website. At that meeting, risk profiles were considered for the five previously proposed chemicals and POPRC decided that these chemicals were likely, as a result of their long-range environmental transport, to lead to significant adverse human health and environmental effects such that global action is warranted. Consequently, the five chemicals were moved forward to the next step in the listing process. In the **Federal Register** notice of December 20, 2006 (71 FR 76325) (FRL–8109–1), EPA invited commenters to provide information, per Annex F, to support the development of risk management evaluations. That information collection step was followed by the development of risk management evaluations. These risk management evaluations were then considered by POPRC 3 in November 2007. At POPRC 3, for commercial PeBDE, chlordecone, HBB, lindane, and PFOS, POPRC completed its review of the available documents, considered the possible control measures, the available social and economic information, and comments and information submitted by Parties and observers relating to the considerations specified in Annex F. POPRC decided to recommend to COP, in accordance with paragraph 9 of Article 8 of the Convention, that COP consider listing the chemicals in Unit III.A., with some modifications, in the Convention. Parties were invited to notify the Secretariat of any relevant issues they wish to raise to COP. Additional information on production, use, and alternatives for PFOS was also requested.

*B. Second Five Chemicals Proposed*

Also at POPRC 2, five new chemicals were submitted for consideration for addition to the Convention.

1. Two of the five proposals were for industrial chemicals:

i. Commercial octabromodiphenyl ether (c-octaBDE).

ii. Short-chained chlorinated paraffins (SCCPs).

2. One of the five proposals was for a chemical with both industrial and pesticidal uses: Pentachlorobenzene (PeCB).

3. Two of the five proposals were for pesticides:

i. Alpha-hexachlorocyclohexane (alpha-HCH).

ii. Beta-hexachlorocyclohexane (beta-HCH).

EPA provided notice of POPRC 2 and POPRC's intention to consider proposals for the five chemicals listed in this unit in the October 6, 2006 **Federal Register** notice. Additional information about the POPRC 2 meeting is available on the Convention website. POPRC 2 decided that the Annex D screening criteria had been fulfilled and requested that Parties and observers provide information, per Annex E, relevant to development of risk profiles for the five chemicals listed in this unit. POPRC 2 also requested additional information on the environmental fate of SCCPs or information relating to their properties which would enable a more comprehensive evaluation of their environmental fate. In the December 20, 2006 **Federal Register** notice, EPA invited commenters to provide information, per Annex E, for the development of risk profiles. Risk profiles were developed and presented in November 2007 for the consideration by POPRC 3.

In accordance with the procedure in Article 8 of the Convention, POPRC 3 examined the risk profiles for the chemicals in this unit and decided that the chemicals, except for SCCPs, are likely, as a result of their long-range environmental transport, to lead to significant adverse human health and/or environmental effects such that global action is warranted. POPRC 3 directed the collection of information, per Annex F, to be used in the development of the risk management evaluations and also requested additional information related to commercial octaBDE and its congeners, and PeCB. Initial draft risk management evaluations were developed during the spring of 2008 for consideration at POPRC 4 in October 2008. At POPRC 4, the risk management evaluations for c-octaBDE, PeCB, alpha-HCH, and beta-HCH were approved. POPRC decided to recommend, for c-octaBDE, that COP consider listing in Annex A hexa- and heptaBDEs present in c-octaBDE, using BDE-153, BDE-154, BDE-175, and BDE-183 as markers for enforcement purposes. For PeCB, it was decided to recommend to COP that the substance be listed in Annexes A and C. POPRC also decided to recommend to COP that it consider listing alpha- and beta-HCH in Annex A, giving due consideration to the by-production of these substances from the production of lindane. Those recommendations are expected to be presented to COP 4 in May 2009.

The draft risk profile for SCCPs was also examined at POPRC 3, but POPRC considered the information available to be insufficient to support the Convention Annex E-related decision that the chemical is likely as a result of its long-range environmental transport to lead to significant adverse human health and/or environmental effects such that global action is warranted and therefore did not agree upon a risk profile for the chemical. POPRC agreed to the further development of the risk profile, asked Parties and observers for additional information for the SCCP risk profile, and delayed the Convention Annex E- related decision on SCCPs to POPRC 4. A revised risk profile was prepared for consideration at POPRC 4. POPRC 4 agreed to consider the risk profile, as revised, at POPRC 5.

*C. Newest Chemicals Proposed*

In the period between POPRC 3 and POPRC 4, two additional chemicals were proposed for consideration to be listed in Annex A, B, and/or Annex C to the Convention. Proposals were submitted for endosulfan, a pesticide, and for hexabromocyclododecane (HBCDD), an industrial chemical. The Secretariat reviewed the proposals and verified that they contain the information specified in Annex D. Those evaluations are posted on the Convention website. At POPRC 4, it was decided to not take action on the HBCDD proposal since the relevant documentation was not submitted sufficiently in advance of the meeting. POPRC 5 will consider the HBCDD proposal. Regarding the endosulfan proposal, POPRC 4 decided that alpha endosulfan, beta endosulfan, and technical endosulfan, fulfill the screening criteria, established a working group to prepare a draft risk profile in accordance with Annex E of the Convention, and invited Parties and observers to submit the information specified in Annex E to the Secretariat.

**List of Subjects**

Environmental protection, Chemicals, Hazardous substances.

Dated: December 1, 2008.

**James B. Gulliford,**

*Assistant Administrator, Office of Prevention, Pesticides and Toxic Substances.*

[FR Doc. E8–28982 Filed 12–5–08; 8:45 am]

BILLING CODE 6560–50–S

## EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

### Sunshine Act; Meeting

**AGENCY HOLDING THE MEETING:** Equal Employment Opportunity Commission.

**DATE AND TIME:** Thursday, December 11, 2008, 2 p.m. Eastern Time.

**PLACE:** Clarence M. Mitchell, Jr. Conference Room on the Ninth Floor of the EEOC Office Building, 1801 L Street, NW., Washington, DC 20507.

**STATUS:** The meeting will be open to the public.

**MATTERS TO BE CONSIDERED:**

**Open Session**

1. Announcement of Notation Votes, and

2. Regulations and Related Appendices Implementing ADA Amendments Act of 2008.

**Note:** In accordance with the Sunshine Act, the meeting will be open to public observation of the Commission's deliberations and voting. (In addition to publishing notices on EEOC Commission meetings in the **Federal Register**, the Commission also provides a recorded announcement a full week in advance on future Commission sessions.)

Please telephone (202) 663–7100 (voice) and (202) 663–4074 (TTY) at any time for information on these meetings. The EEOC provides sign language interpretation at Commission meetings for the hearing impaired. Requests for other reasonable accommodations may be made by using the voice and TTY numbers listed above. *Contact Person for More Information:* Stephen Llewellyn, Executive Officer on (202) 663–4070.

Dated: December 3, 2008.

**Stephen Llewellyn,**

*Executive Officer, Executive Secretariat.*

[FR Doc. E8–29075 Filed 12–5–08; 8:45 am]

BILLING CODE 6570–01–P

## FARM CREDIT SYSTEM INSURANCE CORPORATION

### Farm Credit System Insurance Corporation Board; Regular Meeting

**SUMMARY:** Notice is hereby given of the regular meeting of the Farm Credit System Insurance Corporation Board (Board).

**DATE AND TIME:** The meeting of the Board will be held at the offices of the Farm Credit Administration in McLean, Virginia, on December 11, 2008, from 10 a.m. until such time as the Board concludes its business.

**FOR FURTHER INFORMATION CONTACT:** Roland E. Smith, Secretary to the Farm Credit System Insurance Corporation Board, (703) 883–4009, TTY (703) 883–4056.

**ADDRESSES:** Farm Credit System Insurance Corporation, 1501 Farm Credit Drive, McLean, Virginia 22102.

**SUPPLEMENTARY INFORMATION:** Parts of this meeting of the Board will be open to the public (limited space available) and parts will be closed to the public. In order to increase the accessibility to Board meetings, persons requiring assistance should make arrangements in advance. The matters to be considered at the meeting are:

**Open Session**

*A. Approval of Minutes*

- September 11, 2008.

*B. Business Reports*

- September 30, 2008 Financial Report.
- Report on Insured and Other Obligations.
- Quarterly Report on Annual Performance Plan.

*C. New Business*

- Board Meeting Schedule for 2009.

**Closed Session**

- Confidential Report on System Performance.
- Audit Plan for the Year Ended December 31, 2008.

Dated: December 2, 2008.

**Roland E. Smith,**

*Secretary, Farm Credit System Insurance Corporation Board.*

[FR Doc. E8–28888 Filed 12–5–08; 8:45 am]

BILLING CODE 6710–01–P

## FEDERAL COMMUNICATIONS COMMISSION

### Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

November 27, 2008.

**SUMMARY:** As part of its continuing effort to reduce paperwork burdens and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission invites the general public and other Federal agencies to comment on the following information collection(s). Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. An agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a valid OMB control number.

**DATES:** Written PRA comments should be submitted on or before February 6, 2009. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

**ADDRESSES:** Submit your comments by e-mail to *PRA@fcc.gov*. Include in the e-mail the OMB control number of the collection or, if there is no OMB control number, the Title shown in the **SUPPLEMENTARY INFORMATION** section below. If you are unable to submit your comments by e-mail, contact the person listed below to make alternative arrangements.

**FOR FURTHER INFORMATION CONTACT:** For additional information about the information collection(s) or to obtain a copy of the collection, send an e-mail to: *PRA@FCC.gov* and include the collection's OMB control number as shown in the **SUPPLEMENTARY INFORMATION** section below (or the title of the collection if there is no OMB

control number), or call Leslie F. Smith at (202) 418–0217.

**SUPPLEMENTARY INFORMATION:**

*OMB Control Number:* 3060–0835.

*Title:* Ship Inspections.

*Form Numbers:* FCC 806, 824, 827, and 829.

*Type of Review:* Extension without change of a currently approved collection.

*Respondents:* Businesses or other for-profit; Not-for-profit institutions.

*Number of Respondents and Responses:* 1,210 respondents.

*Estimated Time per Response:* 5 minutes to 4 hours.

*Frequency of Response:* Recordkeeping; Annual and 5 year reporting requirements; Third Party Disclosure.

*Obligation to Respond:* Mandatory. *See* 47 U.S.C. 361 and 362.

*Total Annual Burden:* 5,245 hours.

*Total Annual Cost:* $0.00.

*Privacy Impact Assessment:* No impact(s).

*Nature and Extent of Confidentiality:* The Commission is not requesting that the respondents submit confidential information to the FCC. Respondents may, however, request confidential treatment for information they believe to be confidential under 47 CFR Section 0.459 of the Commission's rules.

*Needs and Uses:* The Communications Act requires the Commission to inspect the radio installation of large cargo ships and certain passenger ships at least once a year to ensure that the radio installation is in compliance with the requirements of the Communications Act. Additionally, the Communications Act requires the inspection of small passenger ships at least once every five years. The Safety Convention (to which the United States is a signatory) also requires an annual inspection. However, the Safety Convention permits an Administrator to entrust the inspections to either surveyors nominated for the purpose or to organizations recognized by it. Therefore, the United States can have other parties conduct the radio inspection of vessels for compliance with the Safety Convention. The Commission allows FCC-licensed technicians to conduct these inspections. FCC-licensed technicians certify that the ship passed an inspection and issue a safety certificate. These safety certificates (FCC Forms 806, 824, 827 and 829) indicate that the vessel complies with the Communications Act and the Safety Convention. These technicians are required to provide a summary of the results of the inspection in the ship's log. In addition, the vessel's owner, operator, or ship's master must certify in the ship's log that the inspection was satisfactory. Inspection certificates issued in accordance with the Safety Convention must be posted in a prominent and accessible place on the ship. The purpose of the information is to ensure that the inspection was successful so that passengers and crewmembers of certain United States ships have access to distress communications in an emergency.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

[FR Doc. E8–29001 Filed 12–5–08; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL COMMUNICATIONS COMMISSION

### Radio Broadcasting Services; AM or FM Proposals To Change the Community of License

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice.

**SUMMARY:** The following applicants filed AM or FM proposals to change the community of license: ALOHA STATION TRUST, LLC, Station WROO, Facility ID 68760, BPH–20070119AHS, From GREEN COVE SPRINGS, FL, To BEVERLY BEACH, FL; AMERICAN FAMILY ASSOCIATION, Station WSQH, Facility ID 91176, BMPED–20081021ABC, From FOREST, MS, To MERIDIAN, MS; BILINGUAL BROADCASTING FOUNDATION, INC., Station KBBF, Facility ID 5310, BPED–20081009AIQ, From SANTA ROSA, CA, To CALISTOGA, CA; BROADCAST SOUTH, LLC, Station WVOH–FM, Facility ID 30658, BPH–20081030ACZ, From HAZLEHURST, GA, To NICHOLLS, GA; CHARLES A. HECHT AND ALFREDO ALONSO, Station WVVT, Facility ID 160904, BMP–20081029ADH, From ESSEX JUNCTION, VT, To EAST GREENBUSH, NY; GRACE BROADCASTING SERVICES, INC., Station WFGZ, Facility ID 50126, BPH–20081020AIQ, From LOBELVILLE, TN, To BELLEVUE, TN; GRACE BROADCASTING SERVICES, INC., Station WNKX, Facility ID 27139, BP–20081020AIO, From CENTERVILLE, TN, To LOBELVILLE, TN; HAWKEYE COMMUNICATIONS, INC., Station KCSI, Facility ID 26456, BMPH–20081020AGI, From TREYNOR, IA, To RED OAK, IA; MARIA E. JUAREZ, Station KDIL, Facility ID 161412, BMP–20080708AFX, From DILLON, MT, To JEROME, ID; MARTIN DIRST, Station KYPT, Facility ID 166004, BMPH–20081020AIH, From WAMSUTTER, WY, To DANIEL, WY; MEADOWS MEDIA, LLC, Station KLVF, Facility ID 34441, BPH–20081114AAL, From PECOS, NM, To LAS VEGAS, NM; PJ RADIO, L.L.C., Station WTSX, Facility ID 53036, BPH–20081104AFA, From PORT JERVIS, NY, To LEHMAN TOWNSHIP, PA; SAGA COMMUNICATIONS OF NEW ENGLAND, LLC, Station WSNI, Facility ID 9795, BPH–20081015ABM, From SWANZEY, NH, To KEENE, NH; SAIDNEWSFOUNDATION, Station WJKZ, Facility ID 175750, BMPED–20081014AFJ, From HANOVER, MI, To HOMER, MI; SEA–COMM, INC., Station WLTT, Facility ID 60882, BPH–20081105ACT, From SHALLOTTE, NC, To BOLIVIA, NC; SINCLAIR TELECABLE, INC. D/B/A SINCLAIR COMMUNICATIONS, Station KSXY, Facility ID 43711, BPH–20081009ANC, From CALISTOGA, CA, To FORESTVILLE, CA; ZOE COMMUNICATIONS, INC., Station WDMO, Facility ID 65632, BPH–20081010AOZ, From DURAND, WI, To BALDWIN, WI.

**DATES:** Comments may be filed through February 6, 2009.

**ADDRESSES:** Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554.

**FOR FURTHER INFORMATION CONTACT:** Tung Bui, 202–418–2700.

**SUPPLEMENTARY INFORMATION:** The full text of these applications is available for inspection and copying during normal business hours in the Commission's Reference Center, 445 12th Street, SW., Washington, DC 20554 or electronically via the Media Bureau's Consolidated Data Base System, *http://svartifoss2.fcc.gov/prod/cdbs/pubacc/prod/cdbs_pa.htm*. A copy of this application may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com*.

Federal Communications Commission.

**James D. Bradshaw,**

*Deputy Chief, Audio Division, Media Bureau.*

[FR Doc. E8–29000 Filed 12–5–08; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL ELECTION COMMISSION

**[Notice 2008–13]**

### Agency Procedures

**AGENCY:** Federal Election Commission.

**ACTION:** Notice of public hearing and request for public comments.

**SUMMARY:** The Federal Election Commission is announcing a public hearing on the policies and procedures of the Federal Election Commission including but not limited to, policy statements, advisory opinions, and public information, as well as various elements of the compliance and enforcement processes such as audits, matters under review, report analysis, administrative fines, and alternative dispute resolution. The Commission also seeks comment from the public on the procedures contained in the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 *et. seq.* (''FECA'' or ''the Act''), as well as the Commission's implementing regulations.

**DATES:** Comments must be received on or before January 5, 2009. A public hearing will be held on Wednesday, January 14, 2009, from 10 a.m. to 5 p.m. at the Federal Election Commission, 999 E Street, NW., 9th floor Hearing Room, Washington, DC 20463. Anyone seeking to testify at the hearing must file written comments by the due date and must include in the written comments a request to testify.

**ADDRESSES:** All comments must be in writing, must be addressed to Stephen Gura, Deputy Associate General Counsel, or Mark Shonkwiler, Assistant General Counsel, and must be submitted in either e-mail, facsimile, or paper copy form. Commenters are strongly encouraged to submit comments by e-mail to ensure timely receipt and consideration. E-mail comments must be sent to *agencypro2008@fec.gov*. If e-mail comments include an attachment, the attachment must be in the Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed comments must be sent to (202) 219–3923, with paper copy follow-up. Paper comments and paper copy follow-up of faxed comments must be sent to the Federal Election Commission, 999 E Street, NW., Washington, DC 20463. All comments must include the full name and postal service address of the commenter or they will not be considered. The Commission will post comments on its Web site after the comment period ends.

**FOR FURTHER INFORMATION CONTACT:** Stephen Gura, Deputy Associate General Counsel, or Mark Shonkwiler, Assistant General Counsel, Office of General Counsel, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

**SUPPLEMENTARY INFORMATION:**

**Background and Hearing Goals**

The Commission is currently reviewing, and seeks public comment on, its policies, practices and procedures. The Commission will use the comments received to determine whether its policies, practices or procedures should be adjusted, and/or whether rulemaking in this area is advised. The Commission has made no decisions in this area, and may choose to take no action.

The Commission conducted a similar review of its enforcement procedures in 2003. *See Enforcement Procedures*, 68 FR 23311 (May 1, 2003). Comments filed in the 2003 review, as well as a transcript of the 2003 public hearing, are available on the Commission's Web site at *http://www.fec.gov/law/policy.shtml* (see bottom of page). Subsequent to that review, the Commission formally adopted several new policies, including a policy on deposition transcripts, a ''fast track'' policy for *sua sponte* matters, a policy clarifying treasurer liability, and an interim disclosure policy for closed enforcement and related files. *See Statement of Policy Regarding Deposition Transcriptions in Nonpublic Investigations*, 68 FR 50688 (Aug. 22, 2003); *Statement of Policy Regarding Self Reporting of Campaign Finance Violations (Sua Sponte Submissions)*, 72 FR 16695 (April 5, 2007); Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 FR 3 (January 3, 2005); and *Statement of Policy Regarding the Disclosure of Closed Enforcement and Related Files*, 68 FR 70426 (Dec. 18, 2003). These policy statements and supporting documents are available on the Commission's Web site at *http://www.fec.gov/law/policy.shtml*. Additionally, in 2007 the Commission created a new procedure within the enforcement process that affords respondents the opportunity for an oral hearing before the Commission at the probable cause stage of a matter under review. *See Enforcement Procedural Rules for Probable Cause Hearings*, 72 FR 64919 (Nov. 19, 2007), available on the Commission's Web site at *http://www.fec.gov/law/cfr/eLcompilation/2007/notice_2007-21.pdf*. The Commission has also adopted several internal procedural changes, which are mentioned in this notice.

The FECA grants to the Commission ''exclusive jurisdiction with respect to civil enforcement'' of the provisions of the Act and Chapters 95 and 96 of Title 26. 2 U.S.C. 437c(b)(1). Enforcement matters come to the Commission through complaints from the public, referrals from the Reports Analysis and Audit Divisions, referrals from other agencies, and *sua sponte* submissions. Enforcement matters are generally handled by the Office of General Counsel pursuant to the procedures set forth in 2 U.S.C. 437g.

During the administrative enforcement process, the Office of General Counsel reviews and investigates enforcement matters, and makes recommendations to the Commission regarding the disposition of matters. Stages of the enforcement process include Reason to Believe (RTB), probable cause, and conciliation. A full description of the Commission's administrative enforcement process is available on the Commission's Web site at *http://www.fec.gov/pages/brochures/complain.shtml*.

The Commission brings *de novo* enforcement suits in U.S. District Courts when matters are not satisfactorily resolved through the administrative enforcement process; it also initiates legal actions to enforce administrative subpoenas during the investigative process.

The Commission also enforces the FECA through its Alternative Dispute Resolution (ADR) and Administrative Fine programs. The ADR program was established at the Commission in 2000 to promote compliance with the law by encouraging settlements outside the traditional enforcement and litigation processes. ADR results in an expeditious resolution that allows participants in the program to have an active role in shaping the settlement, and, as a result, reducing costs for respondents and the Commission. The Interest-based negotiations focus the process on respondents' future compliance with the FECA. A full description of the Commission's ADR program is available on the Commission's Web site at *http://www.fec.gov/pages/brochures/adr.shtml*.

The Administrative Fine Program was established by Congress with the intent of streamlining the enforcement process for violations involving late and non-filing of reports. The Commission believed that the addition of this authority (to assess fines for these violations subject to a reasonable appeal process) would introduce greater certainty to the regulated community about the consequences of noncompliance with the Act's filing requirements, lessen costs, and lead to efficiencies for all parties while maintaining an emphasis on the Act's disclosure requirements. Since its inception in 2000, the Commission has made adjustments to its fine schedules

and the list of acceptable defenses. A full description of the Commission's Administrative Fine program is available on the Commission's Web site at *http://www.fec.gov/pages/brochures/admin_fines.shtml*.

Additionally, the Commission administers the Act through a review of all disclosure reports that are filed with the FEC. These reports are reviewed by the Commission's Reports Analysis Division (RAD) for compliance with the Act and to ensure that the information reported is both accurate and complete. When review of a political committee's disclosure reports reveals that the reports appear not to have met the threshold requirements for substantial compliance with the requirements of the Act, the Commission will conduct an audit of the committee to determine whether the committee complied with the Act's limitations, prohibitions and disclosure requirements. 2 U.S.C. 438(b). In addition, the Commission is required by law to audit presidential campaigns and convention committees that accept public funds.

Finally, the Commission issues additional guidance through advisory opinions, policy statements and other guidelines.

In the course of addressing its administrative responsibilities, the Commission periodically reviews its programs. The purpose of this Notice of Public Hearing is to reexamine the Commission's practices and procedures, some of which have been in place since the Commission was founded, and to give the regulated community and representatives of the public an opportunity to bring before the Commission general comments and concerns about the agency's policies and procedures regarding compliance, enforcement, public disclosure, advisory opinions and any other matter.

The Commission requests those who submit comments to be cognizant of the fact that statutory requirements, such as confidentiality and privacy mandates, may be implicated by certain proposals. Thus, the Commission would appreciate if participants would specify in their written remarks whether their proposals are compatible with applicable statutes or would require legislative action.

The Commission specifically seeks comment on issues confronting counsel who practice before the Commission, complainants and respondents who directly interact with the FEC, treasurers, witnesses, other third parties, and the general public. The Commission seeks general comments on how the FEC's enforcement and other procedures have facilitated or hindered productive interaction with the agency. The Commission is not interested in complaints or compliments about individual FEC employees or matters, but it seeks input on structural, procedural and policy issues. The Commission also seeks comment about practices and procedures used by other civil law enforcement agencies when acting in an enforcement (*i.e.*, non-adjudicative) capacity. For example, do such agencies provide greater or lesser transparency? What opportunities exist for presenting or addressing issues, evidence, or potential claims that might be the basis of a subsequent adjudicative proceeding? The Commission is also interested in any studies, surveys, research or other empirical data that might support changes in its enforcement procedures.

**General Topics for Specific Comments**

The Commission welcomes input on any aspect of its policies and procedures. Among the topics on which the Commission will accept comment are those below. However, the list is not exhaustive and comments are encouraged on other issues as well.

*I. Enforcement Process*

A. Motions Before the Commission

Both complainants' and respondents' attorneys have occasionally submitted motions for the Commission's consideration, including motions to dismiss and reconsider. Although neither the FECA nor the Commission's regulations provide for consideration of such motions, and the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* (''APA''), does not require that agencies entertain such motions in non-adjudicative proceedings, the Commission has reviewed these motions on a case-by-case basis. The Commission requests comments on whether its procedures for consideration of motions should be modified. Should the Commission entertain motions? If yes, what types of motions should be considered? What should be the time frame for consideration of motions generally? Should the motions be served on the Commission Secretary or the General Counsel? Should the movant be granted an oral hearing before the Commission? Should there be substantive or procedural requirements that must be met in order to trigger the Commission's review? Should the motions be considered even though this would extend the time that a MUR remains active? Should parties be required to toll the statute of limitations for periods in which motions are under consideration by the Commission?

B. Deposition and Document Production Practices

When Commission attorneys take a deponent's sworn testimony at an enforcement deposition authorized by section 437d(a)(4), only the deponent and his or her counsel may attend. Under historical practice, the deponent had the right to review and sign the transcript, but normally a deponent was not allowed to obtain a copy of, or take notes on, his or her own transcript until the investigation was complete, *i.e.,* after all depositions had been taken. On August 22, 2003, the Commission published its new deposition policy. *See Statement of Policy Regarding Deposition Transcriptions in Nonpublic Investigations,* 68 FR 50688 (August 22, 2003), available on the Commission's Web site at *http://www.fec.gov/agendaJagendas2003/notice2003–15/fr68nl63p50688.pdf.* Under this policy, the Commission allows deponents in enforcement matters to obtain, upon request to the Office of General Counsel, a copy of the transcript of their own deposition unless, on a case-by-case basis, the General Counsel concludes and informs the Commission that it is necessary to the successful completion of the investigation to withhold the transcript until completion of the investigation.

If the General Counsel decides to recommend that the Commission find probable cause to believe a respondent has violated the Act, the Act requires that the General Counsel so notify the respondent, and provide a brief on the legal and factual issues in the case. The Act entitles respondents to submit, within 15 days, a brief stating their position on the factual and legal issues of the case. 2 U.S.C. 437g(a)(3). Although nothing in the FECA requires that documents or deposition transcripts be provided to respondents at this stage, respondents are generally provided, upon request, with the documents and depositions of other respondents and third party witnesses that are referred to in the General Counsel's brief. Respondents, however, may deem other information that the Commission does not disclose as valuable to the respondents' defense. Note that this practice can cause delay because, upon receiving these documents and depositions, respondents' counsel often seek an extension of time since counsel must submit the reply brief within 15 days of receiving the General Counsel's probable cause brief.

The Commission's practice in providing depositions and documents to respondents contrasts with the practice of some other civil law enforcement

agencies during the investigative stage of their proceedings, in which the only deposition transcript supplied to the respondent is the respondent's own deposition. Further, during the pendency of an investigation, section 6b of the APA, 5 U.S.C. 555(c), grants investigative agencies the right to deny the request of a witness for copies of transcripts of his or her own testimony based on ''good cause,'' in light of concerns that witnesses still to be examined might be coached. *Commercial Capital Corp.* v. *SEC,* 360 F.2d 856, 858 (7th Cir. 1966). On the other hand, it has been suggested the Commission's practice contrasts with procedural rights afforded in litigation matters under the Federal Rules of Civil Procedure, which give litigants the right to attend the depositions of all persons deposed in their case and obtain copies of all deposition transcripts.

The Commission seeks comment on whether counsel should have access to all documents prior to having to respond to a recommendation by the Office of General Counsel. Should deposition transcripts of the respondent, other respondents, and witnesses be released, and if so, when and to whom should they be released? Should respondents be allowed full access to the depositions of all other respondents, including those with the same and those with competing interests? At what point in the enforcement process should this occur? Would full access to the deposition transcripts of all other respondents increase the likelihood of a public disclosure in violation of 2 U.S.C. 437g(a)(12)? Would such release itself violate 2 U.S.C. 437g(a)(12)? If full access were to be granted prior to the probable cause stage, would it compromise the effectiveness of the Commission's investigations? Should respondents or respondent's counsel be allowed to attend depositions of other respondents or witnesses, including those with the same and those with competing interests? If so, under what circumstances? Again, would such access be consistent with 2 U.S.C. 437g(a)(12)?

Similarly, the Commission seeks comment on whether all relevant documents required to be disclosed in civil litigation pursuant to Federal Rule of Civil Procedure 26(a) should be provided with the probable cause brief. Is the Rule 26(a) model appropriate for a proceeding that is investigative, rather than adversarial? Would it be practical (or, in cases with multiple respondents, legal) to do so in cases involving voluminous records and multiple respondents? Who should bear the costs of copying documents and ordering deposition transcripts from court reporters? Would providing all such materials and allowing time for their review further delay the submission of responsive briefs? Would doing so compromise investigations? Would doing so compromise the Commission's ability to obtain and share information with other governmental agencies? Should this be done on a case-by-case basis? Would some standard other than Rule 26(a) of the Federal Rules of Civil Procedure provide a more workable standard?

The Commission seeks comment on these or other approaches to balancing its need to conduct effective investigations with the interests of respondents seeking to support their positions before the Commission.

C. Extensions of Time

Respondents have 15 days to respond to the General Counsel's probable cause brief. 2 U.S.C. 437g(a)(3). Although the Commission does not have any regulations addressing whether and under what circumstances an extension of this 15 day deadline is warranted, the Office of the General Counsel typically will grant an extension upon a showing of good cause. Should the Commission provide more explicit guidance regarding when an extension is warranted? If so, under what circumstances, if any, should extensions of time be granted to respondents to respond to the probable cause brief? Are there particular situations in which extensions of time should be denied? If extensions were granted, should they be contingent on respondents' agreements to toll the statute of limitations for the extension period?

D. Appearance Before the Commission

Under FECA, respondents are currently permitted to present their position through written submissions in response to the complaint and the General Counsel's probable cause brief, and generally they may do so at the RTB stage pursuant to Commission practice. The Commission also allows oral presentations prior to voting on a recommendation by the General Counsel to find probable cause. *See Enforcement Procedural Rules for Probable Cause Hearings,* 72 FR 64919 (Nov. 19, 2007), available on the Commission's Web site at *http://www.fec.gov/law/cfr/eLcompilation/2007/notice_2007-21.pdf.* Has the opportunity for oral presentation been helpful? Can the process be improved and, if so, how? Has the opportunity to appear in person before the Commission at the probable cause stage changed respondents' interest in conciliating at an earlier stage, and if so, how?

The Commission also seeks comment on whether respondents should be entitled to appear before the Commission, either *pro se* or through counsel, at other times such as when the Commission is considering motions (*see* I–A, above), audit reports that state violations of law, or prior to finding RTB. If so, should appearances be limited to certain types of hearings and cases? If so, what should be the limiting criteria? What should be the scope and form of the personal appearance? Should the Commission be permitted to draw an adverse inference if respondents decline to answer certain questions or do not fully answer them? Allowing counsel to appear would add an additional procedural right, but could also lengthen the enforcement process. How would this additional step be balanced with the timeliness of completing a MUR? Is the Commission justified in prolonging the process? Would this complicate the process or add unnecessary time constraints? Would it place respondents with limited resources, or those located far from Washington, at a comparative disadvantage, and if so, is this a valid reason to restrict personal appearances for all respondents? In cases involving multiple respondents, how would the Commission protect the confidentiality of other respondents also wishing to appear? The Commission would also benefit from hearing about whether other civil law enforcement agencies provide for personal appearances before agency decision-makers.

E. Releasing Documents or Filing Suit Before an Election

While an enforcement matter is pending, the matter remains confidential pursuant to 2 U.S.C. 437g(a)(4)(B). The Commission's regulation at 11 CFR 5.4 mandates that files be publicly released within 30 days of notification to the respondents that the matter is closed. Once an enforcement matter is closed, the Commission's practice is to publicly release documents related to the matter in the normal course of business, even if this occurs immediately prior to, or following, an election that may involve one of the respondents in the matter. Upon resolution of an enforcement matter, the Commission could not deny a Freedom of Information Act, 5 U.S.C. 552 *et. seq.,* request for disclosure of conciliation agreements or other dispositions simply because of the proximity of an upcoming election. Furthermore, the FECA provides for expedited conciliation immediately

prior to an election, which allows voters to consider a Commission determination that a campaign has not violated the FECA as alleged in a complaint, or alternatively, that a campaign has accepted responsibility for an election law violation. 2 U.S.C. 437g(a)(4)(A)(ii).

On the other hand, the Commission is sensitive to the fact that releasing documents, reports, or filing suit before an election, even when it occurs in the normal course of business, may influence election results. The Commission seeks comment on whether consideration of an upcoming election should or should not be considered when releasing documents. In particular, should the Commission adopt a policy of not releasing outcomes of cases for a specific period immediately preceding an election? If so, should that policy apply only to violations from a previous cycle? Would such a policy invite respondents to employ dilatory tactics for the apparent purpose of keeping information confidential until the election is over? Should the same considerations apply when the Commission has completed the administrative process and is prepared to file an enforcement action in federal court? What if the statute of limitations is due to run before or shortly after the election? Would the policy expose the Commission to criticism that it was withholding from voters information that it would normally make public precisely when that information is arguably of greatest interest to the electorate?

F. Timeliness

From the end of fiscal year 2003 to the end of fiscal year 2007 the Commission improved the overall processing time for Enforcement matters by 64%, while at the same time doubling the number of matters it closes on a yearly basis. Nonetheless, it has still been criticized in some quarters for lack of timeliness. Are there specific practices or procedures that the Commission could implement, consistent with the FECA and the APA, which could reduce the time it takes to process MURs? Does the agency have too few staff assigned to handle its workload? Can the Commission afford respondents with more procedural rights without sacrificing its goal of conducting timely investigations? Should respondents be afforded more process than is required by the FECA or the APA when the likely result will be longer proceedings? How should a respondent's timeliness in responding to discovery requests and subpoenas and orders, or the lack thereof, be weighed in the balance? Has any particular stage of the enforcement procedure been a source of timeliness problems?

G. Prioritization

The Commission has adopted an Enforcement Priority System to focus resources on cases that most warrant enforcement action. Should the Commission give lesser or greater priority to cases that require complex investigations and/or raise issues where there is little consensus about the application of the law—such as coordination, qualified non-profit corporation status, and express advocacy/issue ad analysis? Since cases involving these issues often involve large amounts of spending, and hence large potential violations, should these be the cases given high priority? If not, what cases should be given high priority?

H. Memorandum of Understanding With the Department of Justice

The Commission for years has divided responsibility for the enforcement of FECA with the Department of Justice. A 1977 Memorandum of Understanding contemplates that the Department of Justice should handle ''significant and substantial knowing and willful'' violations, and that where the Commission learns of a probable, significant and substantial violation, it will endeavor to expeditiously investigate the matter and refer it promptly to the Department upon a finding of probable cause. Is this still a valid demarcation of responsibility? Does anything in BCRA suggest a different approach would be appropriate?

I. Settlements and Penalties

Settlements and penalties are a sensitive and difficult area for both the Commission and the public. It is vitally important that settlements and penalties are equitable and appropriate. The Commission seeks comment on any systematic settlement or penalty issues that have arisen in the Commission's enforcement of the FECA. How can these issues be resolved? The Commission seeks comment on several issues in particular. Has the Commission's practice of approving proposed conciliation agreements as opening settlement offers been helpful in facilitating discussions? Have the civil penalties accurately reflected the underlying issues? Are admonishments allowed by the statute? Are admonishments a civil penalty? Is it appropriate to base penalties and disgorgements on extrapolations of violations in a sample to the entire universe of funds in question? Is the public aware of how the FEC calculates fines and other penalties? Should the Commission provide this information to the public? Specifically, do other agencies make public their methodology for determining the agency's opening offer in settlement negotiations, which is the purpose for which the Commission's guidelines are used? If the Commission were to publish those guidelines, would they be applicable without exception or with only a few specified exceptions? Should the Commission retain its discretion and flexibility to depart from its guidelines in instances when it feels that fairness or public policy requires another result? Would such guidelines minimize or even eliminate negotiations over what constitutes an appropriate penalty? Have fines and other penalties been consistent? How much consistency is required under the APA, equal protection and due process? Are there other directives or guidelines that should be publicly available, pertaining to enforcement procedures?

J. Designating Respondents in a Complaint

When the Commission last conducted a public review of its enforcement procedures in 2003, one of the topics that generated the most comments was with regard to designating respondents in a complaint. As a result of those comments, the Commission established two new practices. First, the Office of General Counsel modified how it identified respondents upon the initial review of an external complaint. Specifically, the Office of General Counsel used to notify any party mentioned in a complaint, or attachment to a complaint, where they could be inferred to have violated a provision of the FECA. Following the 2003 public review, the Office of General Counsel curtailed its notification practice to include only those parties that were either specifically identified by the complaint to have violated the FECA or were shown to have a clear nexus to the alleged violation in a complaint. Second, in instances where the Office of General Counsel identifies additional respondents at a later stage in the enforcement process, OGC now sends the potential respondent a ''pre-RTB letter'' notifying them of OGC's intention to recommend that the Commission find reason to believe a violation occurred, setting forth the factual basis for the recommendation, and inviting the potential respondent to respond to OGC prior to making its recommendation to the Commission. Have these two procedural changes

effectively addressed the due process issues raised in 2003 about designating respondents in a complaint? Are pre-RTB letters useful to the enforcement process? Are they consistent with the statute? Should OGC provide potential respondents with a copy of the complaint or, in *sua sponte* matters, a copy of the *sua sponte* submission? Would the provision of these documents to someone who has not yet been named as a respondent violate 2 U.S.C. 437g(a)(12)?

*II. Other Programs*

A. Alternative Dispute Resolution

Has the ADR program been helpful? If so, in what ways has the program been helpful? Should it be expanded? Should the referral policies the Commission currently uses be modified so that the ADR program can handle more cases? If so, what cases are most appropriate for ADR? Should a respondent be able to request participation in the ADR program?

What are the perceived advantages or disadvantages of the ADR process compared to the regular enforcement process? What can be done to ensure uniformity of treatment of respondents between the ADR program and the traditional enforcement process? Is the Commission doing an adequate job of ensuring that civil penalties agreed to in ADR are actually paid by respondents and that other agreed upon remedial actions (such as annual internal audits or attendance at an FEC conference) are completed?

Currently, in most instances penalties and other remedial actions are negotiated independently of the Office of General Counsel. What are the perceived advantages or disadvantages of the ADR negotiations being independent of the Office of General Counsel? If the ADR program were to negotiate in coordination with the Office of General Counsel, would that provide a disincentive for respondents to disclose confidential information for fear that the information would be available to the Office of General Counsel in the event that ADR does not result in a successful resolution of the matter?

What else can the Commission do to improve the ADR process?

B. Administrative Fines

Has the Administrative Fine program improved consistency of civil penalty amounts? Are the schedules of the administrative fines published in the Commission's regulations (11 CFR 111.43 and 111.44) useful?

What else can the Commission do to improve the Administrative Fine process?

C. Reports Analysis

All persons and entities who file disclosure reports with the Commission must interact with the RAD. All reports filed with the Commission are reviewed by RAD. The RAD will attempt to acquire information through a Request for Additional Information (RFAI) if an error, omission, need for additional clarification, or prohibited activity is discovered in the course of reviewing a report. Are the RFAI's clear and understandable? Do RFAI's provide sufficient time to respond? Should the times vary based on the nature of the request? Are RFAI's consistent in the information they seek? Some RFAI's seek information which is not required by the report. Is this practice consistent with the law?

If a potential violation is discovered and the committee fails to take corrective action or provide clarifying information to adequately address the issue, the committee may be referred for enforcement or audit. Has the Commission appeared to have been consistent in its approach to RAD referrals? What steps could the Commission take to increase transparency and improve the RAD referral procedure?

What else can the Commission do to improve the RAD's processes?

D. Audits

While presidential campaigns that accept matching funds are audited automatically, other committees are only audited based on Commission procedures that set audit priorities. The committee has the opportunity to respond confidentially to the Interim Audit Report/Preliminary Audit Report, and changes from the IAR/PAR in the Final Audit Report can result from information provided by the audited committee in that response. These final audit reports are made public. This process raises several questions upon which the Commission seeks comment. Is it sufficiently clear to the general public how the Commission decides to audit a particular committee? If not, should more information be made public? If it should, what information should be made public? Is it possible to release the specified information without providing committees a road map on how to violate the law just enough to avoid being audited? Does the selection of committees for audit have the appearance of being done in a neutral manner? What can be done to improve public confidence in the neutrality, fairness and relevancy of the audit selection process? What is the significance of an audit finding that a violation of law has occurred? Does such a finding in an audit report constitute ''enforcement?'' What is the public perception of such a finding? Does such a finding have immediate punitive and other adverse consequences for the committee, including candidate committees?

Are committees being given sufficient opportunity to be heard by the Commission, particularly prior to the release of audit reports reaching legal conclusions that the committee violated the law? If not, what is the best way to ensure that committees have appropriate and full due process before the Commission? Should audited committees be allowed to file a written brief in response to the audit report? Should audited committees be allowed to have a hearing before the Commission? Should this hearing be at the time of the interim audit report, the final audit report, or both? Please note as well that many of the questions raised in Part I.D., pertaining to appearances before the Commission in the enforcement process, apply as well to the question of appearances in audits.

What else can the Commission do to improve the audit process?

*III. Advisory Opinions and Policy Statements*

A. Advisory Opinions

Currently, advisory opinion requests are submitted in writing and posted on the Commission Web site for comment. Typically, one or more draft opinions are proposed and posted on the Web site for comment and the Commission adopts one of the draft opinions or an amended version of one of the drafts. As part of this process, should the requestor be permitted to appear before the Commission before or at the time the Commission considers a request? Should commenters get a similar opportunity? How would allowing requestors or commenters to appear before the Commission affect the statutory requirement that the Commission render an opinion within sixty days of a complete written request? If the Commission were to allow requestors to appear, should they be required to waive the sixty day time period? Given the statutory reference to ''written comments,'' would a legislative change be required to permit requestors or commenters to appear before the Commission?

Furthermore, have advisory opinion requests generally been resolved in a timely manner? Have requesters

experienced a time lag between the time they file a request with the Commission and when the request is deemed submitted for the purpose of beginning the 60-day clock? How can the Commission improve on rendering advisory opinions promptly?

What else can the Commission do to improve the advisory opinion process?

B. Policy Statements and Other Guidelines

In recent years the Commission has issued a number of policy statements, which are available on the Commission's Web site at *http://www.fec.gov/law/policy.shtml.* Have these statements helped increase the transparency of the Commission's practices and procedures? How can the transparency of the Commission's practices and procedures be improved? Are there substantive or procedural flaws in any of these policy statements that the Commission should address or revise? Should any of these policy statements be embodied in regulations to provide better clarity and access to the public? Are there additional policy statements that the Commission should consider issuing? If so, what Commission practices and procedures should be addressed in the policy statements? Should policy statements, directives and guidelines be placed on the Web site?

What other policy statements could the Commission issue that would be helpful to the public?

*IV. Other Issues*

As noted above, the Commission welcomes comments on other issues relevant to these enforcement policies and procedures, including any comments concerning how the FEC might increase the fairness, substantive and procedural due process, efficiency and effectiveness of the Commission.

On behalf of the Commission.

Dated: December 2, 2008.

**Donald F. McGahn II,**

*Chairman, Federal Election Commission.*

[FR Doc. E8–28896 Filed 12–5–08; 8:45 am]

**BILLING CODE 6715–01–P**

## FEDERAL RESERVE SYSTEM

### Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/.*

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 2, 2009.

**A. Federal Reserve Bank of San Francisco** (Kenneth Binning, Vice President, Applications and Enforcement) 101 Market Street, San Francisco, California 94105–1579:

*1. Carpenter Fund Manager GP LLC; Carpenter Community Bancfund–A, L.P.; Carpenter Fund Management Company, LLC; Carpenter Community Bancfund, L.P.; Carpenter Community Bancfund CA, L.P.; SCJ, Inc.; CCFW, Inc. (dba Carpenter & Company)*, all of Irvine, California, to acquire CG Holdings, Inc., Wilmington, Delaware, and thereby indirectly acquire up to 80 percent of the voting shares of California General Bank, N.A, (in organization), Pasadena, California.

In connection with this application, CG Holdings, Inc., Wilmington, Delaware, has also applied to become a bank holding company by acquiring up to 80 percent of the voting shares of California General Bank, N.A. (in organization), Pasadena, California.

Board of Governors of the Federal Reserve System, December 3, 2008.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. E8–28933 Filed 12–5–08; 8:45 am]

**BILLING CODE 6210–01–S**

## FEDERAL TRADE COMMISSION

### Rescission of FTC Guidance Concerning the Cambridge Filter Method

**AGENCY:** Federal Trade Commission

**ACTION:** Notice

**SUMMARY:** The Federal Trade Commission (''FTC'' or ''Commission'') has rescinded its 1966 guidance providing that it is generally not a violation of the FTC Act to make factual statements of the tar and nicotine yields of cigarettes when statements of such yields are supported by testing conducted pursuant to the Cambridge Filter Method, also frequently referred to as ''the FTC Method.'' In addition, advertisers should not use terms such as ''per FTC Method'' or other phrases that state or imply FTC endorsement or approval of the Cambridge Filter Method or other machine-based test methods.

**DATES:** Except as specified in this notice, the Commission's rescission of the guidance is effective on November 26, 2008.

**ADDRESSES:** Requests for copies of this notice should be sent to the Consumer Response Center, Room 130, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580. The notice is also available on the Internet at the Commission's web site, *http://www.ftc.gov.*

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information should be addressed to Rosemary Rosso, Senior Attorney, Division of Advertising Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580, (202) 326–2174.

**SUPPLEMENTARY INFORMATION:** Cigarette yields for tar, nicotine, and carbon monoxide are typically measured by the Cambridge Filter Method, which commonly has been referred to as ''the FTC Method.'' On July 14, 2008, the Commission published a **Federal Register** notice seeking comment on a proposal to rescind guidance the Commission issued in 1966, which stated that it generally is not a violation of the FTC Act to make factual statements of the tar and nicotine yields of cigarettes when statements of such yields are supported by testing conducted pursuant to the Cambridge Filter Method. 73 Fed. Reg. 40350 (July 14, 2008). The Notice sought comment concerning the Commission's proposal, and the likely effects of rescission of the FTC guidance. On July 30, the Commission extended the comment

period until September 12, 2008. 73 Fed. Reg. 44268 (July 30, 2008).

## I. BACKGROUND

On March 25, 1966, the Commission informed the major cigarette manufacturers that factual statements of the tar and nicotine content of the mainstream smoke of cigarettes would not be in violation of legal provisions administered by the FTC so long as:

(1) no collateral representations (other than factual statements of tar and nicotine content of cigarettes offered for sale to the public) are made, expressly or by implication, as to reduction or elimination of health hazards, and (2) the statement of tar and nicotine content is supported by adequate records of tests conducted in accordance with the Cambridge Filter Method.[1]

Importantly, the 1966 guidance only addressed simple factual statements of tar and nicotine yields. It did not apply to other conduct or express or implied representations, even if they concerned tar and nicotine yields. Thus, deceptive claims about tar and nicotine yields or health risks continued to be subject to the full force of the Commission's jurisdiction. *See, e.g., FTC v. Brown & Williamson Tobacco Corp.*, 778 F. 2d 35 (D.C. Cir. 1985); *American Tobacco Co.*, 119 F.T.C. 3 (1995). Moreover, the Commission's 1966 guidance did not *require* companies to state the tar and nicotine yields of their cigarettes in their advertisements or on product labels. Rather, it set forth the type of substantiation the Commission would deem adequate to support statements of tar and nicotine yields *if* cigarette companies chose to make such statements.

From the outset, cigarette testing under the Cambridge Filter Method was intended to produce uniform, standardized data about the tar and nicotine yields of mainstream cigarette smoke, *not* to replicate actual human smoking. Because no test known at the time could accurately replicate human smoking, the FTC believed that the most important objective was to ensure that cigarette companies could present tar and nicotine information to the public based on a standardized method that would allow comparisons among cigarettes. In 1966, most public health officials believed that reducing the amount of ''tar'' in a cigarette could reduce a smoker's risk of lung cancer. Therefore, it was thought that giving consumers uniform and standardized information about the tar and nicotine yields of cigarettes would help smokers make informed decisions about the cigarettes they smoked.[2]

Despite dramatic decreases in machine-measured tar and nicotine yields since then, the Commission has been concerned for some time that the current test method may be misleading to individual consumers who rely on the ratings it produces as indicators of the amount of tar and nicotine they actually will get from their cigarettes, or who use this information as a basis for comparison when choosing which cigarettes they smoke. In fact, the current yields tend to be relatively poor predictors of tar and nicotine exposure. This is primarily due to smoker compensation—*i.e.*, the tendency of smokers of lower-rated cigarettes to take bigger, deeper, or more frequent puffs, or to otherwise alter their smoking behavior in order to obtain the dosage of nicotine they need.

Concerns about the machine-based Cambridge Filter Method became a substantially greater issue in the 1990s because of changes in modern cigarette design and due to a better understanding of the nature and effects of compensatory smoking behavior.[3] Today, the consensus of the federal health agencies and the scientific community is that machine-based measurements of tar and nicotine yields using the Cambridge Filter Method ''do not offer smokers meaningful information on the amount of tar and nicotine they will receive from a cigarette, or on the relative amounts of tar and nicotine exposure they are likely to receive from smoking different brands of cigarettes.''[4]

Given the serious limitations of the existing test method, the Commission published a **Federal Register Notice** seeking comment on a proposal to rescind its guidance providing that factual statements supported by testing conducted pursuant to the Cambridge Filter Method generally would not violate the FTC Act.

## II. COMMENTS RECEIVED IN RESPONSE TO COMMISSION'S NOTICE

The Commission received 36 comments in response to its **Federal Register Notice**.[5] Of those, 27 commenters supported the proposal to rescind the 1966 guidance, seven comments opposed the proposal, and two comments neither supported nor opposed the specific proposal to rescind the 1966 guidance.[6] The comments are discussed below.

[1] News Release of the Federal Trade Commission (Mar. 25, 1966) (reciting the text of identical letters sent to the major cigarette manufacturers and the Administrator of The Cigarette Advertising Code, Inc.). The Cambridge Filter Method determines the relative yields of individual cigarettes by ''smoking'' them in a standardized fashion, according to a pre-determined protocol, on a machine. The machine is calibrated to take one puff of 2-seconds duration and 35 ml. volume every minute, and to smoke the cigarettes to a specified length.

[2] When the test method was adopted, the public health community believed that ''[t]he preponderance of scientific information strongly suggests that the lower the tar and nicotine content of cigarette smoke, the less harmful would be the effect.'' U.S. Dept. of Health and Human Services, *The Health Consequences of Smoking: The Changing Cigarette* 1 (1981) (quoting a 1966 Public Health Service statement).

[3] To address these concerns, in 1994, the Commission, along with Congressman Henry Waxman, asked the National Cancer Institute (''NCI'') to convene a consensus conference to address cigarette testing issues. That conference took place in December 1994. *Smoking and Tobacco Control Monograph 7: The FTC Cigarette Test Method for Determining Tar, Nicotine, and Carbon Monoxide Yields of U.S. Cigarettes: Report of the NCI Expert Committee*, National Institutes of Health, National Cancer Institute (1996). In 1997, the Commission published a **Federal Register Notice** proposing certain changes to the test method in accordance with recommendations from the NCI consensus conference. 42 Fed. Reg. 48,158 (Sept. 12, 1997). In response, the cigarette companies argued in favor of retaining the existing test method. Public health agencies asked the Commission to postpone its proposed modifications until a broader review of unresolved scientific issues surrounding the system could be addressed. In 1998, the Commission responded to the public health agencies' concerns by formally requesting that the Department of Health and Human Services (''DHHS'') conduct a review of the FTC's cigarette test method. Letter from Donald S. Clark, Secretary, Federal Trade Commission to the Honorable Donna E. Shalala, Secretary, Department of Health and Human Services (Nov. 19, 1998). The DHHS provided its initial response to the FTC in an NCI Report concerning the public health effects of low tar cigarettes. *Smoking and Tobacco Control Monograph 13: Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine*, National Institutes of Health, National Cancer Institute (2001) (''Monograph 13''). The national panel of scientific experts assembled for the review concluded that the existing scientific evidence, including patterns of mortality from smoking-caused diseases, does not indicate a benefit to public health from changes in cigarette design and manufacturing over the past 50 years. Monograph 13 at 10.

[4] Testimony of Cathy Backinger, Ph.D., Acting Chief, Tobacco Control Research Branch, National Cancer Institute, presented before the Committee on Science, Commerce and Transportation, U.S. Senate (Nov. 13, 2007). *See also* Testimony of Jonathan M. Samet, M.D., M.S., Professor and Chair, Dept. of Epidemiology, Johns Hopkins Bloomberg School of Public Health, presented before the Committee on Science, Commerce and Transportation, U.S. Senate (Nov. 13, 2007); Monograph 13.

[5] The comments are cited in this notice by reference to the name of the commenter. The comments are available on the Internet at the Commission's web site, *http://www.ftc.gov*. The comments also are on the public record and are available for public inspection by contacting the Consumer Response Center, 600 Pennsylvania Avenue, NW, Washington, DC 20580 from 9 a.m. to 5 p.m. Monday through Friday, except federal holidays.

[6] One of these comments, from a church organization, indicated the group's general concern that any tobacco use is harmful. In addition, an individual expressed the view that the Commission was complicit in deceptions by cigarette companies.

*A. Comments Supporting the Proposal*

Comments supporting the Commission's proposal to rescind its 1966 guidance came from public health and tobacco advocacy organizations, an international health organization, a municipal health department, academic and health professionals, individuals, and Members of the United States Senate.[7]

1. Basis for Support

One commenter, an official at the American Cancer Society, stated that the guidance should be rescinded because it has not served its purpose of informing consumers about brands that confer less risk of tobacco-related harm.[8] Several commenters indicated their support for the proposal because the tar and nicotine yields derived through the Cambridge Filter Method do not provide meaningful information about the relative health risks among cigarette brands.[9] Other commenters stated that machine-based yields do not provide meaningful information to consumers about the amount of tar and nicotine actually inhaled by smokers or the differences in exposure they would receive when switching brands of cigarettes.[10] Some of these commenters cited research showing that there is no meaningful difference in a smoker's exposure to tar and nicotine based on whether that smoker smoked ''light'' or low tar cigarettes, or regular full-flavored cigarettes.[11] Many of the commenters stated that the tar and nicotine yields derived from the Cambridge Filter method are misleading to consumers.[12] Some commenters cited studies indicating that consumers mistakenly believe that lower yield cigarettes confer a reduced risk of harm relative to higher yield cigarettes.[13]

2. Likely Effects of Rescinding the 1966 Guidance

Some of the commenters stated that rescinding the 1966 Guidance would help ensure that consumers are not misled and would lead to a better public understanding that lower yield cigarettes do not reduce health risks caused by smoking.[14] Other commenters indicated that rescinding the guidance would facilitate smoking cessation by eliminating deceptive claims.[15] One commenter stated that rescinding the guidance would allow consumers to make more informed choices about cigarettes by no longer permitting information that minimizes the health risks associated with smoking.[16] Another indicated that rescission of the guidance was likely to have positive effects on smoking intensity, brand choice, and/or attempts to quit smoking.[17] One organization stated that Commission withdrawal of the guidance would help public health organizations be more effective in their efforts to support smoking cessation and to prevent youth initiation of smoking.[18]

*B. COMMENTS OPPOSING THE PROPOSAL*

The Commission received comments opposing its proposal from the four major domestic cigarette manufacturers, and three individuals.[19]

1. Comments from Individuals

One individual, affiliated with a smoking cessation program, indicated that the current test method provides useful information to consumers trying to quit smoking by allowing them to choose brands that have very low yields of nicotine as an initial part of the cessation process.[20] The other two individuals stated that the FTC should fix the existing method rather than rescind its guidance.[21] One of these comments added that once the test method is fixed, the FTC should amend its guidance to require companies to test not only tar, nicotine, and carbon monoxide yields, but also other identified toxins in tobacco smoke such as aldehydes, benzopyrenes, and tobacco-specific nitrosamines, and to require cigarette companies to disclose those yields on cigarette packages.[22]

2. Industry Comments

Each of the four major domestic cigarette manufacturers stated that the FTC should retain the current guidance. These commenters said that the 1966 guidance, permitting the use of a single standardized test method, the Cambridge Filter method, should be retained until a replacement or supplemental test method is approved.[23] These commenters noted that federal and international scientific authorities currently are exploring means for addressing the limitations of machine-based test methods such as the Cambridge Filter method.

a. Basis for Opposition and Likely Effects of Rescission

The industry comments stated three general bases for their opposition to the proposed rescission of the guidance. First, each of the companies stated that elimination of the current guidance will lead to consumer confusion, especially since the existing guidance has been in place for over 40 years.[24] Second, most of the industry commenters indicated that a uniform test method is in the public interest.[25] Two commenters stated that consumers would have no means for evaluating relative yields of cigarettes without a single standardized test method.[26] One company indicated that elimination of the guidance could lead to a new ''tar derby'' in which companies would use different methods of measuring the yields in their cigarettes, thereby leading to greater consumer confusion.[27] Third, three of the industry comments contended that Commission withdrawal of the guidance would be misguided in light of pending legislation that would give the U.S. Food and Drug Administration (''FDA'') jurisdiction over cigarette testing specifically and tobacco generally.[28] These commenters stated that if the legislation is enacted, the FDA might decide to reinstate the Cambridge Filter method or impose a test method at odds with the Commission's proposal. Thus, Commission withdrawal of the guidance now could lead to two upheavals in a relatively short period of time, leading

[7] The commenters are the American Academy of Pediatrics, the American Cancer Society Cancer Action Network, American Legacy Foundation, Dr. A. Brandt, Campaign for Tobacco Free Kids (joined by 19 health-related organizations), Dr. G. Connolly, Dr. M. Eriksen, Joanie Fogel, M. Hauckq, K. Karnes, D. Kasper, P. Konigsberg, Konigsberg, Senator Lautenberg (joined by 15 additional Senators), Dr. J. Love, Dr. D. Lynch, A. Moore, NYC Department of Health and Hygiene, Dr. R. O'Connor, Partnership for Prevention, M. Reilly, Smokefree Pennsylvania, Dr. M. Thun, Dr. N. Benowitz, Dr. D. Burns, Dr. K. Warner, and the World Health Organization (''WHO'').

[8] Thun.

[9] *E.g.*, Brandt, Kasper, NYC Dept. of Health.

[10] *E.g.*, Campaign for Tobacco Free Kids, American Academy of Pediatrics, Connolly, Hackq, Benowitz, Burns, WHO.

[11] *E.g.*, American Legacy Foundation, Campaign for Tobacco Free Kids, Connolly.

[12] *E.g.*, American Legacy Foundation, Brandt, Campaign for Tobacco Free Kids, Connolly, Eriksen, Karnes, Lautenberg, Moore, O'Connor, Partnership for Prevention, Thun, Warner, WHO.

[13] *E.g.*, Thun.

[14] *E.g.*, American Legacy Foundation, Brandt, Eriksen, NYC Dept. of Health.

[15] *E.g.*, Campaign for Tobacco Free Kids, Connolly, Fogel, Karnes, Kasper, Lautenberg, Love, Partnership for Prevention.

[16] NYC Dept. of Health.

[17] Love.

[18] Campaign for Tobacco Free Kids.

[19] Liggett Group LLC, Lorillard Tobacco Company, Philip Morris USA, R.J. Reynolds Tobacco Company, Dr. J. Nitzkin, Dr. R. Shipley, Dr. C. Wright.

[20] Shipley.

[21] Wright, Nitzkin.

[22] Wright.

[23] Liggett, Philip Morris, R.J. Reynolds, Lorillard (until DHHS responds to FTC request for recommendations as to whether and how to change the existing test method).

[24] Liggett, Lorillard, Philip Morris, R.J. Reynolds.

[25] *E.g.*, Philip Morris, Liggett, Lorillard.

[26] Philip Morris, Lorillard.

[27] Philip Morris.

[28] Liggett, Lorillard, R.J. Reynolds.

to confusion and unnecessary industry expense.[29] One company also said that rescission of the guidance was unwarranted because the Commission has not presented evidence demonstrating that consumers are misled by the yields derived from the current test method.[30]

b. Require Additional Disclosures as an Alternative to Rescission

Three of the industry comments recommended that the Commission consider the use of disclosures or disclaimers as an alternative to rescission of the guidance. These commenters stated that disclosures or disclaimers would reduce any perceived risk of consumer confusion as to the tar and nicotine yields obtained by the Cambridge Filter method. Liggett suggested that the FTC consider the use of qualifying information or disclosures. Lorillard recommended the use of disclaimers such as ''results may vary.'' Philip Morris stated that the Commission should consider publishing additional consumer education such as an FTC Consumer Alert explaining the limits of the Cambridge Filter method, or require specific disclosures or disclaimers that would decrease the likelihood of consumer confusion.

c. Use of Terms That State or Imply FTC Endorsement

In its **Federal Register Notice** seeking public comment, the Commission stated that advertisers should no longer use the phrase ''by FTC Method'' or other terms or phrases that state or imply the Commission's approval or endorsement of the Cambridge Filter method, or yields derived from such method, if the 1966 guidance were rescinded. None of the cigarette companies, nor other commenters, raised any objections concerning this issue. Liggett requested guidance as to whether companies would be able to use terms such as ''by Cambridge Method'' as an alternative to ''by FTC Method.''

d. Effective Dates

The industry comments noted that the Commission did not specify any effective date for compliance if the agency decided to withdraw its guidance. Most of these comments recommended that the FTC provide at least a one-year interim period.[31]

## III. DISCUSSION

After considering all of the comments, the Commission has decided to withdraw its 1966 guidance. Advertisers who include statements of tar and nicotine yields as measured by the Cambridge Filter method must ensure that such claims comport with the FTC Act. In addition, advertisers should no longer use the phrase ''by FTC Method'' or other terms or phrases that state or imply the Commission's approval or endorsement of the Cambridge Filter method, or yields derived from that method or other machine-based test methods.

1. Basis for the Commission's Rescission of the 1966 Guidance

The Commission has reached this decision for several reasons. First, the underlying premise for the Commission's guidance was that tar and nicotine statements based on the Cambridge Filter Method would help consumers make informed decisions by providing a metric for reducing their risk of adverse health effects from smoking. There is now a consensus among the public health and scientific communities that the Cambridge Filter method is sufficiently flawed that statements of tar and nicotine yields as measured by that method are not likely to help consumers make informed decisions. Thus, the underlying premise of the 1966 guidance is no longer valid.

In addition, the Commission believes the statements of tar and nicotine yields as measured by this test method are confusing at best, and are likely to mislead consumers who believe they will get proportionately less tar and nicotine from lower-rated cigarettes than from higher-rated brands. The Commission will not allow its stamp of approval on a test method that is confusing or misleading to consumers.

Finally, removal of any reference to the FTC should substantially improve consumer education efforts. It is difficult for the FTC or public health officials to discuss the limitations of ratings obtained pursuant to a test method that is stated to be a method apparently endorsed by an agency of the federal government. For example, the Commission's consumer alert on tar and nicotine yields conveys an overall message that consumers should not trust the tar and nicotine numbers, while at the same time, cigarette brand advertising implies that the FTC is endorsing those numbers.

2. The Proposed Alternatives Are Inadequate

Given the inherent limits of the Cambridge Filter method, the Commission does not believe that retaining the guidance until approval of a new test method is a viable alternative. The FTC does not have the specialized scientific expertise needed to design and evaluate scientific test methodologies. Thus, when evaluating medical or other scientific issues, the Commission often relies on other governmental agencies and outside experts with more knowledge in the relevant area. Accordingly, in 1994, the Commission asked the NCI to convene a consensus conference to address cigarette testing issues, and, in 1998, the FTC asked the Department of Health and Human Services for recommendations concerning whether and how to change the test method.[32] There currently does not appear to be a scientific consensus on these issues. Nor is there any anticipated date for reaching a resolution of these issues. Thus, simply waiting until the issues are resolved does not appear warranted or reasonable.

Similarly, the Commission is not convinced that simply amending the guidance to require the addition of disclosures or disclaimers is an adequate alternative to rescission of the guidance.

Likewise, the Commission does not agree that rescission of the guidance is unwarranted or ill-advised because pending legislation would give the FDA jurisdiction over cigarette testing specifically, and tobacco generally. Legislation vesting the FDA with jurisdiction over tobacco products has been introduced annually for over a decade and has yet to be enacted.[33] Most tobacco manufacturers have opposed that legislation, and it is not clear when such legislation may be enacted into law. Moreover, given the clear scientific consensus concerning the inherent limitations of the Cambridge Filter method, it is not likely that the FDA would reimpose a uniform system of cigarette testing that required use of the Cambridge Filter method as it exists today.

[29] *E.g.*, R.J. Reynolds, Lorillard.

[30] Lorillard.

[31] Liggett, Philip Morris, and R.J. Reynolds.

[32] *See supra* note 3.

[33] The Commission notes that it has long recommended that Congress consider giving authority over cigarette testing to one of the federal government's science-based public health agencies. *See, e.g.*, Prepared Statement of the Federal Trade Commission Before the Committee on Commerce, Science, and Transportation, United States Senate (November 13, 2007); Prepared Statement of the Federal Trade Commission Before the Committee on Energy and Commerce, Subcommittee on Commerce, Trade, and Consumer Protection, United States House of Representatives (June 3, 2003); Prepared Statement of the Federal Trade Commission Before the Committee on Government Reform, United States House of Representatives (June 3, 2003); Report to Congress for 1997, Pursuant to the Cigarette Labeling and Advertising Act (July 1999).

3. Requests for Guidance Concerning Future Tar and Nicotine Statements

The comments submitted by the cigarette manufacturers requested guidance on several issues. In particular, Lorillard asked whether Commission rescission of its 1966 guidance would permit companies to include any statements of tar and nicotine yields in future cigarette advertisements.[34] The Commission's rescission of its guidance does not prohibit statements of tar and nicotine yields as long as those claims are truthful, non-misleading, and adequately substantiated. If a claim is not likely to mislead, advertisers can generally make such a claim without running afoul of the FTC Act. At the same time, companies must ensure that their claims do not erroneously convey the impression that the stated yields are the amounts of tar or nicotine a consumer is actually likely to inhale from cigarette smoke, or convey an erroneous or unsubstantiated message that a relatively lower yield cigarette presents a reduced risk of harm.[35]

Liggett requested guidance as to whether companies could include reference to the ''Cambridge Filter method'' rather than the ''FTC method'' in any future advertisements. The Commission's rescission of its 1966 guidance does not prohibit companies from referencing the specific test method used to measure any stated yields of tar or nicotine. Future claims will be evaluated under the FTC Act's prohibition against deceptive acts or practices. Thus, companies can make claims that reference a specific test method as long as the claims are truthful, non-misleading, and substantiated. Companies should ensure that such claims do not falsely state or imply the FTC's endorsement or approval of that method.

4. Dates

The Commission understands that packaging, advertising, and marketing materials that relied on the 1966 guidance may already be in channels of distribution and cannot be readily withdrawn. In the exercise of its prosecutorial discretion, the Commission does not intend to challenge actions taken in reliance on that guidance under circumstances in which altering or withdrawal of the materials was impracticable. Specifically, the Commission will not consider any challenges, prior to January 1, 2009, to materials that conformed to the 1966 guidance. Additionally, the Commission will not consider challenges to point-of-sale materials before March 1, 2009; to print advertisements that have already been distributed to publishers for publication before March 1, 2009; or to inventories of cigarette packaging distributed before March 1, 2009, to the extent that those packaging materials were printed before January 1, 2009.

5. Use of Descriptors

Cigarette manufacturers have adopted descriptive terms such as ''light'' and ''ultra low'' based on ranges of machine-measured tar yields. The Commission has neither defined those terms, nor provided guidance or authorization as to the use of descriptors. Thus, the Commission did not address, nor did it seek comment on, the use of descriptors in its July 14, 2008 **Federal Register Notice**. Nonetheless, a number of comments raised the use of descriptors. In particular, several of the comments supporting Commission rescission of the 1966 guidance recommended that the Commission ban any use of descriptors.[36] Several of the industry comments, on the other hand, requested guidance as to their continued use of descriptors.[37]

The Commission declines the invitation to initiate a proceeding that would prohibit all use of descriptors. Cigarette manufacturers have been banned from using descriptors by the trial judge in the RICO lawsuit brought by the U.S. Department of Justice,[38] although that remedy is one of the issues currently before the court of appeals. Accordingly, Commission action to ban the use of descriptors appears unwarranted at this time.

At the same time, any continued use of descriptors is subject to the FTC Act's proscription against deceptive acts and practices. To the extent that descriptors are used in a manner that conveys an overall impression that is false, misleading, or unsubstantiated, such use would be actionable. Thus, companies must ensure that any continued use of descriptors does not convey an erroneous or unsubstantiated message that a particular cigarette presents a reduced risk of harm or is otherwise likely to mislead consumers.

## IV. CONCLUSION

Based upon the analysis discussed above, the Federal Trade Commission has rescinded its 1966 guidance that it generally is not a violation of the FTC Act to make factual statements of the tar and nicotine yields of cigarettes when statements of such yields are supported by testing conducted pursuant to the Cambridge Filter Method, also frequently referred to as ''the FTC Test Method.'' Advertisers should not use terms such as ''per FTC Method'' or other phrases that state or imply FTC endorsement or approval of the Cambridge Filter Method or other machine-based test methods.

By direction of the Commission.

**Donald S. Clark**

*Secretary*

## CONCURRING STATEMENT OF COMMISSIONER PAMELA JONES HARBOUR

*Regarding* **Federal Register Notice** *Rescinding the FTC's 1966 Guidance Concerning the Cambridge Filter Method*

Today, the Commission has taken a bold step: removing its apparent imprimatur from cigarette advertisements. This action, while commendable, should only be a first step. Further action is needed.

Contrary to recent criticism,[1] the FTC has not been a passive player in the area of tobacco advertising. The Commission has long advocated for the development of a new test for tar and nicotine.[2] The Commission has sought assistance from the scientific community to determine what changes should be made to the testing method. There still is no consensus on this issue, however, and this lack of agreement has led the Commission to rescind its outdated guidance.

Tobacco companies will no longer be able to use terms indicating that the FTC approves

[34] Lorillard likewise asked whether companies were still required to state tar and nicotine yields in cigarette advertisements pursuant to a 1970 agreement among major cigarette manufacturers. The Commission notes that it is not a signatory to that agreement, and has never *required* statements of tar and nicotine yields in cigarette advertisements. *See* Brief of the United States as Amicus Curiae in Support of Respondent, *Altria Group, Inc. v. Good*, No. 07–562 (U.S. Sup. Ct. June 2008).

[35] For example, broad, unqualified claims that emphasize a product feature that may have no relative or actual significance or benefit to consumers, or that fail to disclose information necessary to eliminate a misleading impression, or that deceptively imply a comparative benefit could pose concerns under the FTC Act. *See, e.g.*, Deception Policy Statement, appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984), *cited with approval in Kraft, Inc. v. FTC*, 970 F.2d 314 (7th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993).

[36] *E.g.*, American Academy of Pediatrics, American Legacy Foundation, O'Connor, Brandt.

[37] Liggett, Lorillard, R.J. Reynolds. Philip Morris indicated that it did not address the use of descriptors in its comment in light of the Commission's **Federal Register Notice** and on-going litigation.

[38] *U.S. v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006).

[1] *See* Jerry Markon, *Suit on Tobacco Ads Sparks Feisty Debate*, Washington Post, Oct. 7, 2008, at A02.

[2] *See* Prepared Statement of the Federal Trade Commission Before the Committee on Commerce, Science, and Transportation, United States Senate (November 13, 2007), (*http://www.ftc.gov/os/testimony/P064508tobacco.pdf*).

or endorses the Cambridge Filter Method. The Commission also has clarified that if tobacco firms choose to make claims based on this discredited testing method, these claims will not enjoy any presumption of legitimacy. Going forward, advertisements for cigarettes, like any other ads, will continue to be scrutinized under Section 5 of the FTC Act.

Now that the FTC has removed its apparent imprimatur from the testing method, I urge the scientific community to redouble its efforts. Scientists must develop a test that provides consumers with a meaningful measure of the tar and nicotine yields of the cigarettes they smoke.

More importantly, I urge the next Congress to reintroduce S. 625, the Family Smoking Prevention and Tobacco Control Act. This bill includes several key consumer protection measures. First, the bill allows the Food and Drug Administration to regulate tobacco products. The FDA has lacked any authority in this area for decades, and tobacco manufacturers have exploited the void. The bill would authorize FDA scientists to track, analyze, and regulate the components of tobacco products. If this legislation is enacted, the FDA will wield more effective tools to protect public health.

Second, the bill properly assigns authority to the FDA to issue certain regulations concerning tar and nicotine yields, including requirements governing the methodology for determining tar and nicotine yields and the public disclosure of information about such yields or other constituents of tobacco smoke. For more than 10 years, the Commission has recommended to Congress that one of the government's science-based public health agencies be given jurisdiction over cigarette testing. The FDA clearly has the requisite scientific expertise for this task.

Third, the bill appropriately preserves coordination between the FTC and the FDA in enforcing labeling and marketing requirements. This kind of enforcement is a core element of the FTC's consumer protection mission. The bill wisely preserves the FTC's jurisdiction over unfair or deceptive cigarette advertising.

The regulation of the manufacture, sale, advertising, and marketing of tobacco products is a tall order, but it is crucial to the health of our country, especially its young people. Smoking is a continuing public health crisis. It deserves to be at the top of the new administration's public health agenda.

## CONCURRING STATEMENT OF COMMISSIONER JON LEIBOWITZ

*Regarding Rescission of Guidance on Cigarette Testing Methodology*

Our action today ensures that tobacco companies may not wrap their misleading tar and nicotine ratings in a cloak of government sponsorship. Simply put, the FTC will not be a smokescreen for tobacco companies' shameful marketing practices.

For far too long, tobacco companies have advertised cigarettes using ''light'' and ''low tar'' descriptors based on machine-tested tar and nicotine results while knowing that the cigarettes, when actually smoked by people, would not deliver lower tar or nicotine.[1]

And for far too long, the tobacco industry has attempted to use the FTC imprimatur to imply government endorsement of the tar and nicotine ratings.[2] The implication that this agency had mandated disclosure of the ratings furthered the misconception that the descriptors—and the ratings themselves—said something meaningful about the absolute or relative health characteristics of the cigarettes.[3] To the contrary, the FTC has never required disclosure of tar and nicotine yields, nor authorized the use of descriptors.[4]

There's another benefit to our action today. Efforts to educate consumers about the facts behind cigarette ratings—*i.e.*, that the ratings can't predict the amount of tar and nicotine a smoker gets from any particular cigarette, in part because smokers compensate for the lower tar and nicotine yield by inhaling more deeply and smoking longer[5]—will no longer have to battle a contrary message on cigarette advertisements that may have led to consumer confusion about what the ratings really mean.

After today, there should be no confusion: there is no such thing as a safe—or even a *safer*—cigarette.

[FR Doc. E8–28969 Filed 12–5–08: 8:45 am]

**[Billing Code: 6750–01–S]**

[1] In the U.S. Department of Justice lawsuit against the major tobacco companies under the Racketeer Influenced and Corrupt Organizations Act (''RICO''), U.S. District Court Judge Kessler ruled that the tobacco company defendants had ''falsely marketed and promoted low tar/light cigarettes as less harmful than full-flavor cigarettes in order to keep people smoking and sustain corporate revenues'' and that they ''internally recognized that low tar cigarettes are not less harmful than full-flavor cigarettes.'' *United States v. Philip Morris USA*, 449 F. Supp. 2d 1, 430, 456 (D.D.C. 2006); *see also id.* at 430–561. The case is now on appeal.

[2] For example, in defending against a class action lawsuit against manufacturers of ''light'' and ''low-tar'' cigarettes, Philip Morris wrongly asserted that the FTC ''has required tobacco companies to disclose tar and nicotine yields in cigarette advertising using a government-mandated testing methodology and has authorized them to use descriptors as shorthand references to those numerical test results.'' Brief for Petitioner Philip Morris at 2, *Altria v. Good*, No. 07–562 (U.S. Mar. 31, 2008).

[3] Tobacco company research conducted literally decades ago—which was never presented to the Commission—indicated that lower tested yields did not entail a reduction in smoke intake. Brief for the United States as Amicus Curiae Supporting Respondents at 9, *Altria v. Good*, No. 07–562 (U.S. June 18, 2008). *See also id.* at 9–11 (setting forth instances where tobacco companies failed to disclose to the Commission, or affirmatively downplayed, effects of compensation); *Philip Morris*, 449 F. Supp. 2d at 431 (''Defendants did not disclose the full extent and depth of their knowledge and understanding of smoker compensation to the public health community or to government regulators.'').

[4] *See* Brief for the United States as Amicus Curiae Supporting Respondents at 15, *Altria v. Good*, No. 07–562 (U.S. June 18, 2008).

[5] *E.g.*, FTC Consumer Alert, *Up in Smoke: The Truth About Tar and Nicotine Ratings*, (*www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt069.pdf*) (May 2000).

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2008–N–0038]**

### Risk Communication Advisory Committee; Notice of Meeting

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

*Name of Committee*: Risk Communication Advisory Committee.

*General Function of the Committee*: To provide advice and recommendations to the agency on FDA's regulatory issues.

*Date and Time*: The meeting will be held on February 26, 2009, from 8 a.m. to 5 p.m. and February 27, 2009, from 8 a.m. to 2 p.m.

*Addresses*: Submit electronic comments and information to *http://www.regulations.gov*. Comments are to be identified with the docket number found in brackets in the heading of this document. Written comments should be submitted to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, by close of business on March 31, 2009. All comments received will be posted without change, including any personal information provided. Comments received on or before February 12, 2009, will be provided to the committee before or at the meeting; comments received after that time will still be considered by FDA.

*Location*: National Transportation Safety Board (NTSB) Conference Center, 429 L'Enfant Plaza SW., Washington, DC 20594 (at Metro's L'Enfant Plaza station; parking is limited and public transportation is recommended.)

*Contact Person*: Lee L. Zwanziger, Office of the Commissioner, Office of Policy, Planning and Preparedness, Office of Planning (HFP–60), Food and Drug Administration, 5600 Fishers Lane (for express delivery: rm. 15–22), Rockville, MD, 20857, 301–827–2895, FAX: 301–827–3285, Food and Drug Administration, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 8732112560. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications

that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

*Agenda*: On February 26 and 27, 2009, there will be a discussion of different types of prescription drug information currently available to patients in the form of Medication Guides, Patient Package Inserts (PPIs), and Consumer Medication Information (CMI).

CMI is information developed by the private sector and distributed with each prescription at the pharmacy, as provided by law. On August 6, 1996, Public Law 104–180 was enacted and adopted the following goals with regard to CMI: 75 percent of people receiving new prescriptions would receive ''useful'' written patient information with their prescriptions by 2000, and 95 percent of people receiving new prescriptions would receive ''useful'' written patient information with their prescriptions by 2006. The committee will review and discuss a recently completed survey designed to assess whether the year 2006 goal was achieved (for results, see committee background, to be posted as described in this document). The committee will also discuss possible next steps for assuring that consumers receive useful written information with their prescriptions.

The survey is a followup to the year 2001 evaluation of the quality of consumer medication information dispensed in community pharmacies (*http://www.fda.gov/cder/reports/prescriptionInfo/default.htm*). To assist the private sector in meeting the year 2006 goal, FDA published a guidance on producing ''Useful Written Consumer Medication Information (CMI)'' (*http://www.fda.gov/cder/guidance/7139fnl.htm*).

In 1998, FDA published a final rule that required the development of a Medication Guide for a small number of drugs that the agency considered posed a serious and significant health concern (63 FR 66378, December 1, 1998). A Medication Guide is produced by the drug sponsor, reviewed and approved by FDA and is a component of the approved professional product labeling. An FDA public meeting was held in June 2007 to obtain feedback on the development, distribution, comprehensibility and accessibility of Medication Guides. At that meeting, stakeholders voiced a concern that for prescription drugs with both a Medication Guide and CMI, patients would be getting unnecessarily duplicative information (meeting summary: *http://www.fda.gov/cder/meeting/SummaryPublicHearingMedicationGuides.htm*).

Finally, PPIs are also required for some drugs and are considered part of the approved product labeling, for example, for estrogens and oral contraceptives.

FDA will seek the advice of the advisory committee, and commentary from stakeholders and from the public, for consideration as it considers appropriate next steps to improve the communication of information about prescription drugs to patients.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is or will be available at *http://www.fda.gov/ohrms/dockets/ac/acmenu.htm*, click on the year 2009 and scroll down to the appropriate advisory committee link.

*Procedure*: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before February 19, 2009. Oral presentations from the public will be scheduled between approximately 1 p.m. and 3 p.m. on February 26 and between approximately 10:30 a.m. and 11:30 a.m. on February 27. Those desiring to make formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before February 19, 2009. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by February 20, 2009.

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Lee L. Zwanziger at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/oc/advisory/default.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: November 26, 2008.

**Randall W. Lutter,**

*Deputy Commissioner for Policy.*

[FR Doc. E8–28887 Filed 12–5–08; 8:45 am]

BILLING CODE 4160–01–S

## DEPARTMENT OF THE INTERIOR

### Office of the Secretary

### Privacy Act of 1974; Establishment of a New System of Records

**AGENCY:** Office of the Secretary, Interior.

**ACTION:** Proposed establishment of a new Privacy Act system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974, as amended (5 U.S.C. 552a), the Office of the Secretary of the Department of the Interior is issuing public notice of its intent to establish a new Privacy Act system of records, DOI–84, ''National Business Center Datamart.''

**DATES:** Comments must be received by January 20, 2009.

**ADDRESSES:** Any persons interested in commenting on this new, proposed system of records may do so by submitting comments in writing to the Office of the Secretary Acting Privacy Act Officer, Linda S. Thomas, U.S. Department of the Interior, MS–116 SIB, 1951 Constitution Avenue NW., Washington, DC 20240, or by e-mail to *Linda_Thomas@nbc.gov*.

**FOR FURTHER INFORMATION CONTACT:** Mark Stover, Chief, Applications Management and Technology Branch, National Business Center, U.S. Department of the Interior, 7301 West Mansfield Avenue, Denver, CO 80235–2230 or by e-mail at *Mark_A_Stover@nbc.gov*.

**SUPPLEMENTARY INFORMATION:** The information contained in Datamart is derived from two existing systems

covered by Privacy Act Systems of Records Notices: Federal Personnel and Payroll System (FPPS) covered by DOI–85, ''Payroll, Attendance, Retirement, and Leave Records'' and Federal Financial System (FFS) covered by DOI–90, ''Federal Financial System,'' as well as associated systems. The purpose of the Datamart is to provide a data warehouse that allows appropriate users to access FPPS and FFS data through a core reporting tool, Hyperion. The reports may be pre-formatted or ad hoc, and are available to appropriate users from the Department of the Interior or appropriate individuals from other Federal agencies, as detailed in the routine uses. This notice will be effective as proposed at the end of the comment period unless comments are received which would require a contrary determination. The Department will publish a revised notice if changes are made based upon a review of comments received.

Dated: December 3, 2008.

**Linda S. Thomas,**

*Office of the Secretary Acting Privacy Act Officer.*

**SYSTEM NAME:**

Interior, National Business Center Datamart, DOI–84.

**SYSTEM LOCATION:**

Records are located at the National Business Center, U.S. Department of the Interior, 7301 West Mansfield Avenue, Denver, CO 80235.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEMS:**

(1) Current and former employees of the Department of the Interior.

(2) Current and former emergency workers of the Department of the Interior.

(3) Current and former volunteers within the Department of the Interior (volunteers).

(4) Current and former contractors within the Department of the Interior (contractors).

(5) Individuals identified as emergency contacts for the above employees, emergency workers, and volunteers.

(6) Individual and corporate vendors who do business with the Department of Interior. (Only records containing personal information relating to individuals are subject to the Privacy Act.)

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Employee (and emergency worker, volunteer, contractor and vendor) name, address, phone numbers, birth date; employee (and emergency worker and volunteer) emergency contact information (including name, address, phone numbers and relationship to individual), Social Security Number and organizational code; employee common identifier (ECI); vendor Taxpayer Identification Number; vendor code or number; employee ethnicity/race, pay rate, grade, length of service, individual's pay and leave records; time and attendance records, leave request records, allowances and cost distribution records; employee deductions for Medicare, Old Age Survivor and Disability Insurance (OASDI), bonds, Federal Employees' Group Life Insurance (FEGLI), union dues, taxes, allotments, quarters, retirement, charities, health benefits, Flexible Spending Account, Long Term Care, and Thrift Savings Fund contributions; employee awards, shift schedules, pay differentials, tax lien data, commercial garnishments and child support and/or alimony wage assignments; related payroll and personnel data. Also included is information on debts owed to the government as a result of overpayment, refunds owed or a debt referred for collection on an employee, emergency worker or contractor.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

31 U.S.C. 3512, *et seq.*; 5 U.S.C. 5101, *et seq.*; Pub. L. 97–255; Office of Management and Budget Circular A–127.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

The primary use of records in the system is to provide a repository for data from FPPS (Federal Personnel Payroll System) and FFS (Federal Financial System) that allows agencies to query the data in order to produce required reports in support of fiscal operations and personnel payroll processing.

Disclosure outside the Department of the Interior may be made:

(1) To other Federal agencies to produce required reports, in support of their fiscal and personnel/payroll processing.

(2) (a) To any of the following entities or individuals, when the circumstances set forth in paragraph (b) are met:

(i) The U.S. Department of Justice (DOJ);

(ii) A court or an adjudicative or other administrative body;

(iii) A party in litigation before a court or an adjudicative or other administrative body; or

(iv) Any DOI employee or DOI emergency worker acting in his or her individual capacity if DOI or DOJ or the DOI emergency worker's agency has agreed to represent that individual or pay for private representation of the individual;

(b) When:

(i) One of the following is a party to the proceeding or has an interest in the proceeding:

(A) DOI or any component of DOI;

(B) Any DOI emergency worker's agency;

(C) Any other Federal agency appearing before the Office of Hearings and Appeals;

(D) Any DOI employee or DOI emergency worker acting in his or her official capacity;

(E) Any DOI employee or DOI emergency worker acting in his or her individual capacity if DOI or DOJ or the DOI emergency worker's agency has agreed to represent that individual or pay for private representation of the individual;

(F) The United States, when DOJ determines that DOI or any DOI emergency worker's agency is likely to be affected by the proceeding; and

(ii) DOI or any DOI emergency worker's agency deems the disclosure to be:

(A) Relevant and necessary to the proceeding; and

(B) Compatible with the purpose for which the records were compiled.

(3) To appropriate agencies, entities, and persons when:

(a) It is suspected or confirmed that the security or confidentiality of information in the system of records has been compromised; and

(b) The Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to an economic or property interest, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the Department or another agency or entity) that rely upon the compromised information; and

(c) The disclosure is made to such agencies, entities and persons who are reasonably necessary to assist in connection with the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize or remedy such harm.

(4) To a congressional office in response to a written inquiry that an individual covered by the system, or the heir of such individual if the covered individual is deceased, has made to the office.

(5) To any criminal, civil or regulatory law enforcement authority (whether federal, state, territorial, local, tribal or foreign) when a record, either alone or

in conjunction with other information, indicates a violation or potential violation of law—criminal, civil or regulatory in nature, and the disclosure is compatible with the purpose for which the records were compiled.

(6) To an official of another Federal agency to provide information needed in the performance of official duties related to reconciling or reconstructing data files or to enable that agency to respond to an inquiry by the individual to whom the record pertains.

(7) To Federal, state, territorial, local, tribal or foreign agencies that have requested information relevant or necessary to the hiring, firing or retention of an employee or contractor, or the issuance of a security clearance, license, contract, grant or other benefit, when the disclosure is compatible with the purpose for which the records were compiled.

(8) To representatives of the National Archives and Records Administration to conduct records management inspections under the authority of 44 U.S.C. 2904 and 2906.

(9) To state and local governments and tribal organizations to provide information needed in response to court order and/or for discovery purposes related to litigation, when the disclosure is compatible with the purpose for which the records were compiled.

(10) To an expert, consultant or contractor (including employees of the contractor) of DOI that performs services requiring access to these records on DOI's behalf to carry out the purposes of the system.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Records maintained in the Datamart are electronic and contain information from source systems. They are stored in magnetic media at the central computer processing center. All NIST guidelines, as well as Departmental and OMB guidance are followed concerning the storage of the records.

**RETRIEVABILITY:**

Records may be retrieved by entries reflecting the various categories of records in the system including name of individual, name of emergency contact, Social Security Number, Tax Identification Number, vendor code or number, date of birth, organizational code, etc.

**SAFEGUARDS:**

Electronic records are maintained with safeguards meeting all appropriate statutory and regulatory guidelines, as well as Departmental guidance addressing the security requirements of Departmental Privacy Act Regulations (43 CFR 2.51) for automated records, and with Office of Management and Budget, and NIST. Further, agency officials only have access to records pertaining to their agencies.

(1) Physical security: Computer systems are maintained in locked rooms housed within secure Department of the Interior buildings.

(2) Technical Security: Electronic records are maintained in conformity with Office of Management and Budget and Departmental guidelines reflecting the implementation of the Federal Information Security Management Act. The electronic data are protected through user identification, passwords, database permissions, encryption and software controls. Such security measures establish different degrees of access for different types of users. An audit trail is maintained and reviewed periodically to identify unauthorized access. A Privacy Impact Assessment was completed to ensure that Privacy Act requirements and personally identifiable information safeguard requirements are met.

(3) Administrative Security: All DOI and contractor employees with access to Datamart are required to complete Privacy Act, Federal Records Act and IT Security Awareness training prior to being given access to the system, and on an annual basis thereafter. In addition, Federal employees supervise and monitor the use of Datamart.

**RETENTION AND DISPOSAL:**

Records contained in this system are documented as items 1400 and 7554 of the Department of the Interior, Office of the Secretary's pending records schedule.

**SYSTEM MANAGER AND ADDRESS:**

Chief, Applications Management and Technical Services Branch, National Business Center, U.S. Department of the Interior, 7301 West Mansfield Avenue, Denver, CO 80235–2230.

**NOTIFICATION PROCEDURES:**

Inquiries regarding the existence of records should be addressed to the System Manager. The request must be in writing, signed by the requester, and meet the requirements of 43 CFR 2.60, which requires writing PRIVACY ACT INQUIRY prominently on your envelope and correspondence.

**RECORDS ACCESS PROCEDURES:**

A request for access should be submitted to the System Manager at the above address. It must be submitted in writing, signed by the requester, and meet the requirements of 43 CFR 2.63, which requires writing PRIVACY ACT REQUEST FOR ACCESS prominently on the envelope and the front of the request.

**CONTESTING RECORDS PROCEDURES:**

A petition for amendment should be addressed to the System Manager. The request must be in writing, signed by the requester, and meet the content requirements of 43 CFR 2.71, which include stating the reasons why the petitioner believes the record is in error, and the changes sought.

**RECORD SOURCE CATEGORIES:**

The source data for the system comes from FPPS and FFS.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

[FR Doc. E8–29019 Filed 12–5–08; 8:45 am]

**BILLING CODE 4310–RK–P**

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R9–MB–2008–NO156; 91200–1231–9BPP]**

### Take of Migrant Peregrine Falcons in the United States for Use in Falconry

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of availability.

**SUMMARY:** This notice is to announce the availability of a *Final Environmental Assessment and Management Plan (FEA)* for take of migrant peregrine falcons (*Falco peregrinus*) in the United States for use in falconry.

**ADDRESSES:** The FEA is available from the Division of Migratory Bird Management, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 634, Arlington, VA 22203–1610. You can request a copy of the FEA by calling 703–358–1825. The FEA also is available on the Division of Migratory Bird Management Web site at *http://www.fws.gov/migratorybirds/.*

**FOR FURTHER INFORMATION CONTACT:** Dr. George Allen, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, at 703–358–1825.

**SUPPLEMENTARY INFORMATION:** We published a notice of the availability of a Draft Environmental Assessment on November 13, 2007 (72 FR 63921). We stated in the DEA that our management goal is to allow a reasonable harvest of migrant Northern peregrines while not increasing cumulative harvest of the U.S. portion of the Western or the

Alaskan segment of the Northern population to a harvest rate (defined as the proportion/percentage of fledged young in a given year that are removed by falconers) greater than 5%, and to have a minimal impact on non-target populations by limiting take of peregrines from them to less than 1%.

In the DEA, we considered six alternatives to address potential take of migrant peregrine falcons in the United States and Alaska. Under the No-Action Alternative, no legal take of migrant peregrine falcons for falconry could occur. We also evaluated alternatives that would allow take in different locations and at different times.

Having reviewed the comments on the DEA, we have revised the assessment, have reanalyzed data on North American peregrine falcon migration, and have considered eight alternatives for the harvest of passage peregrines. We analyzed the likely effects of harvest under the eight alternatives using band recovery data for peregrines that had been banded as nestlings and re-encountered during their first year, and the best available conservative estimates of population size for each management population. From these data sets, we estimated the proportion of each management population's first-year cohort that potentially would be exposed to harvest risk annually under each alternative, and, assuming harvest was in proportion to availability, the likely makeup of harvest.

The preferred alternative in our FEA is to allow take of 116 nestling and post-fledging first-year peregrine falcons from the nesting period through 31 August west of 100 degrees W longitude (including Alaska), and allow a take of 36 first-year migrant peregrine falcons between 20 September and 20 October from anywhere in the U.S. east of 100 degrees W longitude. These harvest limits take into account an annual falconry harvest of up to two migrant peregrine falcons in Canada and up to 25 in Mexico, which we believe is consistent with the current harvest in the two countries.

We expect there to be extensive coordination through the flyway councils on matters of harvest allocation among participating States in the U.S. and Mexico, and Canadian provinces. We propose to work with the flyway councils to establish procedures for collection, housing, and assessment of feather samples, and to establish criteria for determining the sex of harvested peregrines. In addition, we propose to monitor the number, sex, and geographic distribution of peregrines that are harvested to ensure compliance with the frameworks in the proposed action. We will work through the flyway councils, or take regulatory actions, to resolve issues of non-compliance.

Future population surveys may identify changes in population size or productivity values from those reported here. We will review population and harvest data for Canada, the U.S., and Mexico every five years, or at the request of the flyway councils, to reassess the allowable harvest limits. If, during one of these reviews, we determine that *F. p. anatum* is no longer formally considered threatened or endangered by the Canadian Wildlife Service in Canada, and if the Atlantic and Mississippi flyway councils have determined that peregrines from the Eastern management population no longer warrant special protection, we may consider a more liberal take of migrants.

Dated: November 20, 2008.

**Kenneth Stansell,**

*Director, U.S. Fish and Wildlife Service.*

[FR Doc. E8–29011 Filed 12–5–08; 8:45 am]

BILLING CODE 4310–55–P

## DEPARTMENT OF THE INTERIOR

### Bureau of Indian Affairs

### Jena Band of Choctaw Indians Liquor Control Ordinance

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Notice.

**SUMMARY:** This notice publishes the Liquor Control Ordinance of the Jena Band of Choctaw Indians. The Ordinance regulates and controls the possession, sale, and consumption of liquor within the tribal lands. The tribal lands are located in Indian Country and this Ordinance allows for possession and sale of alcoholic beverages within their boundaries. This Ordinance will increase the ability of the tribal government to control the tribe's liquor sales, distribution and possession, and at the same time will provide an important source of revenue for the continued operation and strengthening of the tribal government and the delivery of tribal services.

**DATES:** *Effective Date:* This Ordinance is effective January 7, 2009.

**FOR FURTHER INFORMATION CONTACT:** Chanda M. Joseph, Tribal Operations Officer, Eastern Regional Office, 545 Marriott Drive, Suite 700, Nashville, TN 37214, Telephone (615) 564–6750; or Elizabeth Colliflower, Office of Tribal Services, 1849 C Street, NW., Mail Stop 4513–MIB, Washington, DC 20240; Telephone (202) 513–7640; Fax (202) 501–0679.

**SUPPLEMENTARY INFORMATION:** Pursuant to the Act of August 15, 1953, Public Law 83–277, 67 Stat. 586, 18 U.S.C. 1161, as interpreted by the Supreme Court in *Rice* v. *Rehner*, 463 U.S. 713 (1983), the Secretary of the Interior shall certify and publish in the **Federal Register** notice of adopted liquor ordinances for the purpose of regulating liquor transactions in Indian Country. The Tribal Council for the Jena Band of Choctaw Indians adopted this Liquor Code on June 14, 2007. The purpose of this Ordinance is to govern the sale, possession and distribution of alcohol within the tribal lands of the Jena Band of Choctaw Indians. This notice is published in accordance with the authority delegated by the Secretary of the Interior to the Assistant Secretary-Indian Affairs. I certify that this Liquor Control Ordinance of the Jena Band of Choctaw Indians was duly adopted by the Tribal Council for the Jena Band of Indians on June 14, 2007.

Dated: November 24, 2008.

**George T. Skibine,**

*Acting Deputy Assistant Secretary for Policy and Economic Development.*

The Jena Band of Choctaw Indians Liquor Control Ordinance reads as follows:

**The Jena Band of Choctaw Indians**

**Liquor Control Ordinance**

**Article I—Title**

This Ordinance shall be known as the ''Jena Band of Choctaw Indians Liquor Control Ordinance.''

**Article II—Authority**

This Ordinance is enacted pursuant to the Act of August 15, 1953 (Pub. L. 83–277, 67 Stat. 686, 18 U.S.C. 1161), the Constitution of the Jena Band of Choctaw Indians (the ''Constitution''), and the Tribe's inherent sovereign authority. The Tribal Council, as the governing body of the Tribe, is empowered pursuant to Article VIII, Section 1(j) and Section 1(l), respectively, of the Constitution to ''[p]romote and protect the health, peace, morals, education, and general welfare of the tribe and its members;'' and to ''[e]stablish policies relating to tribal economic affairs and enterprises consistent with this Constitution.'' Furthermore, the Tribal Council is empowered pursuant to Article VIII, Section 1(o) and Section 1(n), respectively, to ''[p]ass any ordinance and/or resolution necessary or incidental to the exercise of any of the foregoing powers and duties'' and to

''[t]ax and regulate the activities of all persons or entities within Indian Country as permitted by law and to provide for the raising of revenue to meet the needs of the Tribe or to support Tribal governmental operations.''

**Article III—Public Policy and Purpose**

In order to protect the health, safety, and social welfare of the members of the Jena Band of Choctaw Indians and the patrons of businesses located on Tribal Lands, and be consistent with the principles enunciated by the United States Supreme Court in *United States* v. *Montana*, 101 S. Ct. 1245 (1981), the Tribe, as an exercise of sovereign authority and self-determination, has enacted this Ordinance to regulate the introduction, possession, and sale of Liquor on Tribal Lands.

The purpose of this Ordinance is to authorize, regulate, and control the introduction, possession, and sale of Liquor on the Tribal Lands of the Jena Band of Choctaw Indians in accordance with Federal law, the laws of the State of Louisiana, and the laws of the Jena Band of Choctaw Indians. The enactment of this Ordinance will enhance the ability of the Tribal government to control all Liquor related activities within the jurisdiction of the Tribe. This Ordinance is enacted in conjunction with the laws of the State of Louisiana applicable to the sale and distribution of Liquor pursuant to 18 U.S.C. 1161.

**Article IV—Scope**

This Ordinance applies to all Tribal Lands, as defined herein. This Ordinance shall extend to all Persons, as defined herein, receiving or requiring Licenses hereunder, or doing business on Tribal Lands, or having significant contacts within Tribal Lands, or residing within Tribal Lands, or entering into or coming within Tribal Lands, or consuming, possessing, manufacturing, or distributing Liquor within Tribal Lands. All such Persons shall be deemed to have consented to the jurisdiction of the Tribe, and shall, by virtue of such actions, be deemed to have waived all defenses to the jurisdiction and venue of the Tribe, the Tribal Gaming Commission, and the Tribal Court, notwithstanding that such Persons may be of non-Indian descent or character. Any sale or other commercial distribution of Liquor within Tribal Lands, other than sales and distribution in strict compliance with this Ordinance, is detrimental to the health, safety and welfare of the members of the Tribe and others and is therefore prohibited.

**Article V—Definitions**

As used in this Ordinance, the following definitions shall apply:

(a) *Alcohol* has the same meaning as the term ''Liquor'' as herein defined by this Ordinance.

(b) *Alcoholic Beverage or Beverages* has the same meaning as the term ''Liquor'' as herein defined by this Ordinance.

(c) *Bar* means any establishment with special space and accommodations for sale by the glass and for consumption on the premises, ''Liquor'', as herein defined.

(d) *Beer* means any beverage obtained by the alcoholic fermentation of an infusion or decoction of pure hops, or pure extract of hops and pure barley malt or other wholesome grain or cereal in pure water containing not more than four percent (4%) of Alcohol by volume. For the purpose of this Ordinance, any such beverage, including ale, stout, and porter, containing more than four percent (4%) of Alcohol by weight shall be referred to as ''strong beer.''

(e) *Gaming Facility* means a building or buildings and accessory improvements located on Tribal Land, as defined herein, and used in the operation of Class II or Class III Gaming, as applicable, including all land upon which the building or buildings are situated that is appropriated for the use of the Gaming Facility, together with all parts of the Gaming Site and all related appurtenances and fixtures, including any ancillary or related hotel, resort or entertainment facilities.

(f) *Gaming Site* or *Site* means the tract or tracts of Tribal Land upon which a Gaming Facility is located.

(g) *License* means a liquor license duly issued by the Tribal Gaming Commission pursuant to this Ordinance.

(h) *Liquor* means the four varieties of Liquor herein defined (Alcohol, Spirits, Wine and Beer), and all fermented spirituous, vinous, or malt liquor or combinations thereof and mixed liquor, or a part of which is fermented, spirituous, vinous, or malt liquor, or otherwise intoxicating; and every other liquid or solid or semisolid or other substance, patented or not, containing Alcohol, Spirits, Wine or Beer, and all drinks or drinkable liquids and all preparations or mixtures capable of human consumption, and any liquid, semisolid, solid, or other substances that contains more than one percent (1%) of Alcohol by weight, shall be conclusively deemed to be intoxicating.

(i) *Liquor Store* means any store at which Liquor is sold and, for the purpose of this Ordinance; including any store only a portion of which is devoted to the sale of Liquor or Beer.

(j) *Licensed Wholesaler* means a wholesale seller of Liquor that is duly licensed by the Tribe and the State.

(k) *Malt liquor* means Beer, strong beer, ale, stout and porter.

(l) *Management Contractor* means a Person (other than the Tribe) holding a management contract entered into pursuant to 25 U.S.C. 2710(d)(9) or 2711 and approved by the National Indian Gaming Commission pursuant to Part 532 (Approval of Management Contracts), Title 25, Code of Federal Regulations.

(m) *Ordinance* means this Jena Band of Choctaw Indians Liquor Control Ordinance.

(n) *Package* means any container or receptacle used for holding Liquor.

(o) *Patron* means a person visiting premises licensed pursuant to this Ordinance and having the intent to purchase any goods or services for sale to the general public therein.

(p) *Person* means any natural person, partnership, corporation, limited liability company, association, other statutory business entity and any sovereign.

(q) *Public Place* means any location or premises on Tribal Lands to which the general public has unrestricted access and includes gaming facilities and commercial or community facilities of every nature which are open to and/or are generally used by the public and to which the public is permitted to have unrestricted access; public conveyances of all kinds and character; and all other places of like or similar nature to which the general public has unrestricted access, and which generally are used by the public.

(r) *Sale and Sell* means any exchange, barter, and traffic; and also includes the selling of or supplying or distributing, by any means whatsoever, of liquor, or of any liquid known or described as beer or by any name whatsoever commonly used to describe malt or brewed liquor, or of wine, by any person to any person.

(s) *Special Event* means any social, charitable or for-profit discreet activity or event conducted by the Tribal Council or any Tribal enterprise on Tribal Lands at which Liquor is sold or is proposed to be sold.

(t) *Spirits* means any beverage, which contains alcohol obtained by distillation; including wines exceeding seventeen percent (17%) of alcohol by weight.

(u) *State* means the State of Louisiana and any of its agencies or instrumentalities.

(v) *State Law* means the duly enacted applicable laws and regulations of the State of Louisiana, specifically, Title 26

and Title 55 of Louisiana Revised Statutes—Alcoholic Beverages, as amended from time to time.

(w) *Tribal Council* means the governing body of the Tribe as defined in the Constitution.

(x) *Tribal Court* means a court duly constituted under the Constitution of the Jena Band of Choctaw Indians, together with all tribunals provided for the appeal of the decisions of such court under Federal law.

(y) *Tribal Enterprise* means any business entity, operation or enterprise owned, in whole or in part, by the Tribe.

(z) *Tribal Gaming Commission* means the Jena Band Tribal Gaming Commission established pursuant to the Jena Band of Choctaw Indians Gaming Ordinance for the purpose of performing regulatory oversight and to monitor compliance with tribal, Federal, and State regulations, including this Ordinance.

(aa) *Tribal Lands* mean all land over which the Tribe exercises governmental power and that is held in trust by the United States for the benefit of either the Tribe or individual members of the Tribe.

(bb) *Tribe or Tribal* means or refers to the Jena Band of Choctaw Indians, which is recognized by the Secretary of the Department of the Interior of the United States as eligible for the special programs and services provided by the United States to Indians because of their status as Indians and recognized as possessing powers of self-government.

(cc) *Wine* means any alcoholic beverage obtained by fermentation of any fruits (grapes, berries, apples, etc.), or fruit juice, and containing not more than seventeen percent (17%) of alcohol by weight, including sweet wines fortified with wine spirits, such as port, sherry, muscatel and angelica, not exceeding seventeen percent (17%) of alcohol by weight.

**Article VI—Powers of Enforcement**

The Tribal Gaming Commission is hereby delegated primary regulatory authority over the subject matter of this Ordinance. The Tribal Gaming Commission, in furtherance of this Ordinance, has the following powers and duties:

(a) To promulgate, publish and enforce such reasonable rules and regulations regarding the purchase, sale, consumption and distribution of alcoholic beverages in public places on Tribal Lands, as the Tribal Gaming Commission deems necessary.

(b) To employ managers, accountants, security personnel, inspectors and such other persons as shall be reasonably necessary to allow the Tribal Gaming Commission or its designee(s) to perform its functions and exercise its authority as set forth in this Ordinance, and such employees shall be tribal employees.

(c) To issue Licenses permitting the introduction, possession, sale and/or distribution of Liquor on Tribal Lands.

(d) To hold hearings on violations of this Ordinance or for the issuance, suspension, or revocation of Licenses for the sale of Liquor on Tribal Lands;

(e) To bring suit in Tribal Court, in the name of the Tribe to enforce this Ordinance as the Tribal Gaming Commission may deem to be necessary;

(f) To determine and seek damages and collect civil fines imposed by the Tribal Gaming Commission for violation of this Ordinance;

(g) To publish notices and, in the case of any Tribal Council designee(s), make such reports to the Tribal Council as may be appropriate;

(h) To collect sales taxes and fees levied or set by the Tribal Council on liquor sales and the issuance of liquor licenses, and to keep accurate records, books and accounts;

(i) To take or facilitate all action necessary to follow or implement applicable provisions of the laws of the State as required;

(j) To cooperate with appropriate State of Louisiana authorities for purposes of prosecution of any violation of any criminal law of the State of Louisiana; and

(k) To exercise such other powers as may be necessary and appropriate, and in the case of any Tribal Council designee(s), delegated from time to time by the Tribal Council, to implement and enforce this Ordinance.

In the exercise of its powers and duties under this Ordinance, the Tribal Gaming Commission and its individual members, employees and agents shall not:

(a) Accept any gratuity, compensation or other thing of value from any liquor wholesaler, retailer or distributor, or from any licensee; or

(b) Waive the immunity of the Tribe from suit except by express resolution of the Tribal Council, such waiver being subject to the following limitations: The waiver must be transaction specific, limited as to duration and beneficiary, include a provision that limits recourse only to specified assets or revenues of the Tribe or a Tribal entity, and specify the process and venue for dispute resolution, including applicable law.

**Article VII—Application Requirements**

In order to control the proliferation of establishments within Tribal Lands that sell or provide Liquor, all persons or entities that desire to sell Liquor, whether wholesale or retail, within the exterior boundaries of the Tribal Lands must apply to the Tribal Gaming Commission for a license to sell or provide Liquor; provided, however, that no License is necessary to provide Liquor within a private single-family residence on the Tribal Lands for which no money is requested or paid.

Any person applying for a License to sell or provide Liquor on Tribal Lands shall complete and submit an application provided for this purpose by the Tribal Gaming Commission and pay such application fee as may be set from time to time by the Tribal Gaming Commission, and approved by the Tribal Council, for this purpose. An incomplete application will not be considered.

An application to sell or provide Liquor within Tribal Lands shall be submitted to the Tribal Gaming Commission, in triplicate; and application forms shall consist of the following:

(a) The application shall set forth the name of the applicant organization; and

(b) The application shall attach the ordinance(s) and resolution(s) under which the applicant organization is chartered and regulated; and

(c) The application shall describe specifically the land or building where the applicant organization will sell intoxicating beverages or beer; and

(d) The application shall conform to the requirements of the laws of the State as they relate to obtaining of liquor licenses elsewhere in the State.

The Tribal Gaming Commission may reject any application for a License, or for a renewal of a License, under this Ordinance, if the applicant previously has committed acts which have resulted in the suspension or revocation of a License under this Ordinance.

**Article VIII—Licensing**

In the event dual Tribal and State licenses are required by State Law, no person shall be allowed or permitted to sell or provide Liquor on the Tribal Lands unless such person is also licensed by the State, as required, to sell or provide such Liquor. If any such license from the State is revoked or suspended, any applicable Tribal License shall automatically be revoked or suspended.

Licenses for the sale of Liquor issued by the Tribal Gaming Commission shall contain the following requirements:

(a) Each license shall require its holder to conform its operations to State Law that relate to the sale or possession of Liquor;

(b) No license shall be effective for a term more than one year from the date of its issuance, and each renewal thereof shall be subject to the same procedures that apply the initial issuance of a license;

(c) Each license shall explicitly state that its continued validity is dependent upon the compliance of its holder with all provisions of this Ordinance and State Law that relates to the sale or possession of Liquor and, if applicable, a Tribal-State Gaming Compact or Class III Gaming Procedures issued by the Secretary of the Department of the Interior.

The Tribal Gaming Commission may issue a License if it believes such issuance is in the best interests of the Tribe, the residents of the Tribal Lands, and the surrounding community. Licensure is a privilege, not a right, and the decision to issue any License rests in the sole discretion of the Tribal Gaming Commission. Licenses issued by the Tribal Gaming Commission shall not be transferable and may only be utilized by the person or entity in whose name it was issued.

The public places on or within which Liquor is sold or distributed on Tribal Lands shall be open for inspection by the Tribal Gaming Commission or its designee(s) at all reasonable times for the purposes of ascertaining compliance with this Ordinance and other regulations promulgated pursuant hereto.

**Article IX—Liquor Sales**

All Liquor sales shall be on Tribal Land, including leases thereon and shall be on a cash only basis. No credit shall be extended to any person, organization or entity, except that this provision does not prevent the payment for purchases with the use of cashiers or personal checks, payroll checks, debit credit cards or credit cards issued by any financial institution.

Except for sales by Licensed Wholesalers, all sales shall be for the personal use and consumption of the purchaser or members of the purchaser's household, including guests, who are over the age of twenty-one (21). Resale of any Alcoholic Beverage purchased within the exterior boundaries of the Tribal Lands is prohibited. Any person who is not licensed pursuant to this Ordinance who purchases an Alcoholic Beverage within the Tribal Lands and re-sells it, whether in the original container or not, shall be guilty of a violation of this Ordinance and shall be subject to exclusion from the Tribal Lands or liability for money damages of up to five hundred dollars ($500), as determined by the Tribal Gaming Commission after notice and an opportunity to be heard.

All distribution, sale and consumption of Liquor within the Tribal Lands shall be in compliance with this Ordinance and all applicable provisions of State Law.

**Article X—Revocation Authority**

The Tribal Gaming Commission shall have the authority to revoke any License issued under this Ordinance, under the following procedures:

(a) Upon receiving information that the holder of a License under this Ordinance may have violated the terms of the License or applicable State Law or Tribal Law, the Tribal Gaming Commission shall give the License holder written notice that the Tribal Gaming Commission intends to suspend or revoke the holder's License. Such notice shall be sent by certified mail, return receipt requested, to the License holder, and shall specify the grounds for the proposed suspension or revocation.

(b) Any License holder who receives notice of a proposed suspension or revocation may request a hearing by the Tribal Gaming Commission, by sending a written request therefore by certified mail, return receipt requested, to the Chairman of the Tribal Gaming Commission at the Tribal Gaming Commission Office, within seven (7) days of the License holder's receipt of notice.

(c) Upon receipt of a request for hearing under this Ordinance, the Tribal Gaming Commission shall set a date for a hearing, which shall be no later than thirty (30) days from the date of the receipt of the hearing request.

(d) At a hearing held under this Ordinance, the holder of a License under this Ordinance shall be permitted to present evidence with respect to its compliance with the terms of its License and applicable State Law and Tribal Law. In reaching its decision, the Tribal Gaming Commission may consider such evidence, together with all other evidence it deems relevant. Following a hearing, if in the judgment of the Tribal Gaming Commission, the License holder has not complied with the terms of its License and applicable State Law and Tribal Law, the Tribal Gaming Commission shall suspend or revoke its License; and if in the judgment of a Tribal Court, and if not yet established the Tribal Council, the terms of the License and applicable State Law and Tribal Law have been complied with, the proceedings shall be dismissed. In either case, the decision of the Tribal Gaming Commission shall be final.

**Article XI—Taxes**

The Tribal Gaming Commission shall have the authority to impose a sales tax on all wholesale and retail Liquor sales that take place within the Tribal Lands. Such tax may be implemented by duly enacted resolution of the Tribal Gaming Commission, as supplemented by regulations adopted by the Tribal Gaming Commission pursuant to this Ordinance. Any tax imposed by authority of this Article shall apply to all retail and wholesale sales of Liquor Tribal Lands, and to the extent permitted shall preempt any tax imposed on such Liquor sales by the State of Louisiana.

All taxes imposed pursuant to this Article XI shall be paid over to the Jena Band of Choctaw Indians and be subject to distribution by the Tribal Council in accordance with its usual appropriation procedures for essential governmental functions and social services, including administration of this Ordinance.

**Article XII—Use of Proceeds**

The gross proceeds collected by the Tribe from all Licensing of the sale of Alcoholic Beverages within the Tribal Lands and from fines imposed as a result of violations of this Ordinance, shall be applied as follows:

(a) First, for the payment of all necessary personnel, administrative costs, and legal ees incurred in the enforcement of this Ordinance; and

(b) Second, the remainder shall be turned over to the General Fund of the Tribe and expended by the Tribal Council for governmental services and programs on the Reservation.

**Article XIII—Miscellaneous Provisions**

If any provision or application of this Ordinance is determined by judicial review to be invalid, such provision shall be deemed ineffective and void, but shall not render ineffectual the remaining portions of this Ordinance, which shall remain in full force and effect.

This Ordinance shall be effective as of the date on which the Secretary of the Department of the Interior certifies this Ordinance and publishes the same in the **Federal Register**.

Any and all prior resolutions, laws, regulations or ordinances pertaining to the subject matter set forth in this Ordinance are hereby rescinded and repealed in their entirety.

All acts and transactions under this Ordinance shall be in conformity with the laws of the State of Louisiana to the extent required by 18 U.S.C. 1161 and with all federal laws regarding alcohol in Indian Country.

**Article XIV—Amendments**

This Ordinance may be amended only pursuant to a duly enacted Tribal Council Resolution with certification by the Secretary of the Department of the Interior and publication in the **Federal Register**, if required.

**Article XV—Sovereign Immunity**

Nothing contained in this Ordinance is intended to nor does it in any way limit, alter, restrict, or waive the Tribe's sovereign immunity from unconsented suit or action.

[FR Doc. E8–29024 Filed 12–5–08; 8:45 am]

BILLING CODE 4310–4J–P

## DEPARTMENT OF THE INTERIOR

### Bureau of Indian Affairs

### Skokomish Liquor Control Ordinance

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Notice.

**SUMMARY:** This notice publishes an amendment to the Skokomish Indian Tribe's Liquor Control Ordinance published in the **Federal Register** November 3, 1983 (48 FR 50797). The amendment regulates and controls the possession and consumption of liquor within the tribal lands. The tribal lands are located in Indian country and this amended Ordinance allows for possession of alcoholic beverages within their boundaries. This Ordinance will increase the ability of the tribal government to control liquor sales, possession and consumption by the community and its members.

**DATES:** *Effective Date:* This Ordinance is effective on January 7, 2009.

**FOR FURTHER INFORMATION CONTACT:** Betty Scissons, Tribal Government Services Officer, Northwest Regional Office, 911 NE 11th Ave., 8th Floor, Portland, OR 97232, Telephone: (503) 231–6723, Fax (503) 231–2189; or Elizabeth Colliflower, Office of Indian Services, 1849 C Street, NW., Mail Stop 4513–MIB, Washington, DC 20240, *Telephone:* (202) 513–7640.

**SUPPLEMENTARY INFORMATION:** Pursuant to the Act of August 15, 1953, Public Law 83–277, 67 Stat. 586, 18 U.S.C. 1161, as interpreted by the Supreme Court in *Rice* v. *Rehner,* 463 U.S. 713 (1983), the Secretary of the Interior shall certify and publish in the **Federal Register** notice of adopted or amended liquor ordinances for the purpose of regulating liquor transactions in Indian country. The Skokomish Indian Tribe amended its Tribal Liquor Control Ordinance by Resolution No. 08–011 on February 20, 2008. The purpose of this Ordinance is to govern the sale and possession of alcohol within tribal lands of the Tribe. This notice is published in accordance with the authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs. I certify that the amended Skokomish Indian Tribe's Liquor Control Ordinance was duly adopted by the Skokomish Indian Tribe's Tribal Council on February 20, 2008.

Dated: November 24, 2008.

**George T. Skibine,**

*Acting Deputy Assistant Secretary for Policy and Economic Development.*

The amended Skokomish Indian Tribe's Liquor Control Ordinance reads as follows:

**Skokomish Liquor Control Ordinance**

*General Provisions*

4.05.001 Title

This Ordinance shall be known as the Skokomish Liquor Control Ordinance.

4.05.002 Authority

This Ordinance is enacted by the Skokomish Tribal Council, the governing body of the Skokomish Indian Tribe, which has the authority to enact laws and ordinances governing the conduct of individuals and defining offenses against the Tribe; to maintain order and to protect the safety and welfare of all persons within the Skokomish Tribe's jurisdiction pursuant to the Constitution of the Skokomish Indian Tribe Article IV, Section 1; Article V, Section 1(j).

4.05.003 Findings

(a) The introduction, possession and sale of Liquor on Indian reservations have, since Treaty time, been clearly recognized as matters of special concern of Indian tribes and the United States Federal Government. The control of Liquor on reservations and federal trust land remains exclusively subject to their legislative enactments.

(b) Federal law currently prohibits the introduction of Liquor into Indian Country (18 U.S.C. 1154), and expressly delegates to tribes the decision regarding when and to what extent Liquor transactions shall be permitted (18 U.S.C. 1161).

(c) Present day circumstances make a complete ban on Liquor within the Skokomish Indian Reservation ineffective and unrealistic. However, a need still exists for strict regulation and control over Liquor transactions within the Reservation because of the many potential problems associated with the unregulated or inadequately regulated sale, possession and consumption of Liquor. The Tribal Council finds that exclusive tribal control and regulation of Liquor is necessary to achieve maximum economic benefit to the Tribe, to protect the health and welfare of the tribal members, and to address specific tribal concerns relating to Alcohol use on the Reservation.

(d) The enactment of a tribal ordinance governing Liquor sales on the Skokomish Indian Reservation and providing for exclusive purchase and sale through a tribally owned and operated establishment will enhance the ability of the tribal government to control Reservation Liquor distribution and possession, and, at the same time, will provide an important source of revenue for the continued operation of the tribal government and the delivery of essential tribal social services.

4.05.004 Purpose

Tribal regulation of the sale, possession, and consumption of Liquor on the Skokomish Indian Reservation is necessary to protect the health, security, and general welfare of the Skokomish Indian Tribe. In order to further these goals and to provide for an urgently needed additional source of governmental revenue, the Skokomish Tribal Council adopts this Liquor Ordinance to be known as the ''Skokomish Liquor Control Ordinance.'' This Ordinance shall be liberally construed to fulfill the purposes for which it has been adopted.

4.05.005 Jurisdiction

(a) *General Jurisdiction.* The provisions of this Ordinance shall apply to the fullest extent of the sovereign jurisdiction of the Skokomish Indian Tribe as authorized by the Tribe's Constitution, the Treaty of Point No Point and applicable federal law.

(b) *Civil Jurisdiction.* The Skokomish Tribal Court shall have exclusive jurisdiction to enforce the provisions of this Ordinance.

(c) *Disclaimer.* Nothing in this Ordinance shall be construed to require or authorize the criminal trial and punishment by the Skokomish Tribal Court of any non-Indian except to the extent allowed by any applicable present or future Act of Congress or any applicable decision of the United States Supreme Court.

4.05.006 Severability

If any provision or application of this Ordinance is determined by review to be invalid, such adjudication shall not be held to render ineffectual the remaining portions of this Ordinance or

to render such provisions inapplicable to other persons or circumstances.

4.05.007 Effective Date

This Ordinance shall be effective upon certification by the Secretary of the Interior and its publication in the **Federal Register**.

4.05.008 Inconsistent Enactments Rescinded

Any and all prior enactments of the Skokomish Tribal Council, which are inconsistent with the provisions of this Ordinance, are hereby rescinded.

4.05.009 Conformity with Tribal Constitution

All provisions of, acts and transactions under this Ordinance shall at all times comply with the Constitution of the Skokomish Indian Tribe.

4.05.010 Sovereign Immunity Preserved

Nothing in this Ordinance is intended or shall be construed as a waiver of the sovereign immunity, rights, powers or privileges of the Skokomish Indian Tribe.

4.05.011 Application of 18 U.S.C. § 1161

All acts and transactions under this Ordinance shall be in conformity with this Ordinance and in conformity with the laws of the State of Washington as that term is used in 18 U.S.C. 1161.

4.05.012 Amendment

This Ordinance may only be amended by a vote of the Board.

4.05.013 Definitions

(a) *Alcohol* means that substance known as ethyl alcohol, hydrated oxide of ethyl, or Spirits of Wine, which is commonly produced by the fermentation or distillation of grain, starch, molasses or sugar, or other substances including all methods of production, dilutions and mixtures of this substance.

(b) *Alcoholic Beverage* is synonymous with the term Liquor as defined in Section 4.05.013(f) of this Ordinance.

(c) *Beer* means any beverage obtained by the alcoholic fermentation of an infusion or decoction of pure hops, or pure extract of hops and pure barley malt or other wholesome grain or cereal in pure water containing not more than four percent of Alcohol by volume. For the purposes of this title, any such beverage, including ale, stout, and porter, containing more than four percent of Alcohol by weight shall be referred to as ''strong Beer.''

(d) *Board* means the Skokomish Indian Liquor Board as constituted under this Ordinance.

(e) *Gross Profits* means total sales revenue less the cost of goods sold, no adjustment being made for additional expenses and taxes.

(f) *Liquor* includes the four varieties of Liquor herein defined (Alcohol, Spirits, Wine and Beer), and all fermented spirituous, vinous, or Malt Liquor or combinations thereof, and mixed Liquor, a part of which is fermented, spirituous, vinous, or Malt Liquor, or otherwise intoxicating; and every liquid or solid or semi-solid or other substance, patented or not, containing Alcohol, Spirits, Wine or Beer, and all drinks or drinkable liquids and all preparations or mixtures capable of human consumption and any liquid, semi-solid, solid, or other substance, which contains more than one percent of Alcohol by weight shall be conclusively deemed to be intoxicating.

(g) *Malt Liquor* means Beer, strong Beer, ale, stout, and porter.

(h) *Package* means any container or receptacle used for holding Liquor.

(i) *Public Place* includes state or county or tribal or federal highways or roads; buildings and grounds used for school purposes: Public dance halls and grounds adjacent thereto; soft drink establishments, public buildings, public meeting halls, lobbies, halls and dining rooms of hotels, restaurants, theaters, gaming facilities, entertainment centers, stores, garages, and filling stations which are open to and/or are generally used by the public and to which the public is permitted to have unrestricted access, and which are generally used by the public. For the purpose of this Ordinance, *Public Place* shall also include any establishment other than a single-family home, which is designed for or may be used by more than just the owner of the establishment.

(j) *Sale* and *Sell* include exchange, barter, and traffic; and also include the selling or supplying or distributing, by any means whatsoever, of Liquor, or of any liquid known or described as Beer or by any name whatsoever commonly used to describe Malt or brewed Liquor, or of Wine, by any person to any person.

(k) *Spirits* means any beverage, which contains Alcohol obtained by distillation, including Wines exceeding seventeen percent of Alcohol by weight.

(l) *Taxpayer* means one who pays or is subject to a tax.

(m) *Tribal Council* means the governing body of the Skokomish Indian Tribe.

(n) *Tribal Liquor Store* means any store, wholly owned by the Tribe at which Liquor is sold at retail and, for the purpose of this Ordinance, includes stores only a portion of which are devoted to the sale of Liquor.

(o) *Tribe* means the Skokomish Indian Tribe.

(p) *Wine* means any Alcoholic beverage obtained by fermentation of fruits (grapes, berries, apples, etc.) or other agricultural product containing sugar, to which any saccharine substances may have been added before, during, or after fermentation, and containing not more than seventeen percent Alcohol by weight, including sweet Wines fortified with Wine Spirits, such as port, sherry, muscatel, and angelica, not exceeding seventeen percent Alcohol by weight.

*Skokomish Indian Liquor Board*

4.05.014 Liquor Agency Created (REPEALED)

4.05.015 Skokomish Indian Liquor Board

(a) *Liquor Board Established—Composition.* There is hereby established a Skokomish Indian Liquor Board. The members of the Skokomish Tribal Council shall serve as the Skokomish Indian Liquor Board.

(b) *Powers of the Liquor Board.* The Board is empowered to:

(1) Administer this Ordinance by exercising general control, management, and supervision of all Liquor sales, places of sale, and sales outlets as well as exercising all powers necessary to accomplish the purposes of this Ordinance;

(2) Adopt and enforce rules and regulations in furtherance of the purposes of this Ordinance and the performance of its administrative functions;

(3) (REPEALED);

(4) Bring suit in the appropriate court to enforce the provisions of this Ordinance with the consent of the Skokomish Tribal Council. The Board shall not, without the specific consent of the Council, waive the Board's or the Tribe's immunity from suit.

4.05.016 Liquor Business Manager (REPEALED)—Liquor Sales

4.05.017 Only Tribal Sales Allowed

No sales of Alcoholic Beverages shall be made within the exterior boundaries of the Skokomish Indian Reservation, except at a Tribal Liquor Store or other Public Place wholly owned by the Tribe and authorized to sell Liquor.

4.05.018 All Sales Cash

All sales at Tribal Liquor Stores shall be on a cash only basis and no credit shall be extended to any person, organization, or entity except that this

provision does not prevent the payment for purchases with the use of a consumer credit or debit card issued by a federally chartered bank.

4.05.019 All Sales for Personal Use

All sales shall be for the personal use of the purchaser, and resale for profit of an Alcoholic Beverage purchased at a Tribal Liquor Store is prohibited within the exterior boundaries of the Skokomish Indian Reservation. The purchase of an Alcoholic Beverage at a tribal store and subsequent resale of that beverage for profit, whether in the original container or not, shall be a violation of this Ordinance and the violator shall be subject to the penalties prescribed in Section 4.05.027.

4.05.020 Tribal Property

The entire stock of Liquor and Alcoholic Beverages referred to under this Ordinance shall remain tribal property, owned and possessed by the Skokomish Indian Tribe until sold.

*Taxation and Proceeds*

4.05.021 Tax Imposed

There is hereby levied and shall be collected the following taxes:

(a) On each retail sale of Spirits within the exterior boundaries of the Skokomish Indian Reservation, a tax at the rate of 5% of the retail sales price; and

(b) On each retail sale of Beer and Wine within the exterior boundaries of the Skokomish Indian Reservation, a tax at the rate of 1%.

4.05.022 Taxes Due

All taxes for the sale of Liquor and Alcoholic Beverages on the Skokomish Indian Reservation are due on the 15th day of the month following the end of the fiscal quarter for which taxes are due.

(a) *Delinquent Taxes.* Past due taxes shall accrue interest at 2% per month.

(b) *Mandatory Reporting.* In addition to payment of taxes imposed herein, the Taxpayer shall submit a quarterly accounting of all income from the sale or distribution of Liquor as well as for the taxes collected and remitted.

(c) *Annual Audit Required.* The Taxpayer shall audit, on an annual basis, all Gross Proceeds from Liquor sales including tax assessed, overhead costs and the net proceeds distributed to the general fund of the Tribe as required in Section 4.05.023 of this Ordinance.

4.05.023 Distribution of Taxes

All taxes from the sale of Liquor on the Skokomish Indian Reservation by or through the Board shall be paid over to the tax fund of the Skokomish Indian Tribe and be subject to distribution by the Skokomish Tribal Council in accordance with its usual appropriation procedures for essential governmental and social services. Provided, however, that priority in funding shall be given to those tribal programs which demonstrate greatest need and past successful performance in providing community services to tribal members.

4.05.024 Distribution of Gross Profits

The Gross Profits collected by the Taxpayer for all sales of Liquor within the exterior boundaries of the Skokomish Indian Reservation shall be distributed as follows:

(a) For the payment of taxes provided in Section 4.05.021 of this Ordinance;

(b) For the payment of all necessary personnel, administrative costs, and legal fees directly related to the sale of Liquor;

(c) The remainder shall be turned over to the general fund of the Skokomish Indian Tribe on a monthly or other periodic payment schedule established by the Board and shall be expended by the Tribal Council for the general governmental services of the Tribe.

*Illegal Activities*

4.05.025 Violations

(a) *Liquor Stamp—Contraband.* It shall be a violation of this Ordinance for any person to sell Alcoholic Beverages within the exterior boundaries of the Skokomish Indian Reservation without a stamp of the Board affixed to the Package. All Alcoholic Beverages not so stamped which are sold or held for sale on the Skokomish Indian Reservation are hereby declared contraband and, in addition to any penalties or fines imposed by the Court for violation of this section, shall be confiscated and forfeited in accordance with the procedures set out in Rule 3.01.065 of the Skokomish Tribal Court Rules of Civil Procedure (S.T.C. 3.01.065)

(b) *Use of Seal.* It shall be a violation of this Ordinance for any person, other than an employee of the Board, to willfully keep or have in his possession, any legal seal prescribed under this Ordinance unless the same is attached to a Package which has been purchased from a Tribal Liquor Store, or to willfully keep or have in his possession any design in imitation of any official seal prescribed under this Ordinance or calculated to deceive by its resemblance to any official seal, or any paper upon which such design is stamped, engraved, lithographed, printed or otherwise marked.

(c) *Illegal Sale of Liquor by Drink or Bottle.* It shall be a violation of this Ordinance for any person to sell by the drink or bottle any Liquor, except as otherwise provided in this Ordinance.

(d) *Illegal Transportation, Still, or Sale without Permit.* It shall be a violation of this Ordinance for any person to sell or offer for sale or transport in any manner, any Liquor in violation of this Ordinance, or to operate or have in his possession without a permit, any mash capable of being distilled into Liquor.

(e) *Illegal Purchase of Liquor.* It shall be a violation of this Ordinance for any person within the exterior boundaries of the Skokomish Indian Reservation to buy Liquor from any person other than at a properly authorized Tribal Liquor Store or Public Place wholly owned by the Tribe.

(f) *Illegal Possession of Liquor—Intent to Sell.* It shall be a violation of this Ordinance for any person to keep or possess Liquor upon his person or in any place or on premises conducted or maintained by him as a principal or agent with the intent to sell it contrary to the provisions of this Ordinance.

(g) *Sales to Persons Apparently Intoxicated.* It shall be a violation of this Ordinance for any person to sell Liquor to a person apparently under the influence of Liquor.

(h) *Possession and Use of Liquor by Minors.* Except in the case of Liquor given or permitted to be given to a person under the age of twenty-one (21) years by his parent or guardian, for beverage or medicinal purposes, or administered to him by his physician or dentist for medicinal purposes, it shall be a violation of this Ordinance for any person under the age of twenty-one (21) to consume, acquire, or have in his possession any Alcoholic Beverages except when such beverage is being used in connection with religious services.

(i) *Furnishing Liquor to Minors.* It shall be a violation of this Ordinance for any person to permit any other person under the age of twenty-one (21) to consume Liquor on his premises or on any premises under his control, except in those special situations set forth in Section 4.05.024(h) above.

(j) *Sales of Liquor to Minors.* It shall be a violation of this Ordinance for any person to sell any Liquor to any person under the age of twenty-one (21) years.

(k) *Unlawful Transfer of Identification.* It shall be a violation of this Ordinance for any person to transfer in any manner an identification of age to a minor for the purpose of permitting such minor to obtain Liquor. Provided, that corroborative testimony of a witness other than the minor shall be a requirement for conviction.

(l) *Possession of False or Altered Identification.* It shall be a violation of this Ordinance for any person to attempt to purchase an Alcoholic Beverage through the use of false or altered identification, which falsely purports to show the individual to be over the age of twenty-one (21) years.

*Enforcement*

4.05.026 Proof of Unlawful Sale—Intent

In any proceeding under this Ordinance, proof of one unlawful sale of Liquor shall suffice to establish *prima facie* the intent or purpose of unlawfully keeping Liquor for sale in violation of this Ordinance.

4.05.027 Civil Penalties

Any person adjudged to be in violation of this Ordinance shall be subject to a civil penalty of not more than Five Hundred Dollars ($500.00) for each such violation. The Board may adopt by separate rule or regulation a schedule of fines for each type of violation, taking into account its seriousness and the threat it may pose to the general health and welfare of tribal members. Such schedule may also provide, in the case of repeated violations, for imposition of monetary penalties greater than the Five Hundred Dollar ($500.00) limitation set forth above. The penalties provided for herein shall be in addition to any criminal penalties, which may hereafter be imposed by separate chapter or provision of the Skokomish Tribal Code.

4.05.028 Identification—Proof of Minimum Age

Where there may be a question of a person's right to purchase Liquor by reason of his age, such person shall be required to present any one of the following officially issued cards of identification which shows correct age and bears his signature and photograph:

(a) Liquor control authority card of identification of any state; or

(b) Driver's license of any state or an identification card issued by any State Department of Motor Vehicles; or

(c) United States Active Duty Military identification; or

(d) Passport; or

(e) Point-No-Point or other treaty area identification cards.

4.05.029 Illegal Items Declared Contraband

Alcoholic Beverages which are possessed contrary to the terms of this section are declared to be contraband. Any tribal law enforcement officer who issues a citation under this section shall seize all contraband, which he or she shall have the authority to seize consistent with the Skokomish Constitution and the applicable provisions of 25 U.S.C. 1302.

4.02.030 Preservation and Forfeiture

Any tribal law enforcement officer seizing contraband shall preserve the contraband by placing it in a secured area provided for storage of impounded property and shall promptly prepare an inventory in accordance with Civil Rule 3.01.065 of the Skokomish Tribal Court Rules. Upon entry of judgment, the person adjudged to be in violation of this Ordinance shall forfeit all right, title, and interest in the items seized, which shall be disposed of in accordance with Civil Rule 3.01.065(h) of the Skokomish Tribal Court Rules. Provided, however, that the items so forfeited shall not be sold to any person not entitled to possess them under applicable law.

4.05.0031 Abatement

(a) *Declaration of Common Nuisance.* Any room, house, building, boat, vessel, vehicle, structure, or other place where Liquor is sold, manufactured, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this Ordinance or of any other tribal law relating to the manufacture, importation, transportation, possession, distribution, and sale of Liquor, and all property kept in and used in maintaining such place, are hereby declared to be a common nuisance.

(b) *Institution of Action.* The Chairman of the Board shall institute and maintain an action in the Tribal Court in the name of the Tribe to abate and perpetually enjoin any nuisance declared under this title. The plaintiff shall not be required to give bond in the action, and restraining orders, temporary injunctions, and permanent injunctions may be granted in the cause as in other injunction proceedings, and upon final judgment against the defendant, the court may also order the room, house, building, boat, vessel, vehicle, structure, or place closed for a period of one (1) year or until the owner, lessee, tenant, or occupant thereof shall give bond of sufficient surety to be approved by the Court in the sum of not less than One Thousand Dollars ($1,000.00), payable to the Tribe and conditioned that Liquor will not be thereafter manufactured, kept, sold, bartered, exchanged, given away, furnished, or otherwise disposed of thereof in violation of the provisions of this Ordinance or other tribal Liquor laws. If any condition of the bond be violated, the whole amount may be recovered as a penalty for the use of the Tribe. Any action taken under this section shall be in addition to any other penalties provided for in this Ordinance.

(c) *Prima Facie Evidence of Common Nuisance.* In all cases where any person has been adjudged to be in violation of this Ordinance or tribal laws relating to the manufacture, importation, transportation, possession, distribution, and sale of Liquor, an action may be brought in Tribal Court to abate as a nuisance any real estate or other property involved in the commission of the offense, and in any such action a certified copy of the record of such judgment shall be admissible in evidence as *prima facie* evidence that the room, house, vessel, boat, building, vehicle, structure, or place against which such action is brought is a public nuisance.

[FR Doc. E8–29025 Filed 12–5–08; 8:45 am]

**BILLING CODE 4310–4J–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Indian Affairs

### The Confederated Tribes of the Grand Ronde Community of Oregon

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Notice.

**SUMMARY:** This notice publishes an amendment to the Tribal Code (Code), Liquor Ordinance, for the Confederated Tribes of the Grand Ronde Community of Oregon first published in the **Federal Register** July 1, 1996. The amendment regulates and controls the possession and consumption of liquor within the tribal lands. The tribal lands are located in Indian country and this amended Code allows for possession of alcoholic beverages within their boundaries. This Code will increase the ability of the tribal government to control liquor possession, sale and in the community.

**DATES:** *Effective Date:* This Ordinance is effective on December 8, 2008.

**FOR FURTHER INFORMATION CONTACT:** Betty Scissons, Tribal Government Services Officer, Northwest Regional Office, 911 NE 11th Ave., 8th Floor, Portland, OR 97232, Telephone: (503) 231–6723, Fax (503) 231–2189; or Elizabeth Colliflower, Office of Indian Services, 1849 C Street, NW., Mail Stop 4513–MIB, Washington, DC 20240, Telephone: (202) 513–7640.

**SUPPLEMENTARY INFORMATION:** Pursuant to the Act of August 15, 1953, Public Law 83–277, 67 Stat. 586, 18 U.S.C. 1161, as interpreted by the Supreme

Court in *Rice* v. *Rehner,* 463 U.S. 713 (1983), the Secretary of the Interior shall certify and publish in the **Federal Register** notice of adopted liquor ordinances for the purpose of regulating liquor transactions in Indian country. The Confederated Tribes of the Grand Ronde Community of Oregon amended the liquor control section of its Tribal Code by Resolution No. 101–08 on June 18, 2008. The purpose of this amended code is to govern the possession of alcohol within tribal lands of the Tribe.

This notice is published in accordance with the authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs. I certify that this Liquor Control Ordinance of the Code of the Confederated Tribes of the Grand Ronde Community of Oregon was duly adopted by the Tribal Council, on June 18, 2008.

Dated: November 24, 2008.

**George T. Skibine,**

*Acting Deputy Assistant Secretary for Policy and Economic Development.*

The Confederated Tribes of the Grand Ronde Community of Oregon Liquor Control Code reads as follows:

**The Confederated Tribes of the Grand Ronde Community of Oregon**

**Liquor Ordinance**

*Tribal Code § 760*

(a) *Authority and Purpose:*

(1) The authority for the Ordinance and its adoption by Tribal Council is found in the Tribal Constitution under Article III, Section 1, and in the Act of August 15, 1953, Public Law 83–277, 18 U.S.C. 1161.

(2) This Ordinance is for the purpose of regulating the sale, possession and use of alcoholic liquor on the Grand Ronde Reservation and other lands subject to Tribal jurisdiction.

(b) Definitions:

To the extent that definitions are consistent with tribal or federal law, terms used herein shall have the same meaning as defined in Oregon Revised Statutes Chapter 471, and in Oregon Administrative Rules Chapter 845.

(1)''Alcoholic liquor'' shall mean any alcoholic beverage containing more than one-half of one percent alcohol by volume, and every liquid or solid, patented or not, containing alcohol and capable of being consumed by a human being.

(2)''Grand Ronde Reservation'' shall mean all lands held in trust by the United States for the Tribe or its members and all lands owned by the Tribe, wherever located.

(3) Whenever the words ''sell'' or ''to sell'' refer to anything forbidden by this Chapter and related to alcoholic liquor, they include:

(A) To solicit or receive an order.

(B) To keep or expose for sale.

(C) To deliver for value or in any way other than purely gratuitously.

(D) To peddle.

(E) To keep with intent to sell.

(F) To traffic in.

(G) For any consideration, promise or obtained directly or indirectly under any pretext or by any means or procure or allow to be procured for any other person.

(4) The word ''sale'' includes every act of selling as defined in subsection 3 of this section.

(c) *Prohibited Activity:*

(1) It shall be unlawful for any person to sell, trade or manufacture any alcoholic liquor on the Grand Ronde Reservation except as provided for in this Ordinance.

(2) It shall be unlawful for any business establishment or person on the Grand Ronde Reservation to possess, transport or keep with intent to sell, barter or trade to another, any liquor, except for those commercial liquor establishments on the Grand Ronde Reservation licensed by the Tribe, provided, however, that a person may transport liquor from a licensed establishment consistent with the terms of the license.

(3) It shall be unlawful for any person to consume alcoholic liquor on a public highway.

(4) It shall be unlawful for any person to publicly consume any alcoholic liquor at any community function, or at or near any place of business, Indian celebration grounds, recreational areas, including ballparks, and public camping areas, the Tribal Headquarters area and any other area where minors gather for meetings or recreation, except within a tribally licensed establishment where alcohol is sold.

(5) It shall be unlawful for any person under the age of 21 years to buy, attempt to buy or to misrepresent their age in attempting to buy, alcoholic liquor. It shall be unlawful for any person under the age of 21 years to transport, possess or consume any alcoholic liquor on the Grand Ronde Reservation, or to be under the influence of alcohol or to be at an established commercial liquor establishment, except as authorized under Section (e) of this Ordinance. No person shall sell or furnish alcoholic liquor to any minor.

(6) Alcoholic liquor may not be given as a prize, premium or consideration for a lottery, contest, game of chance or skill, or competition of any kind.

(d) *Procedure for License:*

(1) Any request for a license under this Ordinance must be presented to the Tribal Council at least 30 days prior to the requested effective date. Tribal Council shall set license conditions at least as strict as those required by federal law, including at a minimum:

(A) Liquor may only be served and handled in a manner no less strict than allowed under Oregon Revised Statutes Chapter 471.

(B) Liquor may only be served by staff of the licensee; and

(C) Liquor may be served in rooms where gambling is taking place if authorized by Tribal Council resolution.

(2) Council action on a license request must be taken at a regular or special meeting. Unless the request is for a special event license, the Council shall give at least 14 days' notice of the meeting at which the request will be considered. Notice shall be posted at the Tribal Council offices and at the establishment requesting the license, and will be sent by Certified Mail to the Oregon Liquor Control Commission.

(e) *Sale or Service of Liquor by Licensee's Minor Employees:*

(1) The holder of a license issued under this Ordinance or Oregon Revised Statutes Chapter 472 may employ persons 18, 19 and 20 years of age who may take orders for, serve and sell alcoholic liquor in any part of the licensed premises when that activity is incidental to the serving of food except in those areas classified by the Oregon Liquor Control Commission as being prohibited to the use of minors. However, no person who is 18, 19 or 20 years of age shall be permitted to mix, pour or draw alcoholic liquor except when pouring is done as a service to the patron at the patron's table or drawing is done in a portion of the premises not prohibited to minors.

(2) Except as stated in this section, it shall be unlawful to hire any person to work in connection with the sale and service of alcoholic beverages in a tribally licensed liquor establishment if such person is under the age of 21 years.

(f) *Warning Signs Required.*

(1) Any person in possession of a valid retail liquor license, who sells liquor by the drink for consumption on the premises or sells for consumption off the premises, shall post a sign informing the public of the effects and risks of alcohol consumption during pregnancy.

(2) The sign shall:

(A) Contain the message: ''Pregnancy and alcohol do not mix. Drinking alcoholic beverages, including wine, coolers and beer, during pregnancy can cause birth defects.''

(B) Be either:

(i) A large sign, no smaller than eight and one-half inches by 11 inches in size

with lettering no smaller than five-eighths of an inch in height; or

(ii) A reduced sign, five by seven inches in size with lettering of the same proportion as the large sign described in paragraph (a) of this subsection.

(C) Contain a graphic depiction of the message to assist nonreaders in understanding the message. The depiction of a pregnant female shall be universal and shall not reflect a specific race or culture.

(D) Be in English unless a significant number of the patrons of the retail premises use a language other than English as a primary language. In such cases, the sign shall be worded both in English and the primary language or languages of the patrons.

(E) Be displayed on the premises of all licensed retail liquor premises as either a large sign at the point of entry, or a reduced sized sign at points of sale.

(3) The person described in subsection (1) of this section shall also post signs of any size at places where alcoholic beverages are displayed.

(g) *Civil Penalty:*

(1) Any person who violates the provisions of this Ordinance is deemed to have consented to the jurisdiction of the Tribal Court and may be subject to a civil penalty in Tribal Court for a civil infraction. Such civil penalty shall not exceed the sum of $1,000 for each such infraction, provided, however, that the penalty shall not exceed $5,000 if it involves minors.

(2) The procedures governing the adjudication in Tribal Court of such civil infractions shall be those set out in the Trial Court rules.

(3) The Tribal Council hereby specifically finds that such civil penalties are reasonably necessary and are related to the expense of governmental administration necessary in maintaining law and order and public safety on the Reservation and in managing, protecting and developing the natural resources on the Reservation. It is the legislative intent of the Tribal Council that all violations of this Chapter, whether committed by tribal members, non-member Indians, or non-Indians, be considered civil in nature rather than criminal.

(h) *Severability:*

(1) If a court of competent jurisdiction finds any provision of this Ordinance to be invalid or illegal under applicable Federal or Tribal law, such provision shall be severed from this Ordinance and the remainder of this Ordinance shall remain in full force and effect.

(i) *Consistency with State Law:*

(1) The Tribe will comply with Oregon Liquor Laws to the extent required by 18 U.S.C. 1161.

(j) *Effective Date:*

(1) This Ordinance shall be effective upon publication in the **Federal Register** after approval by the Secretary of the Interior or his designee.

I certify this to be a true copy of the Confederated Tribes of the Grand Ronde Community of Oregon Liquor Ordinance.

Jack Giffen, Jr.
*Tribal Council Secretary.*

[FR Doc. E8–29023 Filed 12–5–08; 8:45 am]

**BILLING CODE 4310–4J–P**

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## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[ID–111–1610–DR–049D]**

### Notice of Availability of the Record of Decision for the Snake River Birds of Prey National Conservation Area Resource Management Plan, Idaho

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of availability.

**SUMMARY:** The Bureau of Land Management (BLM) announces the availability of the Record of Decision (ROD) for the Snake River Birds of Prey National Conservation Area (NCA) Resource Management Plan (RMP) located in Southwestern Idaho.

**ADDRESSES:** Copies of the ROD are available upon request from Boise District, Bureau of Land Management, 3948 Development Ave., Boise, Idaho 83705, phone 208–384–3300. Copies can also be downloaded in their entirety at *http://www.blm.gov/id/.*

**FOR FURTHER INFORMATION CONTACT:** John Sullivan, NCA Manager, BLM Four Rivers Field Office, 3948 Development Ave., Boise, Idaho 83705; phone 208–384–3300; e-mail *John_Sullivan@blm.gov*.

**SUPPLEMENTARY INFORMATION:** In accordance with the Federal Land Policy and Management Act of 1976 (FLPMA, 43 U.S.C. 1701 *et seq.*), the BLM prepared the NCA RMP to address management of approximately 484,000 acres of public land along 81 miles of the Snake River. The NCA was established on August 4, 1993, by Public Law 103–64 for the conservation, protection, and enhancement of the natural and environmental resources and values associated with the area, including raptor populations and habitats. The NCA RMP replaces portions of the 1983 Kuna Management Framework Plan (MFP), 1983 Bruneau MFP, 1987 Jarbidge RMP, 1988 Cascade RMP, and 1999 Owyhee RMP that affect the NCA, and replaces the 1996 Snake River Birds of Prey NCA Management Plan.

The NCA RMP enhances the protection of remaining shrub communities through aggressive wildfire suppression; the restoration of up to 130,000 acres of shrub habitat; the completion of up to 100,000 acres of fuels management projects; the modification of Idaho Army National Guard training activities by limiting vehicle maneuver training to non-shrub communities, and providing 4,100 acres of additional maneuver training area; and the identification of area designations (i.e., livestock grazing, vehicle use, right-of-way avoidance, and utility corridors). The approved RMP is the same as Alternative D displayed in the Proposed RMP/Final EIS published in February 2008 with minor modifications and clarifications resulting from changes in the status of federally listed threatened and endangered species. In addition, the area known as Pasture 8B of the Battle Creek Allotment is no longer listed as closed to grazing, but may be grazed at BLM's discretion, under contract or as temporary non-renewable forage, for the purpose of meeting specific NCA resource management objectives, including weed reduction, hazardous fuels management, and ecological improvement. These minor modifications and clarifications did not result in substantial changes to the proposed action.

All protests received by the BLM regarding the RMP have been addressed. No inconsistencies with State or local plans, policies, or programs were identified during the Governor's consistency review of the proposed RMP.

**Thomas H. Dyer,**
*Idaho State Director, Bureau of Land Management.*

[FR Doc. E8–28967 Filed 12–5–08; 8:45 am]

**BILLING CODE 4310–GG–P**

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## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[LNV912000–L12200000.PH0000; 09–0887; TAS: 14X1109]**

### Call for Nominations for the Sierra Front-Northwestern Great Basin Resource Advisory Council, Nevada

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of Call for Nominations for Resource Advisory Committee.

**SUMMARY:** The Bureau of Land Management (BLM) Carson City District Office is soliciting nominations for one representative who works or teaches at a college in Nevada as an academician in natural resource management or the natural sciences, to serve on its Sierra Front-Northwestern Great Basin Resource Advisory Council (RAC) for the 2009–2011 three-year term. Individuals may nominate themselves or others. Nominees must be residents of Nevada, and will be evaluated based on their education, training, experience, and their knowledge of northeastern Nevada. Nominees should have demonstrated a commitment to collaborative resource decision making.

**DATES:** A 45-day nomination period will close January 22, 2009.

**ADDRESSES:** Nomination packages for the Sierra Front-Northwestern Great Basin RAC position should be mailed to the Bureau of Land Management, Carson City District Office, Attn: Mark Struble, 5665 Morgan Mill Road, Carson City, NV 89701.

**FOR FURTHER INFORMATION CONTACT:** Mark Struble, (775) 885–6107 or *Mark_Struble@blm.gov*.

**SUPPLEMENTARY INFORMATION:** The Federal Land Policy and Management Act (FLPMA) directs the Secretary of Interior to involve the public in planning and issues related to management of lands administered by BLM. Section 309 of FLPMA directs the Secretary to select 10 to 15 member citizen-based advisory councils that are established and authorized consistent with the requirements of the Federal Advisory Committee Act (FACA). As required by the FACA, RAC membership must be balanced and representative of the various interests concerned with the management of the public lands.

All nominations must include letters of reference from represented interests or organizations, a completed background information nomination form, as well as any other information that speaks to the nominee's qualifications. For questions about the application process or to request a nomination form, call Mark Struble. Nomination forms are also available online at: *http://www.blm.gov/nv.*

Nominees should live within the geographical area encompassed by the Sierra Front-Northwestern Great Basin RAC, which advises BLM on operations in Washoe, Humboldt, Pershing, Churchill, Storey, Douglas, Lyon, Mineral and Carson City counties. The RAC provides advice and recommendations to the Secretary of the Interior, through the BLM district managers and state director regarding the management of public lands within the Council's geographic area. The RAC will meet several times a year, usually quarterly, in the Carson City and Winnemucca areas.

Dated: December 1, 2008.

**Ron Wenker,**

*State Director, Nevada.*

[FR Doc. E8–28995 Filed 12–5–08; 8:45 am]

BILLING CODE 4310–HC–P

## DEPARTMENT OF THE INTERIOR

### Minerals Management Service

**[Docket No. MMS–2008–OMM–0028]**

### MMS Information Collection Activity: 1010–0072, Prospecting for Minerals Other Than Oil, Gas, and Sulphur; Submitted for Office of Management and Budget (OMB) Review; Comment Request

**AGENCY:** Minerals Management Service (MMS), Interior.

**ACTION:** Notice of extension of an information collection (1010–0072).

**SUMMARY:** To comply with the Paperwork Reduction Act of 1995 (PRA), we are notifying the public that we have submitted to OMB an information collection request (ICR) to renew approval of the paperwork requirements in the regulations under 30 CFR 280, ''Prospecting for Minerals other than Oil, Gas, and Sulphur on the Outer Continental Shelf,'' and related documents. This notice also provides the public a second opportunity to comment on the paperwork burden of these regulatory requirements.

**DATES:** Submit written comments by January 7, 2009.

**ADDRESSES:** You should submit comments directly to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for the Department of the Interior (1010–0072), either by fax (202) 395–6566 or e-mail (*OIRA_DOCKET@omb.eop.gov*).

Please also send a copy to MMS by either of the following methods:

- *http://www.regulations.gov.* Under the tab ''More Search Options,'' click Advanced Docket Search, then select ''Minerals Management Service'' from the agency drop-down menu, then click ''submit.'' In the Docket ID column, select MMS–2008–OMM–0028 to submit public comments and to view supporting and related materials available for this rulemaking. Information on using *Regulations.gov*, including instructions for accessing documents, submitting comments, and viewing the docket after the close of the comment period, is available through the site's ''User Tips'' link. Submit comments to *regulations.gov* by January 7, 2009. The MMS will post all comments.
- Mail or hand-carry comments to the Department of the Interior; Minerals Management Service; Attention: Cheryl Blundon; 381 Elden Street, MS–4024; Herndon, Virginia 20170–4817. Please reference ''Information Collection 1010–0072'' in your subject line and mark your message for return receipt. Include your name and return address in your message text.

**FOR FURTHER INFORMATION CONTACT:** Cheryl Blundon, Regulations and Standards Branch, (703) 787–1607. You may also contact Cheryl Blundon to obtain a copy, at no cost, of the regulations and form that requires the subject collection of information.

**SUPPLEMENTARY INFORMATION:**

*Title:* 30 CFR 280, Prospecting for Minerals other than Oil, Gas, and Sulphur on the Outer Continental Shelf.

*Form:* MMS–134.

*OMB Control Number:* 1010–0072.

*Abstract:* The Outer Continental Shelf (OCS) Lands Act, as amended (43 U.S.C. 1331 *et seq.* and 43 U.S.C. 1801 *et seq.*), authorizes the Secretary of the Interior (Secretary) to prescribe rules and regulations to administer leasing of the OCS. Section 1337(k) of the OCS Lands Act authorizes the Secretary ''* * * to grant to the qualified persons offering the highest cash bonuses on a basis of competitive bidding leases of any mineral other than oil, gas, and sulphur in any area of the outer Continental Shelf not then under lease for such mineral upon such royalty, rental, and other terms and conditions as the Secretary may prescribe at the time of offering the area for lease.'' An amendment to the OCS Lands Act (Pub. L. 103–426) authorizes the Secretary to negotiate agreements (in lieu of the previously required competitive bidding process) for the use of OCS sand, gravel, and shell resources for certain specified types of public uses. The specified uses will support construction of governmental projects for beach nourishment, shore protection, and wetlands enhancement; or any project authorized by the Federal Government.

Section 1340 states that ''* * * any person authorized by the Secretary may conduct geological and geophysical explorations in the [O]uter Continental Shelf, which do not interfere with or endanger actual operations under any lease maintained or granted pursuant to this Act, and which are not unduly harmful to aquatic life in such area.''

The section further requires that permits to conduct such activities may only be issued if it is determined that: The applicant is qualified; the activities are not polluting, hazardous, or unsafe; they do not interfere with other users of the area; and do not disturb a site, structure, or object of historical or archaeological significance.

Section 1352 further requires that certain costs be reimbursed to the parties submitting required G&G information and data. Under the Act, permittees are to be reimbursed for the costs of reproducing any G&G data required to be submitted. Permittees are to be reimbursed also for the reasonable cost of processing geophysical information required to be submitted when processing is in a form or manner required by the Director and is not used in the normal conduct of the business of the permittee.

Responses are mandatory or required to obtain or retain a benefit. No questions of a sensitive nature are asked. The MMS protects information considered proprietary according to 30 CFR 280.70, applicable sections of 30 CFR parts 250 and 252, and the Freedom of Information Act (5 U.S.C. 552) and its implementing regulations (43 CFR 2). The MMS uses the information: (1) To ensure there is no environmental degradation, personal harm or unsafe operations and conditions; (2) the activities do not damage historical or archaeological sites or interfere with other uses; (3) to analyze and evaluate preliminary or planned drilling activities; (4) to monitor progress and activities in the OCS; (5) to acquire G&G data and information collected under a Federal permit offshore; and (6) to determine eligibility for reimbursement from the Government for certain costs. Respondents are required to submit form MMS–134 to provide the information necessary to evaluate their qualifications. The information is necessary for MMS to determine if the applicants for permits or filers of notices meet the qualifications specified by the Act. The MMS uses the information collected to understand the G&G characteristics of hard mineral-bearing physiographic regions of the OCS. It aids MMS in obtaining a proper balance among the potentials for environmental damage, the discovery of hard minerals, and adverse impacts on affected coastal States. Information from permittees is necessary to determine the propriety and amount of reimbursement.

*Frequency:* On occasion, annual; and as required in the permit.

*Estimated Number and Description of Respondents:* Approximately 3 permittees/respondents.

*Estimated Reporting and Recordkeeping Hour Burden:* The estimated annual hour burden for this information collection is a total of 116 hours. The following chart details the individual components and estimated hour burdens. In calculating the burdens, we assumed that respondents perform certain requirements in the normal course of their activities. We consider these to be usual and customary and took that into account in estimating the burden.

| Citation 30 CFR part 280 | Reporting and recordkeeping requirements | Non-hour cost burden | | |
|---|---|---|---|---|
| | | Hour burden | Average number of annual responses | Annual burden hours |
| 10; 11(a); 12; 13; Permit Form. | Apply for permit (Form MMS–134) to conduct prospecting or G&G scientific research activities, including prospecting/scientific research plan and environmental assessment or required drilling plan. | 8 | 3 permits | 24 |
| | | $2,012 permit application fee × 3 permits = $6,036 | | |
| 11(b); 12(c) | File notice to conduct scientific research activities related to hard minerals, including notice to MMS prior to beginning and after concluding activities. | 8 | 3 notices | 24 |
| 21(a) | Report to MMS if hydrocarbon/other mineral occurrences or environmental hazards are detected or adverse effects occur. | 1 | 1 report | 1 |
| 22 | Request approval to modify operations | 1 | 1 request | 1 |
| 23(b) | Request reimbursement for expenses for MMS inspection. | 1 | 3 requests | 3 |
| 24 | Submit status and final reports on specified schedule. | 8 | 4 reports | 32 |
| 28 | Request relinquishment of permit | 1 | *1 relinquishment | *1 |
| 31(b); 73 | Governor(s) of adjacent State(s) submissions to MMS: Comments on activities involving an environmental assessment; request for proprietary data, information, and samples; and disclosure agreement. | 1 | 3 submissions. | 3 |
| 33, 34 | Appeal penalty, order, or decision—burden covered under 5 CFR 1320.4(a)(2), (c) | | | 0 |
| 40; 41; 50; 51; Permit Form. | Notify MMS and submit G&G data/information collected under a permit and/or processed by permittees or 3rd parties, including reports, logs or charts, results, analyses, descriptions, etc. | 4 | 3 submissions | 12 |
| 42(b); 52(b) | Advise 3rd party recipient of obligations. Part of licensing agreement between parties; no submission to MMS. | 1/3 | 3 notices | 1 |
| 42(c), 42(d); 52(c), 52(d) | Notify MMS of 3rd party transactions | 1 | 1 notice | 1 |

| Citation 30 CFR part 280 | Reporting and recordkeeping requirements | Non-hour cost burden | | |
|---|---|---|---|---|
| | | Hour burden | Average number of annual responses | Annual burden hours |
| 60; 61(a) | Request reimbursement for costs of reproducing data/information & certain processing costs. | 1 | *1 request | *1 |
| 72(b) | Submit in not less than 5 days comments on MMS intent to disclose data/information. | 1 | 3 responses | 3 |
| 72(d) | Contractor submits written commitment not to sell, trade, license, or disclose data/information. | 1 | 3 submissions | 3 |
| Part 280 | General departure and alternative compliance requests not specifically covered elsewhere in part 280 regulations. | 2 | 1 request | 2 |
| Permits** | Request extension of permit time period | 1 | 1 extension | 1 |
| Permits** | Retain G&G data/information for 10 years and make available to MMS upon request. | 1 | 3 respondents | 3 |
| | | | 38 responses | 116 |
| **Total Burden** | | | (1) $6,036 Non-Hour Cost Burdens. | |

* NOTE: No requests received for many years. Minimal burden for regulatory (PRA) purposes only.
** These permits are prepared by MMS and sent to respondents; therefore, the forms themselves do not incur burden hours.

*Estimated Reporting and Recordkeeping "Non-Hour Cost" Burden:* We have identified one non-hour cost burden for this collection. When respondents submit an application for permit (Form MMS–134, Application for Permit to Conduct Geological or Geophysical Prospecting) to conduct prospecting or G&G scientific research activities, they submit a $2,012 fee. Refer to the chart to see these specific fee breakdowns. We have not identified any other non-hour cost burdens associated with this collection of information.

*Public Disclosure Statement:* The PRA (44 U.S.C. 3501, *et seq.*) provides that an agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. Until OMB approves a collection of information, you are not obligated to respond.

*Comments:* Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3501, *et seq.* ) requires each agency "* * * to provide notice * * * and otherwise consult with members of the public and affected agencies concerning each proposed collection of information * * *" Agencies must specifically solicit comments to: (a) Evaluate whether the proposed collection of information is necessary for the agency to perform its duties, including whether the information is useful; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) enhance the quality, usefulness, and clarity of the information to be collected; and (d) minimize the burden on the respondents, including the use of automated collection techniques or other forms of information technology.

To comply with the public consultation process, on June 9, 2008, we published a **Federal Register** notice (73 FR 32595) announcing that we would submit this ICR to OMB for approval. The notice provided the required 60-day comment period. In addition, § 280.80 provides the OMB control number for the information collection requirements imposed by the 30 CFR 280 regulations and form. The regulation also informs the public that they may comment at any time on the collections of information and provides the address to which they should send comments. We have received no comments in response to these efforts.

If you wish to comment in response to this notice, you may send your comments to the offices listed under the **ADDRESSES** section of this notice. The OMB has up to 60 days to approve or disapprove the information collection but may respond after 30 days. Therefore, to ensure maximum consideration, OMB should receive public comments by January 7, 2009.

*Public Availability of Comments:* Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

*MMS Information Collection Clearance Officer:* Arlene Bajusz, (202) 208–7744.

Dated: October 6, 2008.

**E.P. Danenberger,**

*Chief, Office of Offshore Regulatory Programs.*

[FR Doc. E8–29032 Filed 12–5–08; 8:45 am]

**BILLING CODE 4310–MR–P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

### National Register of Historic Places; Notification of Pending Nominations and Related Actions

Nominations for the following properties being considered for listing or related actions in the National Register were received by the National Park Service before November 22, 2008.

Pursuant to section 60.13 of 36 CFR part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St. NW., 2280, Washington, DC 20240; by all other carriers, National Register of Historical Places, National Park Service, 1201 Eye St. NW., 8th floor, Washington DC 20005; or by fax, 202–371–6447. Written

or faxed comments should be submitted by December 23, 2008.

**J. Paul Loether,**

*Chief, National Register of Historic Places/ National Historic Landmarks Program.*

**ALABAMA**

**Mobile County**

Knox, Ross, House, 102 Hillwood Rd., Mobile, 08001252

**ARKANSAS**

**Nevada County**

Prescott Commercial Historic District, Bounded by E. 3rd St., Walnut St., W. 3rd St., and Pine St., Prescott, 08001242

**FLORIDA**

**Glades County**

Red Barn, 3 mi. W of Co. Rd. 721 on Co. Rd. 721A, Okeechobee, 08001243

**Orange County**

Barbour, Robert Bruce, House, 656 Park Ave. N., Winter Park, 08001244

**St. Johns County**

Fort Matanzas NM Headquarters and Visitor Center, (Florida's New Deal Resources MPS) 8635 A1A S., St. Augustine, 08001245

**GEORGIA**

**Habersham County**

Demorest Women's Club, 1035 Central Ave., Demorest, 08001247

**Harris County**

Bethlehem Baptist Church Colored School, 200 Bethlehem Dr., Pine Mountain Valley, 08001246

**Taylor County**

Mauk School, 37 GA 127 S., Mauk, 08001248

**Troup County**

Kidd-Robertson House, 2423 Greenville Rd., LaGrange, 08001249

**ILLINOIS**

**Winnebago County**

Lundberg, Charles, House, 946 N. 2nd St., Rockford, 08001251

**IOWA**

**Benton County**

Herring Hotel, 718 13th St., Belle Plaine, 08001250

**MAINE**

**Cumberland County**

Bailey Island Library Hall, 2167 Harpswell Island Rd., Harpswell, 08001253

**Kennebec County**

Kent Burying Ground, NE corner of Fayette Corner Rd. and Oak Hill Rd., Fayette, 08001254

Winthrop Street Historic District (Boundary Increase), 20 Spring St., Augusta, 08001255

**Lincoln County**

Pythian Opera House, 86 Townsend Ave., Boothbay Harbor, 08001256

**Oxford County**

Forest Lodge, Carry Rd., about 1.9 mi. W. of Middle Dam, Upton, 08001257

**York County**

Biddeford—Saco Mills Historic District, Bounded by Pearl, Lincoln, York and Main Sts., Biddeford, Gooch and Saco Sts., Biddeford, 08001258

**MISSOURI**

**Cape Girardeau County**

Main—Spanish Commercial Historic District, (Cape Girardeau, Missouri MPS) Roughly the 100 blocks of Main and Spanish Sts. and adjacent portions of Themis and Independence, Cape Girardeau, 08001259

**St. Louis County**

Webster Park Residential Historic District, Roughly bounded by Newport, Bompart, E. Lockwood, N. Maple and Glen Rd., Webster Groves, 08001260

**MONTANA**

**Fergus County**

Naylor Brothers Ranch Historic District, 503 E. Dry Creek Rd., Buffalo, 08001261

**NORTH DAKOTA**

**Grand Forks County**

Grand Forks County Fairgrounds WPA Structures, 2300 Gateway Dr., Grand Forks, 08001262

**OREGON**

**Multnomah County**

Pacific Hardware and Steel Company Warehouse, 2181 NW Nicolai St., Portland, 08001263

**Washington County**

Young, John Quincy Adams and Elizabeth, House, 12050 NW Cornell Rd., Portland, 08001264

**PENNSYLVANIA**

**Delaware County**

Woodcrest, 610 King of Prussia Rd., Radnor Township, 08001265

**Lawrence County**

Scottish Rite Cathedral, 110 E. Lincoln Ave., New Castle, 08001266

**Luzerne County**

St. Stanislaus Institute, 141 Old Newport St., Newport Township, 08001267

**Northampton County**

Lutz-Franklin School, (Educational Resources of Pennsylvania MPS) 4216 Countryside La., Lower Saucon Township, 08001268

**Philadelphia County**

Amalgamated Center, 2101–2143 S. St., Philadelphia, 08001269

Wynnestay, 5125 Woodbine Ave., Philadelphia, 08001270

**York County**

York Historic District (Boundary Increase), Edgar and Charles St., MD and PA Railroad, Vander and Church Aves., York, 08001271

**VIRGINIA**

Suffolk Independent City, Somerton Historic District, Arthur Dr., Pittmantown Rd., Boonetown Rd., Suffolk, 08001272

[FR Doc. E8–28905 Filed 12–5–08; 8:45 am]

**BILLING CODE 4310–70–P**

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

### Importer of Controlled Substances; Notice of Registration

By Notice dated July 29, 2008, and published in the **Federal Register** on August 6, 2008, (73 FR 45779), Chattem Chemicals, Inc., 3801 St. Elmo Avenue, Building 18, Chattanooga, Tennessee 37409, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of the basic classes of controlled substances listed in schedule II:

| Drug | Schedule |
|---|---|
| Methamphetamine (1105) | II |
| Phenylacetone (8501) | II |
| Raw Opium (9600) | II |
| Concentrate of Poppy Straw (9670) | II |

The company plans to import the listed controlled substances to manufacture bulk controlled substances for sale to its customers.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and 952(a) and determined that the registration of Chattem Chemicals, Inc. to import the basic classes of controlled substances is consistent with the public interest, and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971, at this time. DEA has investigated Chattem Chemicals, Inc. to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 952(a) and 958(a), and in accordance with 21 CFR 1301.34, the above named company is granted registration as an importer of the basic classes of controlled substance listed.

Dated: November 26, 2008.

**Joseph T. Rannazzisi,**

*Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.*

[FR Doc. E8–28970 Filed 12–5–08; 8:45 am]

BILLING CODE 4410–09–P

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

### Importer of Controlled Substances; Notice of Registration

By Notice dated March 19, 2008 and published in the **Federal Register** on March 28, 2008, (73 FR 16717), Mallinckrodt Inc., 3600 North Second Street, St. Louis, Missouri 63147, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of the basic classes of controlled substances listed in schedule II:

| Drug | Schedule |
|---|---|
| Phenylacetone (8501) | II |
| Coca Leaves (9040) | II |
| Opium, raw (9600) | II |
| Poppy Straw (9650) | II |
| Poppy Straw Concentrate (9670) | II |

The company plans to import the listed controlled substances for the manufacture of controlled substances in bulk for distribution to its customers.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and 952(a) and determined that the registration of Mallinckrodt Inc. to import the basic classes of controlled substances is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971, at this time. DEA has investigated Mallinckrodt Inc. to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 952(a) and 958(a), and in accordance with 21 CFR 1301.34, the above named company is granted registration as an importer of the basic classes of controlled substances listed.

Dated: November 26, 2008.

**Joseph T. Rannazzisi,**

*Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.*

[FR Doc. E8–28985 Filed 12–5–08; 8:45 am]

BILLING CODE 4410–09–P

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

### Importer of Controlled Substances; Notice of Registration

By notice dated February 20, 2008, and published in the **Federal Register** on February 29, 2008 (73 FR 11149), Supernus Pharmaceuticals, 1550 East Gude Drive, Rockville, Maryland 20850, made application to the Drug Enforcement Administration (DEA) to be registered as an importer of the basic classes of controlled substances listed in schedule II:

| Drug | Schedule |
|---|---|
| Oxycodone (9143) | II |
| Morphine (9300) | II |

The company plans to import controlled substances for clinical trials and analytical testing.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and 952(a) and determined that the registration of Supernus Pharmaceuticals to import the basic classes of controlled substances is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971, at this time. DEA has investigated Supernus Pharmaceuticals to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 952(a) and 958(a), and in accordance with 21 CFR 1301.34, the above named company is granted registration as an importer of the basic classes of controlled substances listed.

Dated: November 26, 2008.

**Joseph T. Rannazzisi,**

*Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.*

[FR Doc. E8–28987 Filed 12–5–08; 8:45 am]

BILLING CODE 4410–09–P

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

### Manufacturer of Controlled Substances; Notice of Registration

By Notice dated July 29, 2008, and published in the **Federal Register** on August 6, 2008, (73 FR 45785), American Radiolabeled Chemical, Inc., 101 Arc Drive, St. Louis, Missouri 63146, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances listed in schedules I and II:

| Drug | Schedule |
|---|---|
| Gamma hydroxybutyric acid (2010). | I |
| Ibogaine (7260) | I |
| Lysergic acid diethylamide (7315) | I |
| Tetrahydrocannabinols (7370) | I |
| Dimethyltryptamine (7435) | I |
| 1–[1–(2–Thienyl)cyclohexyl] piperidine (7470). | I |
| Dihydromorphine (9145) | I |
| Normorphine (9313) | I |
| Amphetamine (1100) | II |
| Methamphetamine (1105) | II |
| Amobarbital (2125) | II |
| Phencyclidine (7471) | II |
| Phenylacetone (8501) | II |
| Cocaine (9041) | II |
| Codeine (9050) | II |
| Dihydrocodeine (9120) | II |
| Oxycodone (9143) | II |
| Hydromorphone (9150) | II |
| Ecgonine (9180) | II |
| Hydrocodone (9193) | II |
| Meperidine (9230) | II |
| Metazocine (9240) | II |
| Dextropropoxyphene, bulk (non-dosage forms) (9273). | II |
| Morphine (9300) | II |
| Oripavine (9330) | II |
| Thebaine (9333) | II |
| Oxymorphone (9652) | II |
| Phenazocine (9715) | II |
| Fentanyl (9801) | II |

The company plans to manufacture small quantities of the listed controlled substances as radiolabeled compounds for biochemical research.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and determined that the registration of American Radiolabeled Chemical, Inc. to manufacture the listed basic classes of controlled substances is consistent with the public interest at this time. DEA has investigated American Radiolabeled Chemical, Inc. to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the

company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823, and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic classes of controlled substances listed.

Dated: November 3, 2008.

**Joseph T. Rannazzisi,**

*Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.*

[FR Doc. E8–28999 Filed 12–5–08; 8:45 am]

BILLING CODE 4410–09–P

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

### Manufacturer of Controlled Substances; Notice of Registration

By Notice dated July 30, 2008, and published in the **Federal Register** on August 6, 2008, (73 FR 45785), Austin Pharma, LLC., 811 Paloma Drive, Suite A, Round Rock, Texas 78665–2402, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances listed in schedules I and II:

| Drug | Schedule |
|---|---|
| Marihuana (7360) | I |
| Tetrahydrocannabinols (7370) | I |
| Alphamethadol (9605) | I |
| Nabilone (7379) | II |
| Methadone (9250) | II |
| Methadone Intermediate (9254) | II |
| Levo-alphacetylmethadol (9648) | II |
| Alfentanil (9737) | II |
| Remifentanil (9739) | II |
| Sufentanil (9740) | II |
| Fentanyl (9801) | II |

The company plans to manufacture the listed controlled substances in bulk for distribution to its customers.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and determined that the registration of Austin Pharma, LLC. to manufacture the listed basic classes of controlled substances is consistent with the public interest at this time. DEA has investigated Austin Pharma, LLC. to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823, and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic classes of controlled substances listed.

Dated: November 26, 2008.

**Joseph T. Rannazzisi,**

*Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.*

[FR Doc. E8–28994 Filed 12–5–08; 8:45 am]

BILLING CODE 4410–09–P

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

### Manufacturer of Controlled Substances; Notice of Registration

By Notice dated July 29, 2008, and published in the **Federal Register** on August 6, 2008, (73 FR 45784), Boehringer Ingelheim Chemicals, Inc., 2820 N. Normandy Drive, Petersburg, Virginia 23805, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances listed in schedule II:

| Drug | Schedule |
|---|---|
| Amphetamine (1100) | II |
| Lisdexamfetamine (1205) | II |
| Methylphenidate (1724) | II |
| Methadone (9250) | II |
| Methadone Intermediate (9254) | II |

The company plans to manufacture the listed controlled substances in bulk for sale to its customers for formulation into finished pharmaceuticals.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and determined that the registration of Boehringer Ingelheim Chemicals, Inc. to manufacture the listed basic classes of controlled substances is consistent with the public interest at this time. DEA has investigated Boehringer Ingelheim Chemicals, Inc. to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823, and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic classes of controlled substances listed.

Dated: November 26, 2008.

**Joseph T. Rannazzisi,**

*Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.*

[FR Doc. E8–28993 Filed 12–5–08; 8:45 am]

BILLING CODE 4410–09–P

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

### Manufacturer of Controlled Substances; Notice of Registration

By Notice dated July 28, 2008, and published in the **Federal Register** on August 6, 2008, (73 FR 45784), Chemic Laboratories, Inc., 480 Neponset Street, Building 7, Canton, Massachusetts 02021, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of Cocaine (9041), a basic class of controlled substance listed in schedule II.

The company plans to manufacture small quantities of the above listed controlled substance for distribution to its customers for the purpose of research.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and determined that the registration of Chemic Laboratories, Inc., to manufacture the listed basic class of controlled substance is consistent with the public interest at this time. DEA has investigated Chemic Laboratories to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823, and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic class of controlled substance listed.

Dated: November 26, 2008.

**Joseph T. Rannazzisi,**

*Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.*

[FR Doc. E8–28996 Filed 12–5–08; 8:45 am]

BILLING CODE 4410–09–P

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

### Manufacturer of Controlled Substances; Notice of Registration

By Notice dated July 30, 2008, and published in the **Federal Register** on August 6, 2008, (73 FR 45785), Cody Laboratories, 601 Yellowstone Avenue, Cody, Wyoming 82414, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances listed in schedules I and II:

| Drug | Schedule |
|---|---|
| Dihydromorphine (9145) | I |
| Amphetamine (1100) | II |
| Methamphetamine (1105) | II |
| Amobarbital (2125) | II |
| Pentobarbital (2270) | II |
| Secobarbital (2315) | II |
| Phenylacetone (8501) | II |
| Cocaine (9041) | II |
| Codeine (9050) | II |
| Dihydrocodeine (9120) | II |
| Oxycodone (9143) | II |
| Hydromorphone (9150) | II |
| Diphenoxylate (9170) | II |
| Ecgonine (9180) | II |
| Hydrocodone (9193) | II |
| Meperidine (9230) | II |
| Methadone (9250) | II |
| Morphine (9300) | II |
| Oxymorphone (9652) | II |
| Alfentanil (9737) | II |
| Remifentanil (9739) | II |
| Sufentanil (9740) | II |
| Fentanyl (9801) | II |

The company plans on manufacturing the listed controlled substances in bulk for sale to its customers.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and determined that the registration of Cody Laboratories to manufacture the listed basic classes of controlled substances is consistent with the public interest at this time. DEA has investigated Cody Laboratories to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823, and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic classes of controlled substances listed.

Dated: November 26, 2008.

**Joseph T. Rannazzisi,**

*Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.*

[FR Doc. E8–28992 Filed 12–5–08; 8:45 am]

BILLING CODE 4410–09–P

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

### Manufacturer of Controlled Substances; Notice of Registration

By notice dated February 13, 2008, and published in the **Federal Register** on February 21, 2008, (73 FR 9592), Siemens Healthcare Diagnostics Inc., 100 GBC Drive, Mail Stop 514, Newark, Delaware 19702, made application by letter to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances listed in schedules I and II:

| Drug | Schedule |
|---|---|
| Tetrahydrocannabinols (7370) | I |
| Ecgonine (9180) | II |
| Morphine (9300) | II |

The company plans to produce the listed controlled substances in bulk to be used in the manufacture of reagents and drug calibrator/controls which are DEA exempt products.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and determined that the registration of Siemens Healthcare Diagnostics Inc. to manufacture the listed basic classes of controlled substances is consistent with the public interest at this time. DEA has investigated Siemens Healthcare Diagnostics Inc. to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823, and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic classes of controlled substances listed.

Dated: November 26, 2008.

**Joseph T. Rannazzisi,**

*Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.*

[FR Doc. E8–28989 Filed 12–5–08; 8:45 am]

BILLING CODE 4410–09–P

## DEPARTMENT OF LABOR

### Occupational Safety and Health Administration

**[Docket No. OSHA–2008–0045]**

### Blasting and the Use of Explosives; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork Requirements)

**AGENCY:** Occupational Safety and Health Administration (OSHA), Labor.

**ACTION:** Request for public comment.

**SUMMARY:** OSHA solicits public comment concerning its proposal to extend OMB approval of the information collection requirements specified in the Standard on Blasting and the Use of Explosives (29 CFR part 1926, subpart U).

**DATES:** Comments must be submitted (postmarked, sent, or received) by February 6, 2009.

**ADDRESSES:**

*Electronically:* You may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

*Facsimile:* If your comments, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

*Mail, hand delivery, express mail, messenger, or courier service:* When using this method, you must submit three copies of your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2008–0045, U.S. Department of Labor, Occupational Safety and Health Administration, Room N–2625, 200 Constitution Avenue, NW., Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m. to 4:45 p.m., e.t.

*Instructions:* All submissions must include the Agency name and OSHA docket number for the Information Collection Request (ICR) (OSHA–2008–0045). All comments, including any personal information you provide, are placed in the public docket without change, and may be made available online at *http://www.regulations.gov.* For further information on submitting comments see the ''Public Participation'' heading in the section of this notice titled ''Supplementary Information.''

*Docket:* To read or download comments or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the address above. All documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (e.g., copyrighted material) is not publicly available to read or download through the Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You may also contact Bill Parsons at the address below to obtain a copy of the ICR.

**FOR FURTHER INFORMATION CONTACT:** Bill Parsons, Directorate of Construction, OSHA, Room N–3468, 200 Constitution Avenue, NW., Washington, DC 20210, telephone: (202) 693–2020.

**SUPPLEMENTARY INFORMATION:**

## I. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (i.e., employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (the OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of efforts in obtaining information (29 U.S.C. 657).

The Standard on Blasting and the Use of Explosives (29 CFR part 1926, subpart U) specifies a number of paperwork requirements. The following is a brief description of the collection of information requirements contained in the Subpart.

*General Provisions (§ 1926.900)*

*§ 1926.900(d)*—Paragraph (d) states that employers must ensure that explosives not in use are kept in a locked magazine, unavailable to persons not authorized to handle the explosives. The employers must maintain an inventory and use records of all explosives; in use and not in use. In addition, the employer must notify the appropriate authorities in the event of loss, theft, or unauthorized entry into a magazine.

*§ 1926.900(k)(3)(i)*—Paragraph (k)(3)(i) requires employers to display adequate signs warning against the use of mobile radio transmitters on all roads within 1,000 feet of blasting operations to prevent the accidental discharge of electric blasting caps caused by current induced by radar, radio transmitters, lightning, adjacent powerlines, dust storms, or other sources of extraneous electricity. The employer must certify and maintain a record of alternative provisions made to adequately prevent any premature firing of electric firing of electric blasting caps.

*§ 1926.900(o)*—Employers must notify the operators and/or owners of overhead power lines, communication lines, utility lines, or other services and structures when blasting operations will take place in proximity to those lines, services, or structures.

*§ 1926.903(d)*—The employer must notify the hoist operator prior to transporting explosives or blasting agents in a shaft conveyance.

*§ 1926.903(e)*—Employers must perform weekly inspections on the electrical system of trucks used for underground transportation of explosives. The weekly inspection is to detect any failure in the system which would constitute an electrical hazard. The most recent certification of inspection must be maintained and must include the date of inspection, a serial number or other identifier of the truck inspected, and the signature of the person performing the inspection.

*§ 1926.905(t)*—Under § 1926.905(t), the employer blaster must maintain an accurate and up-to-date record of explosives, blasting agents, and blasting supplies used in a blast. In addition, the employer must also maintain a running inventory of all explosives and blasting agents stored on the operation.

*§ 1926.909(a)*—Employers must post a code of blasting agents on one or more conspicuous places at the operation. Additionally, all employees shall familiarize themselves with the code and conform to it at all times. Danger signs warning of blasting agents shall also be placed at suitable locations.

## II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

## III. Proposed Actions

OSHA is requesting that OMB extend its approval of the collection of information requirements contained in the Standard on Blasting and the Use of Explosives. The Agency will include this summary in its request to OMB to extend the approval of these collections of information requirements.

*Type of Review:* Extension of currently approved collection.

*Title:* Blasting and the Use of Explosives (29 CFR part 1926, Subpart U).

*OMB Number:* 1218–0217.

*Affected Public:* Business or other for-profits; Federal Government; State and Local or Tribal Government.

*Frequency:* On occasion.

*Average Time per Response:* Time varies from 5 minutes (.08 hour) to notify a hoist operator of blasting agents to 8 hours to develop an alternative plan if an employer is unable to display adequate warning signs against mobile transmitters during blasting operations.

*Total Burden Hours:* 1,294.

*Estimated Cost (Operation and Maintenance):* $800,000.

## IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) Electronically at *http://www.regulations.gov*, which is the Federal eRulemaking Portal; (2) by facsimile (Fax); or (3) by hard copy. All comments, attachments, and other material must identify the Agency name and the OSHA docket number for the ICR (Docket No. OSHA–2008–0045). You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional

materials must clearly identify your electronic comments by your name, date, and the docket number so the Agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger, or courier service, please contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627).

Comments and submissions are posted without change at *http://www.regulations.gov*. Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and date of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (e.g., copyrighted material) is not publicly available to read or download through this Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* Web site to submit comments and access the docket is available at the Web site's ''User Tips'' link. Contact the OSHA Docket Office for information about materials not available through the Web site, and for assistance in using the Internet to locate docket submissions.

## V. Authority and Signature

Thomas M. Stohler, Acting Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 5–2007 (72 FR 31159).

Signed at Washington, DC, on December 2, 2008.

**Thomas M. Stohler,**

*Acting Assistant Secretary of Labor for Occupational Safety and Health.*

[FR Doc. E8–28988 Filed 12–5–08; 8:45 am]

BILLING CODE 4510–26–P

## DEPARTMENT OF LABOR

### Occupational Safety and Health Administration

**[Docket No. OSHA–2008–0050]**

### Longshoring and Marine Terminal Operations; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

**AGENCY:** Occupational Safety and Health Administration (OSHA), Labor.

**ACTION:** Request for public comment.

**SUMMARY:** OSHA solicits comments concerning its proposal to extend OMB approval of the information collection requirements contained in the Standards on Longshoring (29 CFR part 1918) and Marine Terminal Operations (29 CFR part 1917).

**DATES:** Comments must be submitted (postmarked, sent, or received) by February 6, 2009.

**ADDRESSES:**

*Electronically:* You may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

*Facsimile:* If your comments, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

*Mail, hand delivery, express mail, messenger, or courier service:* When using this method, you must submit three copies of your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2008–0050, U.S. Department of Labor, Occupational Safety and Health Administration, Room N–2625, 200 Constitution Avenue, NW., Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m. to 4:45 p.m., e.t.

*Instructions:* All submissions must include the Agency name and OSHA docket number (OSHA–2008–0050) for the Information Collection Request (ICR). All comments, including any personal information you provide, are placed in the public docket without change, and may be made available online at *http://www.regulations.gov.* For further information on submitting comments, see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION.**

*Docket:* To read or download comments or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the address above. All documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (e.g., copyrighted material) is not publicly available to read or download through the Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You may also contact Theda Kenney at the address below to obtain a copy of the ICR.

**FOR FURTHER INFORMATION CONTACT:** Theda Kenney or Todd Owen, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, Room N–3609, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2222.

**SUPPLEMENTARY INFORMATION:**

## I. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (i.e., employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (the OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of efforts in obtaining information (29 U.S.C. 657).

The Standards on Longshoring and Marine Terminal Operations contain a number of collections of information which are used by employers to ensure that employees are informed properly about the safety and health hazards associated with longshoring and marine terminal operations. OSHA uses the records developed in response to the

collection of information requirements to find out if the employer is complying adequately with the provisions of the standards.

**II. Special Issues for Comment**

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

**III. Proposed Actions**

OSHA is proposing that OMB extend its approval of the information collection requirements contained in the Standards on Longshoring (29 CFR part 1918) and Marine Terminal Operations. The Agency is proposing to retain its current burden hour estimate of 35,948 hours. The Agency will summarize any comments submitted in response to this notice and will include this summary in its request to OMB.

*Type of Review:* Extension of a currently approved collection.

*Title:* Longshoring (29 CFR part 1918) and Marine Terminal Operations (29 CFR part 1917).

*OMB Number:* 1218–0106.

*Affected Public:* Business or other for-profits; Not-for-profit organizations; Federal Government; State, Local, or Tribal Government.

*Number of Respondents:* 750.

*Frequency of Response:* On occasion.

*Average Time per Response:* Varies from one minute (.02 hour) to 1.08 hours

*Estimated Total Burden Hours:* 35,948.

*Estimated Cost (Operation and Maintenance):* $0.

**IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions**

You may submit comments in response to this document as follows: (1) Electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal; (2) by facsimile (FAX); or (3) by hard copy. All comments, attachments, and other material must identify the Agency name and the OSHA docket number for the ICR (Docket No. OSHA–2008–0050). You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify your electronic comments by your name, date, and the docket number so the Agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger, or courier service, please contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627).

Comments and submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and date of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (e.g., copyrighted material) is not publicly available to read or download through this Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* Web site to submit comments and access the docket is available at the Web site's ''User Tips'' link. Contact the OSHA Docket Office for information about materials not available through the Web site, and for assistance in using the Internet to locate docket submissions.

**V. Authority and Signature**

Thomas M. Stohler, Acting Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 5–2007 (72 FR 31159).

Signed at Washington, DC, on December 2, 2008.

**Thomas M. Stohler,**

*Acting Assistant Secretary of Labor for Occupational Safety and Health.*

[FR Doc. E8–28990 Filed 12–5–08; 8:45 am]

BILLING CODE 4510–26–P

## LEGAL SERVICES CORPORATION

### Sunshine Act Notice of Joint Meeting of the Board of Directors' Audit and Ad Hoc Committees

**TIME AND DATE:** The Board of Directors' Audit Committee and Ad Hoc Committees ''the Committees'') of the Legal Services Corporation (''LSC'' or ''Corporation'') will meet jointly on December 11, 2008 via telephone and Web conference call. The meeting will begin at 11 a.m., Eastern Time, and continue until conclusion of the Committees' agenda.

**LOCATION:** 3333 K Street, NW., Washington, DC 20007, 3rd Floor Conference Center.

**STATUS OF MEETING:** Open. Directors will participate by telephone and Web conference in such a manner as to enable interested members of the public to hear and identify all persons participating in the meeting. A portion of the meeting will involve the review and editing of a document utilizing Web conferencing technology. Members of the public that wish to observe the meeting may do so by joining participating staff at the location indicated above. Alternatively, members of the public may listen to the meeting by telephone and if desired may observe the review and modification of the document under consideration by connecting to the meeting through the Internet. Please note that access to the Web conferencing segment will be limited and on a first come, first connected basis. No such limitations apply to telephonic access to the audio portion of the meeting. Telephone and Web conferencing connection instructions follow.

**TELEPHONE ACCESS INSTRUCTIONS:** It is necessary for all participants to connect to the meeting by telephone in order to hear the audio portion of the meeting.

1. Toll-free Number: 1–866–469–3239.
2. Meeting Number/Access Code: 487757980.
3. Password: A password is not required.

To enhance the quality of your listening experience as well as that of others and to eliminate background noises that interfere with the audio recording of the proceeding, please refrain from using speakerphones and mute your telephone during the meeting. If you would like to speak during the public comment period, please release the mute button on your telephone at that time.

**WEB CONFERENCE ACCESS INSTRUCTIONS:**

1. Please click the following Web link or type or copy and paste the address

into your web browser to join the conference: *http://lsc.webexone.com/r.asp?a=4&id=95205&eaddr=1473.*

2. The link should take you to a page on WebEx, the conference Web site that reflects the conference information. Click the ''Join'' button located on the page.

3. The next screen will require you to provide the following information:

a. Display Name—Insert your first and last name;
b. E-mail Address—Insert your e-mail address; and
c. Password—A password is not required.

After providing the required information, click the ''Join'' button located on the page.

4. If you have not participated in a WebEx conference previously, you will be prompted to install the ''WebEx Client'' add-on. Follow the instructions on the screen and the additional prompts. Installation should take approximately 1 minute.

5. You will now enter the on-screen portion of the conference.

6. During the log-on process you will be prompted to join the meeting by telephone. Please do so to hear the audio portion of the meeting.

The document that will be considered by the Committees, the proposed LSC Risk Management Plan, will be available on the Corporation's Web site by 9 a.m., Eastern Time, on Monday, December 10, 2008 at *http://www.lsc.gov/lscgov4/RiskManagementPlan.pdf*, or can be obtained by facsimile by calling 1–866–394–3642.

**MATTERS TO BE CONSIDERED:**

1. Approval of the agenda.
2. Consider and act on a recommendation to make to the Board regarding adoption of a risk management program (RMP) for the Corporation.
3. Public comment.
4. Consider and act on other business.

**CONTACT PERSON FOR INFORMATION:** Patricia Batie, Manager of Board Operations, at (202) 295–1500.

**SPECIAL NEEDS:** Upon request, meeting notices will be made available in alternate formats to accommodate visual and hearing impairments. Individuals who have a disability and need an accommodation to attend the meeting may notify Patricia Batie at (202) 295–1500.

Dated: December 4, 2008.

**Helaine M. Barnett,**

*President.*

[FR Doc. E8–29130 Filed 12–4–08; 4:15 pm]

**BILLING CODE 7050–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket Nos. 030–05224 and 040–08478]**

## Notice of Consideration of Amendment Requests for Decommissioning of the Bell Laboratories, Murray Hill Facility, Murray Hill, NJ and Opportunity To Request a Hearing

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Notice of amendment request and opportunity to request a hearing.

**DATES:** A request for a hearing must be filed by February 6, 2009.

**FOR FURTHER INFORMATION CONTACT:** Steve Hammann, Health Physicist, Commercial and R&D Branch, Division of Nuclear Materials Safety, Region I, U.S. Nuclear Regulatory Commission, King of Prussia, PA 9406. *Telephone:* (610) 337–5399; *fax number:* (610) 337–5269; or *e-mail: stephen.hammann@nrc.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Introduction

The Nuclear Regulatory Commission (NRC) is considering issuance of license amendments to Byproduct Materials License No. 29–00170–03 and Source Materials License No. SMB–1260 issued to Bell Laboratories (the Licensee), to authorize decommissioning of its Murray Hill Facility (the Facility) in Murray Hill, New Jersey under the Licensee's proposed Decommissioning Plan (DP). The Licensee requested this action by filing dated June 12, 2008.

An NRC administrative review, documented in a letter to Bell Laboratories dated October 9, 2008, found the DP acceptable to begin a technical review.

If the NRC approves the DP, the approval will be documented in amendments to NRC License Nos. 29–00170–03 and SMB–1260. However, before approving the proposed amendments, the NRC will need to make the findings required by the Atomic Energy Act of 1954, as amended, and NRC's regulations. These findings will be documented in a Safety Evaluation Report and an Environmental Assessment and/or an Environmental Impact Statement. The Licensee's DP proposes release of the Facility for unrestricted use. This would occur following completion of decommissioning activities and verification by the NRC that the radiological criteria for license termination have been met.

### II. Opportunity To Request a Hearing

The NRC hereby provides notice that this is a proceeding on the Licensee's application dated June 12, 2008. In accordance with the general requirements in Subpart C of 10 CFR Part 2, as amended on January 14, 2004 (69 FR 2182), any person whose interest may be affected by this proceeding and who desires to participate as a party must file a request for a hearing and a specification of the contentions which the person seeks to have litigated in the hearing.

A request for hearing or a petition for leave to intervene must be filed in accordance with the NRC E-Filing rule, which the NRC promulgated on August 28, 2007 (72 FR 49139). The E-Filing process requires participants to submit and serve documents over the internet or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek a waiver in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the petitioner/requestor must contact the Office of the Secretary by e-mail at *HEARINGDOCKET@NRC.GOV,* or by calling (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding [even in instances in which the petitioner/requestor (or its counsel or representative) already holds an NRC-issued digital ID certificate]. Each petitioner/requestor will need to download the Workplace Forms Viewer™ to access the Electronic Information Exchange (EIE), a component of the E-Filing system. The Workplace Forms Viewer™ is free and is available at *http://www.nrc.gov/site-help/e-submittals/install-viewer.html.* Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.*

Once a petitioner/requestor has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer; it can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-*

*submittals.html.* A filing is considered complete at the time the filer submits its documents through EIE. To be timely, an electronic filing must be submitted to the EIE system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The EIE system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically may seek assistance through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html* or by calling the NRC technical help line, which is available between 8:30 a.m. and 4:15 p.m., Eastern Time, Monday through Friday. The help line number is (800) 397–4209 or locally (301) 415–4737.

Participants who believe that they have a good cause for not submitting documents electronically must file a motion, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, *Attention:* Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service.

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.

In accordance with 10 CFR 2.309 (b), a request for a hearing must be filed by February 6, 2009.

In addition to meeting the above requirements, a request for a hearing filed by a person other than an applicant must state:

1. The name, address, and telephone number of the requester;
2. The nature of the requester's right under the Act to be made a party to the proceeding;
3. The nature and extent of the requesters property, financial, or other interest in the proceeding;
4. The possible effect of any decision or order that may be issued in the proceeding on the requesters interest; and
5. The circumstances establishing that the request for a hearing is timely in accordance with 10 CFR 2.309 (b).

In accordance with 10 CFR 2.309 (f)(1), a request for hearing or petitions for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:

1. Provide a specific statement of the issue of law or fact to be raised or controverted;
2. Provide a brief explanation of the basis for the contention;
3. Demonstrate that the issue raised in the contention is within the scope of the proceeding;
4. Demonstrate that the issue raised in the contention is material to the findings that the NRC must make to support the action that is involved in the proceeding;
5. Provide a concise statement of the alleged facts or expert opinions which support the requester's/petitioner's position on the issue and on which the requester/petitioner intends to rely to support its position on the issue; and
6. Provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. This information must include references to specific portions of the application that the requester/petitioner disputes and the supporting reasons for each dispute, or, if the requester/petitioner believes the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the requester's/petitioner's belief.

In addition, in accordance with 10 CFR 2.309 (f)(2), contentions must be based on documents or other information available at the time the hearing request is filed.

Requesters/petitioners should, when possible, consult with each other in preparing contentions and combine similar subject matter concerns into a joint contention, for which one of the co-sponsoring requesters/petitioners is designated the lead representative. Further, in accordance with 10 CFR 2.309 (f)(3), any requester/petitioner that wishes to adopt a contention proposed by another requester/petitioner must do so in writing within ten days of the date the contention is filed, and designate a representative who shall have the authority to act for the requester/petitioner.

In accordance with 10 CFR 2.309 (g), a request for hearing and/or petition for leave to intervene may also address the selection of the hearing procedures, taking into account the provisions of 10 CFR 2.310.

## III. Further Information

Documents related to this action, including the application for amendment and supporting documentation, are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this site, you can access the NRC's Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The ADAMS accession numbers for the documents related to this notice are:

Submittal Letter dated June 12, 2008: ML081910071.
Decommissioning Plan, Volume 1: ML081910076.
Decommissioning Plan, Volume 2: ML081910083.

If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr@nrc.gov.* These documents may also be viewed electronically on the public computers located at the NRC's PDR, O 1 F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. The PDR reproduction contractor will copy documents for a fee.

Dated at Region I, 475 Allendale Road, King of Prussia, PA, this 1st day of December 2008.

For The Nuclear Regulatory Commission.

**James P. Dwyer,**

*Chief, Commercial and R&D Branch, Division of Nuclear Materials Safety, Region I.*

[FR Doc. E8–28941 Filed 12–5–08; 8:45 am]

BILLING CODE 7590–01–P

## NUCLEAR REGULATORY COMMISSION

### Draft Regulatory Guide: Issuance, Availability

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Issuance, Availability of Draft Regulatory Guide (DG)–1178.

**FOR FURTHER INFORMATION CONTACT:** Khoi H. Nguyen, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: (301) 251–7453 or e-mail *Khoi.Nguyen@nrc.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) has issued for public comment a draft guide in the agency's ''Regulatory Guide'' series. This series was developed to describe and make available to the public such information as methods that are acceptable to the NRC staff for implementing specific parts of the NRC's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

The draft regulatory guide, entitled, ''Instrument Sensing Lines,'' is temporarily identified by its task number, DG–1178, which should be mentioned in all related correspondence. This guide describes a method that the staff of the NRC considers acceptable for use in complying with the Commission's regulations with regard to the design and installation of safety-related instrument sensing lines in nuclear power plants. To meet these objectives, the sensing lines must serve a safety-related function to prevent release of reactor coolant as a part of the reactor coolant pressure boundary and provide adequate connection to the reactor coolant system for measuring process variables (e.g., pressure, level, and flow). The term ''safety-related'' refers to those structures, systems, and components necessary to ensure (1) The integrity of the reactor coolant pressure boundary, (2) the capability to shut down the reactor and maintain it in a safe shutdown condition, or (3) the capability to prevent or mitigate the consequences of accidents that could result in potential offsite exposures comparable to the guideline exposures of Title 10, Part 100 of the Code of Federal Regulations, (10 CFR Part 100), ''Reactor Site Criteria.''

### II. Further Information

The NRC staff is soliciting comments on DG–1178. Comments may be accompanied by relevant information or supporting data, and should mention DG–1178 in the subject line. Comments submitted in writing or in electronic form will be made available to the public in their entirety through the NRC's Agencywide Documents Access and Management System (ADAMS). Personal information will not be removed from your comments. You may submit comments by any of the following methods:

1. *Mail comments to:* Rulemaking, Directives, and Editing Branch, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

2. *E-mail comments to: nrcrep.resource@nrc.gov.*

3. *Hand-deliver comments to:* Rulemaking, Directives, and Editing Branch, Office of Administration, U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. on Federal workdays.

4. *Fax comments to:* Rulemaking, Directives, and Editing Branch, Office of Administration, U.S. Nuclear Regulatory Commission at (301) 415–5144.

Requests for technical information about DG–1178 may be directed to the NRC Senior Program Manager, Khoi H. Nguyen at (301) 251–7453 or e-mail to *Khoi.Nguyen@nrc.gov.*

Comments would be most helpful if received by February 6, 2009. Comments received after that date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date. Although a time limit is given, comments and suggestions in connection with items for inclusion in guides currently being developed or improvements in all published guides are encouraged at any time.

Electronic copies of DG–1178 are available through the NRC's public Web site under Draft Regulatory Guides in the ''Regulatory Guides'' collection of the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/doc-collections/.* Electronic copies are also available in ADAMS (*http://www.nrc.gov/reading-rm/adams.html*), under Accession No. ML080510453.

In addition, regulatory guides are available for inspection at the NRC's Public Document Room (PDR), which is located at 11555 Rockville Pike, Rockville, Maryland. The PDR's mailing address is USNRC PDR, Washington, DC 20555–0001. The PDR can also be reached by telephone at (301) 415–4737 or (800) 397–4205, by fax at (301) 415–3548, and by e-mail to *pdr.resource@nrc.gov.*

Regulatory guides are not copyrighted, and Commission approval is not required to reproduce them.

Dated at Rockville, Maryland, this 1st day of December 2008.

For the Nuclear Regulatory Commission.

**Andrea D. Valentin,**

*Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.*

[FR Doc. E8–28937 Filed 12–5–08; 8:45 am]

BILLING CODE 7590–01–P

## NUCLEAR REGULATORY COMMISSION

**[Docket No. 52–016–COL; ASLBP No. 09–874–02–COL–BD01]**

### Calvert Cliffs 3 Nuclear Project, LLC, and Unistar Nuclear Operating Services, LLC; Establishment of Atomic Safety and Licensing Board

Pursuant to delegation by the Commission dated December 29, 1972, published in the **Federal Register**, 37 FR 28,710 (1972), and the Commission's regulations, *see* 10 CFR 2.104, 2.300, 2.303, 2.309, 2.311, 2.318, and 2.321, notice is hereby given that an Atomic Safety and Licensing Board (Board) is being established to preside over the following proceeding:

**Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC**

*(Calvert Cliffs Nuclear Power Plant Unit 3)*

This proceeding concerns a Petition to Intervene from the Nuclear Information and Resource Service (NIRS), Beyond Nuclear, and the Public Citizen Energy Program and Maryland Public Interest Research Group, which was submitted in response to a September 26, 2008 Notice of Hearing and Opportunity to Petition for Leave to Intervene on a Combined License for the Calvert Cliffs Nuclear Power Plant Unit 3 (73 FR 55,876). The Petition to Intervene challenges the application filed by Calvert Cliffs 3 Nuclear Project, LLC and UniStar Nuclear Operating Services,

LLC pursuant to Subpart C of 10 CFR part 52 for a combined license for Calvert Cliffs Nuclear Power Plant Unit 3, which would be located in Calvert County, Maryland. The State of Maryland also submitted a request to participate in the proceeding as an interested State.

The Board is comprised of the following administrative judges:

Ronald M. Spritzer, Chairman, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001;

Gary S. Arnold, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001;

William W. Sager, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

All correspondence, documents, and other materials shall be filed in accordance with the NRC E-Filing rule, which the NRC promulgated in August 2007 (72 FR 49,139).

Issued at Rockville, Maryland, this 2nd day of December 2008.

**E. Roy Hawkens,**

*Chief Administrative Judge, Atomic Safety and Licensing Board Panel.*

[FR Doc. E8–28950 Filed 12–5–08; 8:45 am]

**BILLING CODE 7590–01–P**

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## NUCLEAR REGULATORY COMMISSION

**[Docket Nos. 52–025–COL and 52–026–COL; ASLBP No.09–873–01–COL–BD01]**

### Southern Nuclear Operating Company; Establishment of Atomic Safety and Licensing Board

Pursuant to delegation by the Commission dated December 29, 1972, published in the **Federal Register**, 37 FR 28,710 (1972), and the Commission's regulations, see 10 CFR 2.104, 2.300, 2.303, 2.309, 2.311, 2.318, and 2.321, notice is hereby given that an Atomic Safety and Licensing Board (Board) is being established to preside over the following proceeding:

**Southern Nuclear Operating Company**

*(Vogtle Electric Generating Plant, Units 3 and 4)*

This proceeding concerns a Petition to Intervene from the Atlanta Women's Action for New Directions (Atlanta, WAND), Blue Ridge Environmental Defense League (BREDL), Center for a Sustainable Coast (CSC), Savannah Riverkeeper, and Southern Alliance for Clean Energy (SACE), which was submitted in response to a September 16, 2008, Notice of Hearing and Opportunity to Petition for Leave to Intervene on a Combined License for the Vogtle Electric Generating Plant Units 3 and 4 (73 FR 53,446). The Petition to Intervene challenges the application filed by Southern Nuclear Operating Company pursuant to Subpart C of 10 CFR Part 52 for a combined license for Vogtle Electric Generating Plant, Units 3 and 4, which would be located in Burke County, Georgia.

The Board is comprised of the following administrative judges:

G. Paul Bollwerk, III, Chairman, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001;

Nicholas G. Trikouros, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001;

James F. Jackson, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

All correspondence, documents, and other materials shall be filed in accordance with the NRC E-Filing rule, which the NRC promulgated in August 2007 (72 FR 49,139).

Issued at Rockville, Maryland, this 2nd day of December 2008.

**E. Roy Hawkens,**

*Chief Administrative Judge, Atomic Safety and Licensing Board Panel.*

[FR Doc. E8–28951 Filed 12–5–08; 8:45 am]

**BILLING CODE 7590–01–P**

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## NUCLEAR REGULATORY COMMISSION

**[Docket Nos. 52–029 and 52–030]**

### Progress Energy Florida, Inc.; Application for the Levy County Nuclear Power Plant Units 1 and 2; Notice of Order, Hearing, and Opportunity To Petition for Leave To Intervene

Pursuant to the Atomic Energy Act of 1954, as amended, and the regulations in Title 10 of the *Code of Federal Regulations* (10 CFR) Part 2, ''Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders,'' 10 CFR part 50, ''Domestic Licensing of Production and Utilization Facilities,'' and 10 CFR part 52, ''Licenses, Certifications, and Approvals for Nuclear Power Plants,'' notice is hereby given that a hearing will be held, at a time and place to be set in the future by the U.S. Nuclear Regulatory Commission (NRC, the Commission) or designated by the Atomic Safety and Licensing Board (Board). The hearing will consider the application dated July 28, 2008, and supplemental information dated September 12, 2008, filed by Progress Energy Florida, Inc. (PEF), pursuant to Subpart C of 10 CFR Part 52, for a combined license (COL). The application requests approval of a COL for Levy Nuclear Power Plant Units 1 and 2, to be located in Levy County, Florida. The application also requests a limited work authorization pursuant to 10 CFR 50.10. The application was accepted for docketing on October 6, 2008 (October 14, 2008; 73 FR 60726). The docket numbers established for this COL application are 52–029 and 52–030. The Levy County COL application incorporates by reference Appendix D to 10 CFR 52 (which includes the AP1000 design through Revision 15), as amended by the AP1000 Design Control Document (DCD) submitted by Westinghouse as Revision 16 and Westinghouse Technical Report APP–GW–GLR–134, Revision 5. By letter to Westinghouse dated January 18, 2008, the staff accepted DCD Revision 16 for docketing. Proposed amendments to the AP1000 certified design are the subject of an ongoing rulemaking under docket number 52–006.

The hearing will be conducted by a Board that will be designated by the Chairman of the Atomic Safety and Licensing Board Panel or will be conducted by the Commission. Notice as to the membership of the Board will be published in the **Federal Register** at a later date. The NRC staff will complete a detailed technical review of the application and will document its findings in a safety evaluation report. The Commission will refer a copy of the application to the Advisory Committee on Reactor Safeguards (ACRS) in accordance with 10 CFR 52.87, ''Referral to the ACRS,'' and the ACRS will report on those portions of the application that concern safety.

The NRC staff will also prepare an Environmental Impact Statement, as required by 10 CFR 51.20(b)(2).

Any person whose interest may be affected by this proceeding and desire to participate as a party to this proceeding must file a written petition for leave to intervene in accordance with 10 CFR 2.309. 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.

A petition for a leave to intervene must be filed no later than 60 days from the date of publication of this notice in the **Federal Register**. Non-timely filings will not be entertained absent a determination by the Commission or

presiding officer designated to rule on the petition, pursuant to the requirements of 10 CFR 2.309(c)(i)–(viii).

All documents filed in NRC adjudicatory proceedings, including petitions to intervene and requests to participate as an interested government entity under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule, which was promulgated by the NRC on August 28, 2007 (72 FR 49139). The E-Filing process requires participants to submit and serve documents over the Internet or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek a waiver in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the petitioner must contact the Office of the Secretary by e-mail at *HearingDocket@nrc.gov*, or by calling (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding (even in instances in which the petitioner (or its counsel or representative) already holds an NRC-issued digital ID certificate). Each participant 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 participant has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, it can then submit a filing. 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 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 Meta-System Help Desk, which is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday. The Meta-System Help Desk can be contacted by telephone at 1–866–672–7640 or by e-mail at *MSHD.Resource@nrc.gov.*

Participants who believe that they have a good cause for not submitting documents electronically must file a motion, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, *Attention:* Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service.

Non-timely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer, or the Atomic Safety and Licensing Board that the petition and/or request should be granted and/or the contentions should be admitted based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii). To be timely, filings must be submitted no later than 11:59 p.m. Eastern Standard Time on the due date.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp*, unless excluded pursuant to an order of the Commission, an Atomic Safety and Licensing Board, or a Presiding Officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Any person who files a motion pursuant to 10 CFR 2.323 must consult with counsel for the applicant and counsel for the NRC staff who are listed below. Counsel for the applicant is John H. O'Neill, *John.O'Neill@pillsburylaw.com,* (202) 663–8148. Counsel for the NRC staff in this proceeding are Jody Martin, *Jody.Martin@nrc.gov*, (301) 415–1569, and Sara E. Brock, *Sara.Brock@nrc.gov*, (301) 415–8393.

A person who is not a party may be permitted to make a limited appearance by making an oral or written statement of his position on the issues at any session of the hearing or any pre-hearing conference within the limits and conditions fixed by the presiding officer, but may not otherwise participate in the proceeding. These limited appearance statements need not be submitted using the E-Filing process.

Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland, and will be accessible electronically through the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room link 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 documents located in ADAMS should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, 301–415–4737, or by e-mail to *PDR.Resource@nrc.gov.* The application is also available at *http://www.nrc.gov/reactors/new-reactors/col/levy.html.* The ADAMS accession number for the COL application cover letter is ML082260277. To search for documents in ADAMS using the Levy County COL application docket numbers, 52–029 and 52–030, enter the terms ''05200029''

and ''05200030'' in the ''Docket Number'' field when using either the web-based search (advanced search) engine or the ADAMS find tool in Citrix.

The AP1000 DCD through Revision 15, which is incorporated by reference into Appendix D of Part 52, can be found by going to *http://www.nrc.gov/reactors/new-reactors/design-cert/ap1000.html.* The AP1000 DCD Revision 16 can be found using ADAMS accession number ML071580939 or by going to *http://www.nrc.gov/reactors/new-reactors/col/levy.html.* To search for documents in ADAMS using the docket number for the proposed amendments to the AP1000 design certification, 52–006, enter the term ''05200006'' in the ADAMS ''Docket Number'' field.

**Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation**

1. This order contains instructions regarding how potential parties to this proceeding may request access to documents containing sensitive unclassified information (including Sensitive Unclassified Non-Safeguards Information (SUNSI) and Safeguards Information (SGI)).

2. Within 10 days after publication of this notice of hearing and opportunity to petition for leave to intervene, any potential party as defined in 10 CFR 2.4 who believes access to SUNSI or SGI is necessary for a response to the notice may request access to SUNSI or SGI. A ''potential party'' is any person who intends or may intend to participate as a party by demonstrating standing and the filing of an admissible contention under 10 CFR 2.309. Requests submitted later than 10 days will not be considered absent a showing of good cause for the late filing, addressing why the request could not have been filed earlier.

3. The requester shall submit a letter requesting permission to access SUNSI and/or SGI to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, *Attention:* Rulemakings and Adjudications Staff, and provide a copy to the Associate General Counsel for Hearings, Enforcement and Administration, Office of the General Counsel, Washington, DC 20555–0001. The expedited delivery or courier mail address for both offices is U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, Maryland 20852. The e-mail address for the Office of the Secretary and the Office of the General Counsel are *HearingDocket@nrc.gov* and *OGCmail@nrc.gov*, respectively.[1] The request must include the following information:

a. A description of the licensing action with a citation to this **Federal Register** notice of hearing and opportunity to petition for leave to intervene;

b. The name and address of the potential party and a description of the potential party's particularized interest that could be harmed by the action identified in (a);

c. If the request is for SUNSI, the identity of the individual requesting access to SUNSI and the requester's need for the information in order to meaningfully participate in this adjudicatory proceeding, particularly why publicly available versions of the application would not be sufficient to provide the basis and specificity for a proffered contention;

d. If the request is for SGI, the identity of the individual requesting access to SGI and the identity of any expert, consultant or assistant who will aid the requester in evaluating the SGI, and information that shows:

(i) Why the information is indispensable to meaningful participation in this licensing proceeding; and

(ii) The technical competence (demonstrable knowledge, skill, experience, training or education) of the requester to understand and use (or evaluate) the requested information to provide the basis and specificity for a proffered contention. The technical competence of a potential party or its counsel may be shown by reliance on a qualified expert, consultant or assistant who demonstrates technical competence as well as trustworthiness and reliability, and who agrees to sign a non-disclosure affidavit and be bound by the terms of a protective order; and

e. If the request is for SGI, Form SF–85, ''Questionnaire for Non-Sensitive Positions,'' Form FD–258 (fingerprint card), and a credit check release form completed by the individual who seeks access to SGI and each individual who will aid the requester in evaluating the SGI. For security reasons, Form SF–85 can only be submitted electronically, through a restricted-access database. To obtain online access to the form, the requester should contact the NRC's Office of Administration at 301–415–0320.[2] The other completed forms must be signed in original ink, accompanied by a check or money order payable in the amount of $191.00 to the U.S. Nuclear Regulatory Commission for each individual, and mailed to the U.S. Nuclear Regulatory Commission, Office of Administration, Security Processing Unit, Mail Stop T–6E46, Washington, DC 20555–0012.

These forms will be used to initiate the background check, which includes fingerprinting as part of a criminal history records check. Note: copies of these forms do *not* need to be included with the request letter to the Office of the Secretary, but the request letter should state that the forms and fees have been submitted as described above.

4. To avoid delays in processing requests for access to SGI, all forms should be reviewed for completeness and accuracy (including legibility) before submitting them to the NRC. Incomplete packages will be returned to the sender and will not be processed.

5. Based on an evaluation of the information submitted under items 2 and 3.a through 3.d, above, the NRC staff will determine within 10 days of receipt of the written access request whether (1) there is a reasonable basis to believe the petitioner is likely to establish standing to participate in this NRC proceeding, and (2) there is a legitimate need for access to SUNSI or need to know the SGI requested. For SGI, the need to know determination is made based on whether the information requested is necessary (*i.e.*, indispensable) for the proposed recipient to proffer and litigate a specific contention in this NRC proceeding[3] and whether the proposed recipient has the technical competence (demonstrable knowledge, skill, training, education, or experience) to evaluate and use the specific SGI requested in this proceeding.

6. If standing and need to know SGI are shown, the NRC staff will further determine based upon completion of the background check whether the proposed recipient is trustworthy and reliable. The NRC staff will conduct (as

[1] While a request for hearing or petition to intervene in this proceeding must comply with the filing requirements of the NRC's ''E-Filing Rule,'' the initial request to access SUNSI and/or SGI under these procedures should be submitted as described in this paragraph.

[2] The requester will be asked to provide his or her full name, social security number, date and place of birth, telephone number, and e-mail address. After providing this information, the requester usually should be able to obtain access to the online form within one business day.

[3] Broad SGI requests under these procedures are thus highly unlikely to meet the standards for need to know; furthermore, staff redaction of information from requested documents before their release may be appropriate to comport with this requirement. These procedures do not authorize unrestricted disclosure or less scrutiny of a requester's need to know than ordinarily would be applied in connection with an already-admitted contention.

necessary) an inspection to confirm that the recipient's information protection systems are sufficient to protect SGI from inadvertent release or disclosure. Recipients may opt to view SGI at the NRC's facility rather than establish their own SGI protection program to meet SGI protection requirements.

7. A request for access to SUNSI or SGI will be granted if:

a. The request has demonstrated that there is a reasonable basis to believe that a potential party is likely to establish standing to intervene or to otherwise participate as a party in this proceeding;

b. The proposed recipient of the information has demonstrated a need for SUNSI or a need to know for SGI, and that the proposed recipient of SGI is trustworthy and reliable;

c. The proposed recipient of the information has executed a Non-Disclosure Agreement or Affidavit and agrees to be bound by the terms of a Protective Order setting forth terms and conditions to prevent the unauthorized or inadvertent disclosure of SUNSI and/or SGI; and

d. The presiding officer has issued a protective order concerning the information or documents requested.[4] Any protective order issued shall provide that the petitioner must file SUNSI or SGI contentions 25 days after receipt of (or access to) that information. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI or SGI contentions by that later deadline.

8. If the request for access to SUNSI or SGI is granted, the terms and conditions for access to sensitive unclassified information will be set forth in a draft protective order and affidavit of non-disclosure appended to a joint motion by the NRC staff, any other affected parties to this proceeding,[5] and the petitioner(s). If the diligent efforts by the relevant parties or petitioner(s) fail to result in an agreement on the terms and conditions for a draft protective order or non-disclosure affidavit, the relevant parties to the proceeding or the petitioner(s) should notify the presiding officer within 5 days, describing the obstacles to the agreement.

9. If the request for access to SUNSI is denied by the NRC staff or a request for access to SGI is denied by NRC staff either after a determination on standing and need to know or, later, after a determination on trustworthiness and reliability, the NRC staff shall briefly state the reasons for the denial. Before the Office of Administration makes an adverse determination regarding access, the proposed recipient must be provided an opportunity to correct or explain information. The requester may challenge the NRC staff's adverse determination with respect to access to SUNSI or with respect to standing or need to know for SGI by filing a challenge within 5 days of receipt of that determination with (a) the presiding officer designated in this proceeding; (b) if no presiding officer has been appointed, the Chief Administrative Judge, or if he or she is unavailable, another administrative judge, or an administrative law judge with jurisdiction pursuant to 10 CFR 2.318(a); or (c) if another officer has been designated to rule on information access issues, with that officer. In the same manner, an SGI requester may challenge an adverse determination on trustworthiness and reliability by filing a challenge within 15 days of receipt of that determination.

In the same manner, a party other than the requester may challenge an NRC staff determination granting access to SUNSI whose release would harm that party's interest independent of the proceeding. Such a challenge must be filed within 5 days of the notification by the NRC staff of its grant of such a request.

If challenges to the NRC staff determinations are filed, these procedures give way to the normal process for litigating disputes concerning access to information. The availability of interlocutory review by the Commission of orders ruling on such NRC staff determinations (whether granting or denying access) is governed by 10 CFR 2.311.[6]

10. The Commission expects that the NRC staff and presiding officers (and any other reviewing officers) will consider and resolve requests for access to SUNSI and/or SGI, and motions for protective orders, in a timely fashion in order to minimize any unnecessary delays in identifying those petitioners who have standing and who have propounded contentions meeting the specificity and basis requirements in 10 CFR Part 2. Attachment 1 to this Order summarizes the general target schedule for processing and resolving requests under these procedures.

Dated at Rockville, Maryland this 2nd day of December 2008.

For the Nuclear Regulatory Commission.

**Annette L. Vietti-Cook,**

*Secretary of the Commission.*

## Attachment 1—General Target Schedule for Processing and Resolving Requests for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information in this Proceeding

| Day | Event/Activity |
|---|---|
| 0 | Publication of FEDERAL REGISTER notice of hearing and opportunity to petition for leave to intervene, including order with instructions for access requests. |
| 10 | Deadline for submitting requests for access to Sensitive Unclassified Non-Safeguards Information (SUNSI) and/or Safeguards Information (SGI) with information: supporting the standing of a potential party identified by name and address; describing the need for the information in order for the potential party to participate meaningfully in an adjudicatory proceeding; demonstrating that access should be granted (*e.g.*, showing technical competence for access to SGI); and, for SGI, including application fee for fingerprint/background check. |
| 60 | Deadline for submitting petition for intervention containing: (i) demonstration of standing; (ii) all contentions whose formulation does not require access to SUNSI and/or SGI (+25 Answers to petition for intervention; +7 petitioner/requestor reply). |

[4] If a presiding officer has not yet been designated, the Chief Administrative Judge will issue such orders, or will appoint a presiding officer to do so.

[5] Parties/persons other than the requester and the NRC staff will be notified by the NRC staff of a favorable access determination (and may participate in the development of such a motion and protective order) if it concerns SUNSI and if the party/person's interest independent of the proceeding would be harmed by the release of the information (*e.g.,* as with proprietary information).

[6] As of October 15, 2007, the NRC's final ''E-Filing Rule'' became effective. See Use of Electronic Submissions in Agency Hearings (72 FR 49139; August 28, 2007). Requesters should note that the filing requirements of that rule apply to appeals of NRC staff determinations (because they must be served on a presiding officer or the Commission, as applicable), but not to the initial SUNSI/SGI requests submitted to the NRC staff under these procedures.

| Day | Event/Activity |
|---|---|
| 20 | Nuclear Regulatory Commission (NRC) staff informs the requester of the staff's determination whether the request for access provides a reasonable basis to believe standing can be established and shows (1) need for SUNSI or (2) need to know for SGI. (For SUNSI, NRC staff also informs any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information.) If NRC staff makes the finding of need for SUNSI and likelihood of standing, NRC staff begins document processing (preparation of redactions or review of redacted documents). If NRC staff makes the finding of need to know for SGI and likelihood of standing, NRC staff begins background check (including fingerprinting for a criminal history records check), information processing (preparation of redactions or review of redacted documents), and readiness inspections. |
| 25 | If NRC staff finds no ''need,'' ''need to know,'' or likelihood of standing, the deadline for petitioner/requester to file a motion seeking a ruling to reverse the NRC staff's denial of access; NRC staff files copy of access determination with the presiding officer (or Chief Administrative Judge or other designated officer, as appropriate). If NRC staff finds ''need'' for SUNSI, the deadline for any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information to file a motion seeking a ruling to reverse the NRC staff's grant of access. |
| 30 | Deadline for NRC staff reply to motions to reverse NRC staff determination(s). |
| 40 | (Receipt +30) If NRC staff finds standing and need for SUNSI, deadline for NRC staff to complete information processing and file motion for Protective Order and draft Non-Disclosure Affidavit. Deadline for applicant/licensee to file Non-Disclosure Agreement for SUNSI. |
| 190 | (Receipt +180) If NRC staff finds standing, need to know for SGI, and trustworthiness and reliability, deadline for NRC staff to file motion for Protective Order and draft Non-disclosure Affidavit (or to make a determination that the proposed recipient of SGI is not trustworthy or reliable). Note: Before the Office of Administration makes an adverse determination regarding access, the proposed recipient must be provided an opportunity to correct or explain information. |
| 205 | Deadline for petitioner to seek reversal of a final adverse NRC staff determination either before the presiding officer or another designated officer. |
| A | If access granted: Issuance of presiding officer or other designated officer decision on motion for protective order for access to sensitive information (including schedule for providing access and submission of contentions) or decision reversing a final adverse determination by the NRC staff. |
| A + 3 | Deadline for filing executed Non-Disclosure Affidavits. Access provided to SUNSI and/or SGI consistent with decision issuing the protective order. |
| A + 28 | Deadline for submission of contentions whose development depends upon access to SUNSI and/or SGI. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI or SGI contentions by that later deadline. |
| A + 53 | (Contention receipt +25) Answers to contentions whose development depends upon access to SUNSI and/or SGI. |
| A + | 60 (Answer receipt +7) Petitioner/Intervenor reply to answers. |
| B | Decision on contention admission. |

[FR Doc. E8–28946 Filed 12–5–08; 8:45 am]
**BILLING CODE 7590–01–P**

## OFFICE OF PERSONNEL MANAGEMENT

**[OMB Control No. 3206–0156]**

### Proposed Information Collection; Request for Comments on a Revised Information Collection; Standard Forms 2800 and 2800A

**AGENCY:** Office of Personnel Management.

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, May 22, 1995), this notice announces that the Office of Personnel Management (OPM) intends to submit to the Office of Management and Budget (OMB) a request for review of a revised information collection. This information collection, ''Application for Death Benefits under the Civil Service Retirement System (CSRS)'' (OMB Control No. 3206–0156; form SF 2800), is needed to collect information so that OPM can pay death benefits to the survivors of Federal employees and annuitants. ''Documentation and Elections in Support of Application for Death Benefits When Deceased Was an Employee at the Time of Death'' (OMB Control No. 3206–0156; form SF 2800A), is needed for deaths in service so that survivors can make the needed elections regarding military service.

Comments are particularly invited on whether this information is necessary for the proper performance of functions of the Office of Personnel Management, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate and based on valid assumptions and methodology; and ways 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.

Approximately 68,000 SF 2800's are processed annually. The completion time for this form is approximately 45 minutes. An annual burden of 51,000 hours is estimated. Approximately 6,800 applicants will use SF 2800A annually. The completion time for this form is also approximately 45 minutes. An annual burden of 5,100 hours is estimated. The total burden is 56,100 hours.

For copies of this proposal, contact Margaret A. Miller by telephone at (202) 606–2699, by Fax (202) 418–3251, or by e-mail at *Margaret.Miller@opm.gov.* Please include a mailing address with your request.

**DATES:** Comments on this proposal should be received within 60 calendar days from the date of this publication.

**ADDRESS:** Send or deliver comments to: Ronald W. Melton, Deputy Assistant Director, Retirement Services Program, Center for Retirement and Insurance Services, U.S. Office of Personnel Management, 1900 E Street, NW., Room 3305, Washington, DC 20415–3500.

*For Information Regarding Administrative Coordination Contact:* Cyrus S. Benson, Team Leader, Publications Team, RIS Support Services/Support Group, U.S. Office of Personnel Management, 1900 E Street, NW., Room 4H28, Washington, DC 20415, (202) 606–0623.

Office of Personnel Management.

**Howard Weizmann,**

*Deputy Director.*

[FR Doc. E8–28918 Filed 12–5–08; 8:45 am]
**BILLING CODE 6325–38–P**

## SECURITIES AND EXCHANGE COMMISSION

### Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

*Extension:*

Rule 19a–1, SEC File No. 270–240, OMB Control No. 3235–0216.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), the Securities and Exchange Commission (the ''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Section 19(a) (15 U.S.C. 80a–19(a)) of the Investment Company Act of 1940 (the ''Act'')[1] makes it unlawful for any registered investment company to pay any dividend or similar distribution from any source other than the company's net income, unless the payment is accompanied by a written statement to the company's shareholders which adequately discloses the sources of the payment. Section 19(a) authorizes the Commission to prescribe the form of such statement by rule.

Rule 19a–1 (17 CFR 270.19a–1) under the Act, entitled ''Written Statement to Accompany Dividend Payments by Management Companies,'' sets forth specific requirements for the information that must be included in statements made pursuant to section 19(a) by or on behalf of management companies.[2] The rule requires that the statement indicate what portions of distribution payments are made from net income, net profits from the sale of security or other property (''capital gains'') and paid-in capital. When any part of the payment is made from capital gains, rule 19a–1 also requires that the statement disclose certain other information relating to the appreciation or depreciation of portfolio securities. If an estimated portion is subsequently determined to be significantly inaccurate, a correction must be made on a statement made pursuant to section 19(a) or in the first report to shareholders following the discovery of the inaccuracy.

The purpose of rule 19a–1 is to afford fund shareholders adequate disclosure of the sources from which distribution payments are made. The rule is intended to prevent shareholders from confusing income dividends with distributions made from capital sources. Absent rule 19a–1, shareholders might receive a false impression of fund gains.

Based on a review of filings made with the Commission, the staff estimates that approximately 4600 series of registered investment companies that are management companies may be subject to rule 19a–1 each year, and that each portfolio on average mails two statements per year to meet the requirements of the rule.[3] The staff further estimates that the time needed to make the determinations required by the rule and to prepare the statement required under the rule is approximately 1 hour per statement. The total annual burden for all portfolios therefore is estimated to be approximately 9,200 burden hours.

The staff estimates that approximately one-third of the total annual burden (3,067 hours) would be incurred by a paralegal with an average hourly wage rate of approximately $168 per hour,[4] and approximately two-thirds of the annual burden (6,133 hours) would be incurred by a compliance clerk with an average hourly wage rate of $62 per hour.[5] The staff therefore estimates that the aggregate annual cost of complying with the paperwork requirements of the rule is approximately $895,502 ((3,067 hours × $168) + (6,133 hours × $62)).

To comply with state law, many investment companies already must distinguish the different sources from which a shareholder distribution is paid and disclose that information to shareholders. Thus, many investment companies would be required to distinguish the sources of shareholder dividends whether or not the Commission required them to do so under rule 19a–1.

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act, and is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules. Compliance with the collection of information required by rule 19a–1 is mandatory for management companies that make statements to shareholders pursuant to section 19(a) of the Act. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Written comments are invited on: (a) Whether the collections of information are necessary for the proper performance of the functions of the Commission, including whether the information has practical utility; (b) the accuracy of the Commission's estimate of the burdens of the collections of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burdens of the collections of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Lewis W. Walker, Acting Director/CIO, Securities and Exchange Commission, c/o Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312; or send an e-mail to: *PRA_Mailbox@sec.gov*.

Dated: December 1, 2008.

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8–28907 Filed 12–5–08; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 80a.

[2] Section 4(3) of the Act (15 U.S. C. 80a–4(3)) defines ''management company'' as ''any investment company other than a face amount certificate company or a unit investment trust.''

[3] A few portfolios make monthly distributions from sources other than net income, so the rule requires them to send out a statement 12 times a year. Other portfolios never make such distributions.

[4] Hourly rates are derived from the Securities Industry and Financial Markets Association (''SIFMA''), Management and Professional Earnings in the Securities Industry 2007, modified to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead.

[5] Hourly rates are derived from SIFMA's Office Salaries in the Securities Industry 2007, modified to account for an 1800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead.

## SECURITIES AND EXCHANGE COMMISSION

### Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

*Extension:*

Rule 498; File No. 270–435; OMB Control No. 3235–0488.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (''Act'') (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget a

request for extension of the previously approved collection of information discussed below.

Rule 498 of the Securities Act of 1933 (17 CFR 230.498) permits open-end management investment companies (or a series of an investment company organized as a series company, which offers one or more series of shares representing interests in separate investment portfolios) (''funds'') to provide investors with a ''profile'' that contains a summary of key information about a fund, including the fund's investment objectives, strategies, risks and performance, and fees, in a standardized format. The profile provides investors the option of buying fund shares based on the information in the profile or reviewing the fund's prospectus before making an investment decision. Investors purchasing shares based on a profile receive the fund's prospectus prior to or with confirmation of their investment in the fund.

Consistent with the filing requirement of a fund's prospectus, a profile must be filed with the Commission thirty days before first use. Such a filing allows the Commission to review the profile for compliance with Rule 498. Compliance with the rule's standardized format assists investors in evaluating and comparing funds.

It is estimated that approximately 16 initial profiles and 274 updated profiles are filed with the Commission annually. The Commission estimates that each profile contains on average 1.25 portfolios, resulting in 20 portfolios filed annually on initial profiles and 343 portfolios filed annually on updated profiles. The number of burden hours for preparing and filing an initial profile per portfolio is 25. The number of burden hours for preparing and filing an updated profile per portfolio is 10. The total burden hours for preparing and filing initial and updated profiles under Rule 498 is 3,930, representing an increase of 749 hours from the prior estimate of 3,181. The increase in burden hours is attributable to the higher number of profiles actually prepared and filed as compared to the previous estimates.

The estimates of average burden hours are made solely for the purposes of the Act and are not derived from a comprehensive or even representative survey or study of the cost of Commission rules and forms.

The collection of information under Rule 498 is required to obtain a benefit. The information provided by Rule 498 is not kept confidential. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Please direct general comments regarding the above information to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or e-mail to: *nfraser@omb.eop.gov;* and (ii) Lewis W. Walker, Acting Director/CIO, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312; or send an e-mail to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

Dated: December 1, 2008.

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8–28909 Filed 12–5–08; 8:45 am]

**BILLING CODE 8011–01–P**

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## SECURITIES AND EXCHANGE COMMISSION

### Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Regulation S–B, OMB Control No. 3235–00417, SEC File No. 270–370.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Regulation S–B (17 CFR 228.10, 228.101–228.103, 228.201–228.202, 228.303–228.308, 228.310, 228.401–228.407, 228.501–228.512, 228.601, 228.701–228.703) specifies the non-financial disclosure requirements applicable to registration statements under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) and registration statements under Section 12, annual and other reports under Section 13 and 15(d), going-private transaction statements under Section 13, tender offer statements under Section 13 and 14, annual reports to security holders and proxy and information statements under Section 14 and any other documents required to be filed by small business issuers under the Securities Exchange Act of 1934 (15 U.S.C. 78*l*, 78m, 78n, 78o(d)). Regulation S–B is assigned one burden hour for administrative convenience. Regulation S–B will expire on March 15, 2009.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden imposed by the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Lewis W. Walker, Acting Director/CIO, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, Virginia 22312; or send an e-mail to: *PRA_Mailbox@sec.gov*.

Dated: December 1, 2008.

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8–28953 Filed 12–5–08; 8:45 am]

**BILLING CODE 8011–01–P**

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–59024; File No. 4–533]**

### Joint Industry Plan; Notice of Filing and Immediate Effectiveness of an Amendment to the National Market System Plan for the Selection and Reservation of Securities Symbols To Add the International Securities Exchange, LLC as a Party Thereto

November 26, 2008.

Pursuant to Section 11A(a)(3) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 608 thereunder,[2] notice is hereby given that on November 18, 2008, the International Securities Exchange, LLC (''ISE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') an amendment to the National Market System Plan for the Selection and Reservation of Securities Symbols (''Symbology Plan'' or ''Plan'').[3] The

[1] 15 U.S.C. 78k–1(a)(3).

[2] 17 CFR 242.608.

[3] On November 6, 2008, the Commission approved the Symbology Plan that was originally

amendment proposes to add ISE as a party to the Symbology Plan. The Commission is publishing this notice to solicit comments on the proposed amendment from interested persons.

## I. Description and Purpose of the Amendment

The current parties to the Symbology Plan are CHX, Nasdaq, FINRA, NSX, and Phlx. The proposed amendment to the Symbology Plan would add ISE as a party to the Symbology Plan. A self-regulatory organization (''SRO'') may become a party to the Symbology Plan if it satisfies the requirements of Section I(c) of the Plan. Specifically, an SRO may become a party to the Symbology Plan if: (i) It maintains a market for the listing or trading of Plan Securities,[4] in accordance with rules approved by the Commission, which securities are identified by one, two, three, four, or five character symbols; (ii) it signs a current copy of the Plan; and (iii) it pays to the other parties a proportionate share of the aggregate development costs, based upon the number of symbols reserved by the new party during the first twelve (12) months of such party's membership.

ISE has submitted a signed copy of the Symbology Plan to the Commission in accordance with the requirement set forth in the Symbology Plan regarding new parties to the plan.

## II. Effectiveness of the Proposed Symbology Plan Amendment

The foregoing proposed Symbology Plan amendment has become effective pursuant to Rule 608(b)(3)(iii) [5] because it involves solely technical or ministerial matters. At any time within sixty days of the filing of this amendment, the Commission may summarily abrogate the amendment and require that it be refiled pursuant to paragraph (b)(1) of Rule 608,[6] if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors or the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system or otherwise in furtherance of the purposes of the Act.

## III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the amendment 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 4–533 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 4–533. 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 4–533 and should be submitted on or before December 29, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8–28958 Filed 12–5–08; 8:45 am]

BILLING CODE 8011–01–P

proposed by the Chicago Stock Exchange, Inc. (''CHX''), The Nasdaq Stock Market, Inc. (''Nasdaq''), National Association of Securities Dealers, Inc. (''NASD'') (n/k/a Financial Industry Regulatory Authority, Inc. (''FINRA'')),[4] National Stock Exchange, Inc. (''NSX''), and Philadelphia Stock Exchange, Inc. (''Phlx''), subject to certain changes. *See* Securities Exchange Act Release No. 58904, 73 FR 67218 (November 13, 2008) (File No. 4–533).

[4] ''Plan Securities'' are defined in the Symbology Plan as securities that: (i) Are NMS securities as currently defined in Rule 600(a)(46) under the Act; and (ii) any other equity securities quoted, traded and/or trade reported through an SRO facility.

[5] 17 CFR 242.608(b)(3)(iii).

[6] 17 CFR 242.608(b)(1).

[7] 17 CFR 200.30–3(a)(12).

# SECURITIES AND EXCHANGE COMMISSION

## Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold a Closed Meeting on Tuesday, December 9, 2008 at 2 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), 9(B) and (10) and 17 CFR 200.402(a)(3), (5), (7), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Walter, as duty officer, voted to consider the items listed for the Closed Meeting in closed session.

The subject matter of the Closed Meeting scheduled for Tuesday, December 9, 2008 will be:

Formal orders of investigation;

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings of an enforcement nature;

Consideration of amicus participation; and

Other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: The Office of the Secretary at (202) 551–5400.

Dated: December 2, 2008.

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8–28885 Filed 12–5–08; 8:45 am]

BILLING CODE 8011–01–P

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–59029; File No. SR–BATS–2008–011]**

## Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Make Certain Market Maker Quoting Violations Punishable Under Its Minor Rule Violation Plan

December 1, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 25, 2008, BATS Exchange, Inc. (''BATS'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. BATS has designated the proposed rule change as ''non-controversial'' under Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to amend BATS Rule 8.15.01, entitled ''List of Exchange Rule Violations and Recommended Fine Schedule Pursuant to Rule 8.15'' to expand the list of violations eligible for disposition under the Exchange's Minor Rule Violation Plan (''MRVP'') by adding Rule 11.8(a)(1).

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The purpose of the proposed rule change is to amend Rule 8.15, entitled ''Imposition of Fines for Minor Violation(s) of Rules'' to add Rule 11.8(a)(1) to the list of rules which would be appropriate for disposition under the Exchange's MRVP. The proposed addition of Rule 11.8(a)(1), which provides that a Market Maker must maintain continuous limit orders to buy and sell for round lots in those securities in which the Market Maker is registered to trade, would allow the Exchange to impose a $100 per violation fine for each violation of this rule. By promptly imposing a meaningful financial penalty for such violations, the MRVP focuses on correcting conduct before it gives rise to more serious enforcement action. The MRVP provides a reasonable means of addressing rule violations that do not necessarily rise to the level of requiring formal disciplinary proceedings, while also providing a greater flexibility in handling certain violations. Adopting a provision that would allow the Exchange to sanction violators under the MRVP by no means minimizes the importance of compliance with Exchange Rule 11.8. The Exchange believes that the violation of any of its rules is a serious matter. The addition of a sanction under the MRVP simply serves to add an additional method for disciplining violators of Exchange Rule 11.8. The Exchange will continue to conduct surveillance with due diligence and make its determination, on a case by case basis, whether a violation of Exchange Rule 11.8 should be subject to formal disciplinary proceedings.

2. Statutory Basis

The approval of the rule change proposed in this submission is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[5] In particular, the proposed change is consistent with Section 6(b)(5) of the Act,[6] because it would promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system, and, in general, protect investors and the public interest, by giving the Exchange the ability to promptly impose a meaningful financial penalty for such violations before there is a need for more serious enforcement action.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change imposes any burden on competition.

*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.

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act[7] and Rule 19b–4(f)(6) thereunder.[8]

BATS has asked the Commission to waive the 30-day operative delay. The Commission hereby grants the Exchange's request and believes that such waiver is consistent with the protection of investors and the public interest. The proposed rule change is based on the rules of other exchanges that were previously approved by the Commission,[9] and does not raise any novel or significant regulatory issues. The proposed rule change will provide the Exchange with a reasonable means of addressing rule violations that do not necessarily rise to the level of requiring formal disciplinary proceedings. For these reasons, the Commission

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6). The Commission notes taht BATS has satisfied the five-day pre-filing notice requirement.

[9] *See, e.g.,* Securities Exchange Act Release No. 41366 (May 4, 1999), 64 FR 25939 (May 13, 1999) (SR–CSE–99–04); Securities Exchange Act Release No. 57697 (April 22, 2008), 73 FR 23287 (April 29, 2008) (SR–NYSEArca–12008–32).

designates the proposed rule change as operative upon filing.[10]

At any time within 60 days of the filing of the proposed rule change the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–BATS–2008–011 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–BATS–2008–011. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at the principal office of the self-regulatory organization. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BATS–2008–011 and should be submitted on or before December 29, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8–28959 Filed 12–5–08; 8:45 am]

BILLING CODE 8011–01–P

[10] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's effect on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[11] 17 CFR 200.30–3(a)(12).

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–59032; File No. SR–CBOE–2008–121]**

## Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Temporary Membership Status and Interim Trading Permit Access Fees

December 1, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on November 28, 2008, the Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the CBOE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CBOE proposes to adjust (i) the monthly access fee for persons granted temporary CBOE membership status (''Temporary Members'') pursuant to Interpretation and Policy .02 under CBOE Rule 3.19 (''Rule 3.19.02'') and (ii) the monthly access fee for Interim Trading Permit (''ITP'') holders under CBOE Rule 3.27. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/Legal/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CBOE included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The CBOE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The current access fee for Temporary Members under Rule 3.19.02[2] and the current access fee for ITP holders under Rule 3.27[3] are both $9,937 per month. Both access fees are currently set at the indicative lease rate (as defined below) for November 2008. The Exchange proposes to adjust both access fees effective at the beginning of December 2008 to be equal to the indicative lease rate for December 2008 (which is $9,500). Specifically, the Exchange proposes to revise both the Temporary Member access fee and the ITP access fee to be $9,500 per month commencing on December 1, 2008.

The indicative lease rate is defined under Rule 3.27(b) as the highest clearing firm floating monthly rate[4] of the CBOE Clearing Members that assist in facilitating at least 10% of the CBOE transferable membership leases.[5] The Exchange determined the indicative lease rate for December 2008 by polling each of these Clearing Members and obtaining the clearing firm floating monthly rate designated by each of these Clearing Members for that month.

The Exchange used the same process to set the proposed Temporary Member

[2] *See* Securities Exchange Act Release No. 56458 (September 18, 2007), 72 FR 54309 (September 24, 2007) (SR–CBOE–2007–107) for a description of the Temporary Membership status under Rule 3.19.02.

[3] *See* Securities Exchange Act Release No. 58178 (July 17, 2008), 73 FR 42634 (July 22, 2008) (SR–CBOE–2008–40) for a description of the Interim Trading Permits under Rule 3.27.

[4] Rule 3.27(b) defines the clearing firm floating monthly rate as the floating monthly rate that a Clearing Member designates, in connection with transferable membership leases that the Clearing Member assisted in facilitating, for leases that utilize that monthly rate.

[5] The concepts of an indicative lease rate and of a clearing firm floating month rate were previously utilized in the CBOE rule filings that set and adjusted the Temporary Member access fee. Both concepts are also codified in Rule 3.27(b) in relation to ITPs.

and ITP access fees that it used to set the current Temporary Member and ITP access fees. The only difference is that the Exchange used clearing firm floating monthly rate information for the month of December 2008 to set the proposed access fees (instead of clearing firm floating monthly rate information for the month of November 2008 as was used to set the current access fees) in order to take into account changes in clearing firm floating monthly rates for the month of December 2008.

The Exchange believes that the process used to set the proposed Temporary Member access fee and the proposed Temporary Member access fee itself are appropriate for the same reasons set forth in CBOE rule filing SR–CBOE–2008–12 with respect to the original Temporary Member access fee.[6] Similarly, the Exchange believes that the process used to set the proposed ITP access fee and the proposed ITP access fee itself are appropriate for the same reasons set forth in CBOE rule filing SR–CBOE–2008–77 with respect to the original ITP access fee.[7]

Each of the proposed access fees will remain in effect until such time either that the Exchange submits a further rule filing pursuant to Section 19(b)(3)(A)(ii) of the Act[8] to modify the applicable access fee or the applicable status (*i.e.*, the Temporary Membership status or the ITP status) is terminated. Accordingly, the Exchange may, and likely will, further adjust the proposed access fees in the future if the Exchange determines that it would be appropriate to do so taking into consideration lease rates for transferable CBOE memberships prevailing at that time.

The procedural provisions of the CBOE Fee Schedule related to the assessment of each proposed access fee are not proposed to be changed and will remain the same as the current procedural provisions relating to the assessment of that access fee.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Section 6(b)(4) of the Act,[10] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among persons using its facilities.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

CBOE does not believe that the proposed rule change will impose any burden on competition 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 rule change establishes or changes a due, fee, or other charge imposed by the Exchange, it has become effective pursuant to Section 19(b)(3)(A) of the Act[11] and subparagraph (f)(2) of Rule 19b–4[12] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2008–121 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2008–121. 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 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 No. SR–CBOE–2008–121 and should be submitted on or before December 29, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8–28962 Filed 12–5–08; 8:45 am]

**BILLING CODE 8011–01–P**

[6] *See* Securities Exchange Act Release No. 57293 (February 8, 2008), 73 FR 8729 (February 14, 2008) (SR–CBOE–2008–12), which established the original Temporary Member access fee, for detail regarding the rationale in support of the original Temporary Member access fee and the process used to set that fee, which is also applicable to this proposed change to the Temporary Member access fee as well.

[7] *See* Securities Exchange Act Release No. 58200 (July 21, 2008), 73 FR 43805 (July 28, 2008) (SR–CBOE–2008–77), which established the original ITP access fee, for detail regarding the rationale in support of the original ITP access fee and the process used to set that fee, which is also applicable to this proposed change to the ITP access fee as well.

[8] 15 U.S.C. 78s(b)(3)(A)(ii).

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(2).

[13] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–59038; File No. SR–CBOE–2008–118]**

## Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of Proposed Rule Change Related to Obvious Error Rules

December 2, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 26, 2008, the Chicago Board Options Exchange, Incorporated (the ''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The 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 6.25 and Rule 24.16 to adopt procedures which would allow CBOE to review transactions on its own motion. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/Legal*), at the Office of the Secretary, CBOE and at the Commission.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

CBOE proposes to amend Rule 6.25 and Rule 24.16 pertaining to the nullification and adjustment of options transactions. Specifically, CBOE proposes to adopt a new provision which provides that in the interest of maintaining a fair and orderly market and for the protection of investors, the President of CBOE or his/her designee (collectively ''CBOE officer''), who shall be an officer of CBOE but may not be a member, may, on his or her own motion or upon request, determine to review any transaction occurring on CBOE that is believed to be erroneous.[3] A transaction reviewed pursuant to this new paragraph (3) may be nullified or adjusted only if it is determined by the CBOE officer that the transaction is erroneous as provided in Rule 6.25(a)(1)–(6) or Rule 24.16(a)(1)–(6). A transaction would be adjusted or nullified in accordance with the provision under which it is deemed an erroneous transaction.[4] The CBOE officer may be assisted by Trading Officials in reviewing a transaction (or the senior official in the control room in the case of transactions being reviewed under 6.25(a)(6) or Rule 24.16(a)(6)).

The CBOE officer shall act pursuant to this paragraph as soon as possible after receiving notification of the transaction, and ordinarily would be expected to act on the same day as the transaction occurred. However, because a transaction under review may have occurred near the close of trading or due to unusual circumstances, the rule provides that the CBOE officer shall act no later than 8:30 a.m. (CT) on the next trading day following the date of the transaction at issue. A member affected by a determination to nullify or adjust a transaction pursuant to this new paragraph (3) may appeal such determination in accordance with Rule 6.25(d) or Rule 24.16(d); however, a determination by a CBOE officer not to review a transaction, or a determination not to nullify or adjust a transaction for which a review was requested or conducted, is not appealable. CBOE believes it is appropriate to limit review on appeal to only those situations in which a transaction is actually nullified or adjusted. Additionally, transactions adjusted or nullified pursuant to this new paragraph cannot be reviewed by an Obvious Error Panel under paragraph (c) of Rule 6.25.

This new provision is not intended to replace a party's obligation to request review, within the required time periods under Rule 6.25 and Rule 24.16, of any transaction that it believes meets the criteria for an obvious error. And, if a transaction is reviewed and a determination is rendered pursuant to paragraphs (b)(1) and (b)(2), Rule 6.25 and Rule 24.16, as amended, specifically state that relief shall not be granted under this new paragraph (b)(3).

Moreover, CBOE does not anticipate exercising this new authority in every situation in which a party fails to make a timely request for review of a transaction under paragraph (b)(1) of Rule 6.25 and Rule 24.16. CBOE believes this provision will help to protect the integrity of its marketplace by vesting a CBOE officer with the authority to review a transaction that may be erroneous, in those situations where a party failed to make a timely request for a review.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (''Act'')[5] and the rules and regulations thereunder and, in particular, the requirements of Section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[7] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest. CBOE notes that the CBOE officer can adjust or nullify a transaction under the authority granted by this new provision only if the transaction meets the objective criteria for an obvious error under CBOE's rules.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

CBOE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

No written comments were solicited or received with respect to the proposed rule change.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] In the event a party to a transaction requests that the President or his/her designee review a transaction, the CBOE officer nonetheless would need to determine, on his or her own motion, whether to review the transaction.

[4] With regard to Rule 24.16, paragraph (c) pertaining to adjustments and nullifications would also be considered.

[5] 15 U.S.C. 78f(b)(1).

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

(A) by order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2008–118 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2008–118. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available 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–CBOE–2008–118 and should be submitted on or before December 29, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8–28965 Filed 12–5–08; 8:45 am]

**BILLING CODE 8011–01–P**

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–59033; File No. SR–DTC–2008–08]**

## Self-Regulatory Organizations; the Depository Trust Company; Order Granting Approval of a Proposed Rule Change To Eliminate the Ability To Obtain a Physical Certificate From DTC for Issues That Are Eligible and Participating in the Direct Registration System

December 1, 2008.

### I. Introduction

On July 9, 2008, The Depository Trust Company (''DTC'') filed with the Securities and Exchange Commission (''Commission'') proposed rule change SR–DTC–2008–08 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'').[1] Notice of the proposal was published in the **Federal Register** on September 2, 2008.[2] The Commission received two comment letters.[3] For the reasons discussed below, the Commission is granting approval of the proposed rule change.

### II. Description

Currently, DTC participants (*i.e.*, broker-dealers and banks) use the Withdrawal-by-Transfer (''WT'') service to instruct DTC to have securities assets held in the participant's DTC account reregistered in the name of an individual investor, a firm, or a third party. The reregistered assets can be issued in certificated form or as a DRS position.[4] On receipt of a WT instruction from a participant, DTC either (i) sends a certificate the issuer's transfer agent for reregistration in the name of the person or entity identified in the WT instruction or (ii) instructs the issuer's transfer agent to debit DTC's position and issue securities in the name of the person or entity identified in the WT instruction.

In an effort to further reduce the industry's dependency on physical certificates, DTC is eliminating the issuance of physical certificates through its WT service for issues that participate in DRS. DTC believes this modification of its WT service reaffirms its goals of reducing the costs and risk associated with processing physical certificates.

Pursuant to the rule change, beginning January 1, 2009, DTC will no longer provide for the issuance of a certificate through the WT service if the issue is participating in DRS. Instead, DTC will instruct the issuer's transfer agent to establish a DRS position and to provide a DRS statement in lieu of a physical certificate. An investor will still be able to obtain a physical certificate to the person or entity identified in the WT instruction by taking the investor's DRS statement directly to the issuer's transfer agent for conversion to a certificate or by using DTC's Deposit and Withdrawal at Custodian (''DWAC'') process.[5]

The rule change will also eliminate a participant's ability to obtain a physical certificate through the WT service for issues eligible but not participating in DRS on or after July 1, 2009 (''elimination date''). For the small number of issues anticipated not to have become eligible to participate in DRS by the elimination date, WT instructions requesting a physical certificate may continue to be processed through DWAC or Rush WT processes.

Additionally, the rule change will eliminate DTC's Direct Mail by Depository (''DMD'') service for all issues in the fourth quarter of 2009. As a result, DTC will no longer mail certificates to investors. Participants will still be able to use the Direct Mail by Agent (''DMA'') service through which DTC instructs the transfer agent to provide DRS statements or physical certificates to investors or their

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[8] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] Securities Exchange Act Release No. 58404 (August 21, 2008), 73 FR 51326.

[3] Letters from Daniel Raider (September 30, 2008) and Candice D. Fordin, Associate Counsel, The Depository Trust Company (October 13, 2008).

[4] Issues that participate in the DRS program allow investors to hold their assets in DRS book-entry form on the books of the issuer.

[5] DWAC is a method of electronically transferring shares between participants and the transfer agent. For more information about the DWAC service, see Securities Exchange Act Release No. 30283 (January 23, 1992), 57 FR 3658 (January 30, 1992) [File No. SR–DTC–91–16] (order granting approval of the DWAC service).

appointed third parties. Physical certificates could also be obtained through DTC's Central Delivery processes through which DTC mails certificates to the participant or allows the participant to pick up the certificate.

### III. Comment Letters

The Commission received two comment letters, one from an individual investor and the other from DTC.[6] The individual investor opposed the proposed rule change because he contends it is inconsistent with the purposes of the Exchange Act and would undermine the ability of beneficial shareholders to become registered shareholders, particularly with respect to issues that are not DRS eligible. The commenter believes that registered shareholders can be assured of receiving information directly from the company, receiving dividends promptly, and obtaining certain rights afforded under state law.

To address the concerns raised by the commenter, DTC responded with a comment letter. DTC stated that the commenter's understanding of DRS is inaccurate because investors holding positions in DRS are actually registered directly on the records of the issuer in book-entry form and therefore are registered shareholders. Furthermore, DTC contended that DRS provides benefits such as reducing the risk of holding securities certificates and allowing the assets to be accurately and quickly moved from DRS to street name position for despositing, thereby assisting in the prompt and accurate clearance and settlement of securities transactions. DTC also noted that because investors holding DRS positions are registered shareholders, they will receive all communications and disbursements directly from the issuer and may request a certificate directly from the issuer's transfer agent.

### IV. Discussion

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions, assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible, to foster cooperation and coordination with persons engaged in the clearance and settlement of securities transactions, to remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions, and, in general, to protect investors and the public interest.[7] Broker-dealers currently use DTC's services to obtain securities certificates on behalf of themselves or their customers. Discontinuing those services at DTC should decrease the use of securities certificates. DTC's rule change should make processing securities transactions more safe and efficient by discouraging the use of securities certificates, which increase the risks and costs associated with processing securities transactions.

Contrary to the commenter's statements that DTC's proposed rule change would undermine the investor's ability to become a registered shareholder or eliminate the investor's ability to obtain a certificate, DTC's proposed rule change does neither. Only the issuer can decide whether to make securities eligible for DRS or make securities certificates available. DTC's proposed rule will simply eliminate the issuance of securities certificates through DTC's WT service for issues that are participating in DRS. Furthermore, as DTC noted, investor's holding their securities in DRS are registered shareholders and thereby eligible to all the same rights and obligations as are eligible to investors holding securities certificates.

Accordingly, for the reasons stated above the Commission believes that the rule change is consistent with DTC's obligation under Section 17A of the Act.

### V. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act and the rules and regulations thereunder.

*It is therefore ordered,* pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR–DTC–2008–08) be and hereby is approved.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[8]

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8–28963 Filed 12–5–08; 8:45 am]

BILLING CODE 8011–01–P

[6] Supra note 3.

[7] 15 U.S.C. 78q(b)(3)(F).

[8] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–59021; File No. SR–ISE–2008–91]**

## Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Complex Orders

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 25, 2008, the International Securities Exchange, LLC (the ''Exchange'' or the ''ISE'') filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II, and III below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The ISE proposes to amend its Rule 722 regarding Complex Orders. The text of the proposed rule change is as follows, with deletions in [brackets] and additions in *italics:*

Rule 722. Complex Orders

(a) *Definitions.* [Complex Orders Defined. A complex order is any order for the same account as defined below:]

*(1) Complex Order. A complex order is any order involving the simultaneous purchase and/or sale of two or more different options series in the same underlying security, for the same account, in a ratio that is equal to or greater than one-to-three (.333) and less than or equal to three-to-one (3.00) and for the purpose of executing a particular investment strategy.*

[(1) Spread Order. A spread order is an order to buy a stated number of option contracts and to sell the same number of option contracts, of the same class of options.

(2) Straddle Order. A straddle order is an order to buy (sell) a number of call option contracts and the same number of put option contracts on the same underlying security which contracts have the same exercise price and expiration date (e.g., an order to buy two XYZ July 50 calls and to buy two XYZ July 50 puts).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

(3) Strangle Order. A strangle order is an order to buy (sell) a number of call option contracts and the same number of put option contracts in the same underlying security, which contracts have the same expiration date (e.g., an order to buy two ABC June 40 calls and to buy two ABC June 35 puts).

(4) Combination Order. A combination order is an order involving a number of call option contracts and the same number of put option contracts in the same underlying security and representing the same number of shares at option.

(5) Combination orders with non-equity options legs. One or more legs of a complex order may be to purchase or sell a stated number of units of another security.

(i) Stock-Option Order. A stock-option order is an order to buy or sell a stated number of units of an underlying stock or a security convertible into the underlying stock (''convertible security'') coupled with either (A) the purchase or sale of option contract(s) on the opposite side of the market representing either the same number of units of the underlying stock or convertible security or the number of units of the underlying stock necessary to create a delta neutral position; or (B) the purchase or sale of an equal number of put and call option contracts, each having the same exercise price, expiration date, and each representing the same number of units of stock, as and on the opposite side of the market from, the stock or convertible security portion of the order.]

*(2) Stock-Option Order. A stock-option order is an order to buy or sell a stated number of units of an underlying stock or a security convertible into the underlying stock (''convertible security'') coupled with the purchase or sale of options contract(s) on the opposite side of the market representing either (A) the same number of units of the underlying stock or convertible security, or (B) the number of units of the underlying stock necessary to create a delta neutral position, but in no case in a ratio greater than 8 options contracts per unit of trading of the underlying stock or convertible security established for that series by the Clearing Corporation.*

*(3)*[(ii)] SSF-Option Order. A SSF-option order is an order to buy or sell a stated number of units of a single stock future or a security convertible into a single stock future (''convertible SSF'') coupled with either (A) the purchase or sale of option contract(s) on the opposite side of the market representing either the same number of units of stock underlying the single stock future or convertible SSF, or the number of units of stock underlying the single stock future or convertible SSF necessary to create a delta neutral position; or (B) the purchase or sale of an equal number of put and call option contracts, each having the same exercise price, expiration date, and each representing the same number of units of underlying stock, as and on the opposite side of the market from, the stock underlying the single stock future or convertible SSF portion of the order.

[(6) Ratio Order. A spread, straddle or combination order may consist of legs that have a different number of contracts, so long as the number of contracts differs by a permissible ratio. For purposes of this paragraph, a permissible ratio is any ratio that is equal to or greater than one-to-three (.333) and less than or equal to three-to-one (3.00). For example, a one-to-two (.5) ratio, a two-to-three (.667) ratio, or a two-to-one (2.0) ratio is permissible, whereas a one-to-four (.25) ratio or a four-to-one (4.0) ratio is not.

(7) Butterfly Spread Order. A butterfly spread order is an order involving three series of either put or call options all having the same underlying security and time of expiration and, based on the same current underlying value, where the interval between the exercise price of each series is equal, which orders are structured as either (i) a ''long butterfly spread'' in which two short options in the same series offset by one long option with a higher exercise price and one long option with a lower exercise price or (ii) a ''short butterfly spread'' in which two long options in the same series are offset by one short option with a higher exercise price and one short option with a lower exercise price.

(8) Box Spread Order. A box spread order is an order involving (a) a long call option and a short put option with the same exercise price, coupled with (b) a long put option and a short call option with the same exercise price; all of which have the same underlying security and time of expiration.

(9) Collar Order. A collar order is an order involving the sale of a call option coupled with the purchase of a put option in equivalent units of the same underlying security having a lower exercise price than, and same expiration date as, the sold call option.]

(b) No Change.

(1) No Change.

(2) Complex Order Priority. Notwithstanding the provisions of Rule 713, a complex order, as defined in paragraph (a)(*1*) of this Rule, may be executed at a total credit or debit price with one other Member without giving priority to bids or offers established in the marketplace that are no better than the bids or offers comprising such total credit or debit; provided, however, that if any of the bids or offers established in the marketplace consist of a Public Customer limit order, the price of at least one leg of the complex order must trade at a price that is better than the corresponding bid or offer in the marketplace by at least one minimum trading increment as defined in Rule 710. Under the circumstances described above, [the option leg of] *if* a stock-option order, as defined in subparagraph *(a)(2)*[(a)(5)(i)(A)] of this Rule, or SSF-option order as defined in subparagraph *(a)(3)*[(a)(5)(ii)(A)] of this Rule, *has one option leg, such option leg* has priority over bids and offers established in the marketplace by Non-Customer orders and market maker quotes that are no better than the price of the options leg, but not over such bids and offers established by Public Customer Orders. [The option legs of] *If* a stock-option order as defined in subparagraph *(a)(2)*[(a)(5)(ii)(B)], or SSF-option order as defined in subparagraph *(a)(3)*[(a)(5)(ii)(B)], consisting of a combination order with stock or single stock futures, as the case may be, *has more than one option leg, such option legs* may be executed in accordance with the first sentence of this subparagraph (b)(2).

(3)–(4) No Change.

Supplementary Material to Rule 722

.01 A bid or offer made as part of a stock-option order (as defined in *(a)(2)*[(a)(5)(i)] above) or a SSF-option order (as defined in *(a)(3)*[(a)(5)(ii)] above) is made and accepted subject to the following conditions: (1) The order must disclose all legs of the order and must identify the security (which in the case of a single stock future requires sufficient identification to determine the market(s) on which the single stock future trades) and the price at which the non-option leg(s) of the order is to be filled; and (2) concurrent with the execution of the options leg of the order, the initiating member and each member that agrees to be a contra-party on the non-option leg(s) of the order must either elect to have the stock leg(s) of a stock-option order electronically communicated to a designated broker-dealer for execution as provided in .02 below or take steps immediately to transmit the non-option leg(s) to a non-Exchange market(s) for execution. Failure to observe these requirements will be considered conduct inconsistent with just and equitable principles of trade and a violation of Rule 400.

A trade representing the execution of the options leg of a stock-option or SSF-

option order may be cancelled at the request of any member that is a party to that trade only if market conditions in any of the non-Exchange market(s) prevent the execution of the non-option leg(s) at the price(s) agreed upon.

.02 No Change.

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## II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

### *A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

(a) Purpose

ISE currently has rules governing the trading of ''complex orders.'' Specifically, ISE Rule 722 contains definitions of complex orders and specifies the standing of such orders on the ISE. They state that the legs that comprise a complex order receive neither time-price priority nor away market price protection. And similar to the rules of the other options exchanges, our rules provide that the legs of a complex order may not be executed at prices that are inferior to the best prices available on the ISE.

The Exchange now proposes to amend its Rule 722 regarding complex orders. For many years, the options exchanges have recognized that strategies involving more than one option series or more than one instrument associated with an underlying security are different from regular buy and sell orders for a single series, and order to achieve such strategies should be defined separately. As the sophistication of the industry has grown, so have the strategies, and the options exchanges have regularly added new strategies to the list of defined complex order types. The investing industry, however, creates new, legitimate investment strategies that do not necessarily fit into one of the narrow definitions for complex order types that the exchanges presently use. These order types are often developed for a particular strategy, specific to a particular issue. To attempt to define every individual strategy, and file additional rules to memorialize them, would be a time consuming and extremely onerous process, and would serve only to confuse the investing public. As a result, bona fide transactions to limit risk are not afforded the facility of execution afforded more common complex orders.

ISE Rule 722 currently defines at least nine specific complex strategies. These are the most comprehensive lists of complex strategies defined in a rule set, yet they do not cover all of the possibilities of complex orders. To provide for greater flexibility in the design and use of complex strategies, ISE proposes to eliminate specific complex order types described in Rule 722, and adopt a generic definition approved for use for exemption from Trade Through Liability by the Options Linkage Authority as described in the ''Plan For The Purpose Of Creating And Operating An Intermarket Option Linkage.'' The Exchange believes adopting a generic definition of complex orders will give investors more flexibility in creating strategies with greater accuracy.

In addition, the Exchange also proposes to amend the definition of a Stock-Option Order in ISE Rule 722 to conform the Exchange's definition to that of NYSE Arca, Inc. (''NYSE Arca''). Specifically, under the proposed new definition, a stock-option order is an order to buy or sell a stated number of units of an underlying stock or a security convertible into the underlying stock coupled with the purchase or sale of options contract(s) on the opposite side of the market representing either (A) the same number of units of the underlying stock or convertible security, or (B) the number of units of the underlying stock necessary to create a delta neutral position, but in no case in a ratio greater than 8 options contracts per unit of trading of the underlying stock or convertible security.

(b) Basis

The basis under the Securities Exchange Act of 1934 (''Exchange Act'') for this proposed rule change is the requirement under Section 6(b)(5) [3] that an exchange have rules that are designed to promote just and equitable principles of trade, and to remove impediments to and perfect the mechanism for a free and open market and a national market system, and in general, to protect investors and the public interest. ISE believes adopting a generic definition of for [sic] complex orders and amending the definition of a stock-option order, as proposed in the instant rule change, is appropriate in that complex orders and stock-option orders are widely recognized and utilized by market participants and are invaluable, both as an investment, and a risk management, strategy. The proposed rule change will provide the opportunity for a more efficient mechanism for carrying out these strategies.

### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

This proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. The Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing the proposed rule change as required by Rule 19b–4(f)(6).[4] For the foregoing reasons, the Exchange believes the proposed rule filing qualifies for immediate effectiveness as a ''non-controversial'' rule change under paragraph (f)(6) of Rule 19b–4 of the Act.

The proposed amendment to ISE Rule 722 will allow the Exchange to adopt a generic definition for complex orders and amend the definition of stock-option orders to give market participants an ability to create trading opportunities that may be more closely aligned with their investment and/or risk management strategies. This proposed rule change adopting a generic

[3] 15 U.S.C. 78f(b)(5).

[4] 17 CFR 240.19b–4(f)(6).

definition for complex orders and amending the definition of stock-option orders is identical to the equivalent definitional changes adopted in a proposal previously submitted by NYSE Arca.[5] For the foregoing reasons, the Exchange believes the proposed rule change is non-controversial, does not raise any new, unique or substantive issues, and is beneficial for competitive purposes and to promote a free and open market for the benefit of investors.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form *http://www.sec.gov/rules/sro.shtml*); or
- Send an E-mail to *rule-comments@sec.gov.* Please include File No. SR–ISE–2008–91 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–ISE–2008–91. 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 Commissions Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the ISE. 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–ISE–2008–91 and should be submitted by December 29, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8–28956 Filed 12–5–08; 8:45 am]

**BILLING CODE 8011–01–P**

[5] *See* Securities Exchange Act Release Nos. 58174 (July 16, 2008), 73 FR 42640 (July 22, 2008) (Approving SR–NYSEArca–2008–54).

[6] 17 CFR 200.30–3(a)(12).

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–59030; File No. SR–Phlx–2008–80]**

## Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the NASDAQ OMX PHLX, Inc., Relating to XLE® Fees

December 1, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1], and Rule 19b–4 thereunder,[2] notice is hereby given that on November 19, 2008, the NASDAQ OMX PHLX, Inc. (''Phlx'' or ''Exchange''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared 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, pursuant to Section 19(b)(1) of the Act[3] and Rule 19b–4 thereunder,[4] proposes to delete the XLE Fee Schedule[5] and to delete references to XLE fees from Appendix A of the Exchange's fee schedule.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.phlx.com/regulatory/reg_rulefilings.aspx.*

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The purpose of the proposed rule change is to update the Exchange's fee schedules by deleting fees that are no longer applicable. Recently, the Exchange ceased operation of the technology used to operate XLE®.[6] At this time, XLE® is no longer available to accept orders and is no longer available to execute any transactions. Therefore, the Exchange proposes to delete all fees relating to XLE® from its fee schedule.

2. Statutory Basis

The Exchange believes that its proposal to amend its schedule of fees is consistent with Section 6(b) of the Act[7] in general, and furthers the objectives of Section 6(b)(4) of the Act[8] in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members. Deleting XLE®-related fees from the Exchange's fee schedule is necessary given that the Exchange has ceased operation of the technology used to operate XLE®.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition not

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(1).

[4] 17 CFR 240.19b–4.

[5] XLE® was the Exchange's equity trading system.

[6] *See* Securities Exchange Act Release No. 58613 (September 22, 2008), 73 FR 57181 (October 1, 2008) (SR–Phlx–2008–65). The Exchange ceased operation of the technology used to operate XLE® on October 24, 2008.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(4).

necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were either solicited or received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act [9] and paragraph (f)(2) of Rule 19b–4 [10] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2008–80 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2008–80. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available 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–Phlx–2008–80 and should be submitted on or before December 29, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8–28960 Filed 12–5–08; 8:45 am]

BILLING CODE 8011–01–P

[9] 15 U.S.C. 78s(b)(3)(A)(ii).

[10] 17 CFR 240.19b–4(f)(2).

[11] 17 CFR 200.30–3(a)(12).

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–59023; File No. SR–NASDAQ–2008–090]**

## Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding Enhancements to the Nasdaq Regulation Reconnaissance Service

November 26, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 24, 2008, The NASDAQ Stock Market LLC (''Nasdaq''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. 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 the Substance of the Proposed Rule Change**

Nasdaq proposes to establish fees for an enhancement to the Regulation Reconnaissance Service, which would provide firms with the ability to recreate the Nasdaq/CQS order books and trade data by way of a visual display. The text of the proposed rule change is available on Nasdaq's Web site, at Nasdaq's principal office, and at the Commission's Public Reference Room.

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

Nasdaq proposes to establish a fee for a new enhancement to the Nasdaq Regulation Reconnaissance Service (''Reg Recon''). Reg Recon is currently available as an add-on to the Nasdaq Workstation and Weblink ACT 2.0. Nasdaq is proposing to provide access to the Market Replay function to Reg Recon subscribers for an additional fee. Market Replay is a software program developed by Nasdaq, which uses publicly-available information to recreate and display the Nasdaq/CQS order books and trade data for any point in time.[3]

Nasdaq currently provides Market Replay for free on a publicly-accessible Web site as a demonstration of the product. Nasdaq hopes that vendors will ultimately purchase Market Replay to provide access to the functionality to their customers, either using the software ''as is'' or integrating the software into their proprietary displays. Nasdaq is proposing to provide Reg Recon subscribers an option to enhance their service with an integrated version of Market Replay.

Market Replay allows users to reconstruct the market for any Nasdaq/CQS security, and view trades and quotes at the millisecond level. In particular, Market Replay allows users to access the historical market for a particular security by entering a symbol, date, and timeframe. Subscribers may

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Market Replay data is delayed 15 minutes.

view quotes and/or trades in a security for the day and timeframe requested.

By way of a scrolling chart, Market Replay displays the National Best Bid and Offer together with the consolidated trades for the chosen security in simulated real time. Users are able to zoom in on the chart and manipulate the chart speed and direction. Users may also filter the data presented on the chart by market center.[4] Market Replay can also provide users with a list of trades that occurred during a user-defined timeframe, and can calculate price and volume statistics for that timeframe (*i.e.*, minimum/maximum price, total shares, and Volume Weighted Average Price).

Similarly, Market Replay can provide a minimum and maximum National Best Bid and Offer for a selected timeframe, as well as the minimum and maximum bid and offer for each exchange trading stock during the timeframe.

In addition to providing a useful analytical tool, Nasdaq believes that firms would find Market Replay helpful in responding to customer inquiries regarding the price received in a particular trade. In particular, firms can send to customers a Nasdaq-validated screen shot of the moment their particular trade occurred, confirming the quality of the execution.

Nasdaq proposes to offer Reg Recon subscribers access to the Market Replay function to [*sic*] for a fee of $500 per MPID, per month, plus a fee of $50 per user, per month. The proposed fees will cover the expense of purchasing the publicly-available data, as well as cover the costs associated with purchasing the Market Replay software from Nasdaq Data Products as any vendor must do. The proposed fees will also cover the costs associated with establishing the service, responding to customer requests, configuring Nasdaq's systems, programming to user specifications, and administering the service, among other things.

Nasdaq notes that the Reg Recon service generally, and the Market Replay upgrade are entirely optional services. Firms may choose to purchase Reg Recon or not, and those that choose to purchase it may then choose to purchase the Market Replay upgrade or not. If a firm does not perceive that the Reg Recon and Market Replay services are sufficiently valuable, it will choose not to purchase those services.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[5] in general, and with Section 6(b)(5) of the Act,[6] in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The amendments proposed herein will provide Reg Recon subscribers with a useful analytical tool with which to analyze and understand the historical market for Nasdaq/CQS securities and assist with researching RegNMS trade-throughs.

Nasdaq also believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[7] in general, and with Section 6(b)(4) of the Act,[8] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which the Nasdaq operates or controls, and it does not unfairly discriminate between customers, issuers, brokers or dealers. Use of the Market Replay enhancement to Reg Recon is voluntary and the subscription fees will be imposed on all purchasers equally based on the level of service selected.

The proposed fees will cover the costs associated with establishing the service, responding to customer requests, configuring Nasdaq's systems, programming to user specifications, and administering the service, among other things.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

Written comments were neither solicited nor received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[9] and Rule 19b–4(f)(6) thereunder.[10]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2008–090 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2008–090. 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

[4] Currently, Market Replay supports the following market centers: American Stock Exchange; CBOE Stock Exchange; Chicago Stock Exchange; Financial Industry Regulatory Authority; International Securities Exchange; National Stock Exchange; New York Stock Exchange; NYSE Arca; Philadelphia Stock Exchange; and The NASDAQ Stock Market. Nasdaq plans to add data for the BATS Exchange and Boston Stock Exchange in the future.

[5] 15 U.S.C. 78f.

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78f(b)(4).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6).

with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of Nasdaq. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2008–090 and should be submitted on or before December 29, 2008.

For the Commission, by the Division of Trading & Markets, pursuant to delegated authority.[11]

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8–28957 Filed 12–5–08; 8:45 am]

**BILLING CODE 8011–01–P**

[11] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–59019; File No. SR–NYSEALTR–2008–04]**

## Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by NYSE Alternext US LLC To Implement a Previously Adopted Revenue Sharing Program for ETF Quoting Participants on the Exchange

November 26, 2008.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on November 14, 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, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to restore a previously adopted revenue sharing program for ETF quoting participants on the Exchange. The text of the proposed rule change is available at NYSE Alternext, the Commission's Public Reference Room, and *http://www.nyse.com.*

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange proposes to restore a revenue sharing program (RSP) for ETF quoting participants on the Exchange. The RSP was first put in place by the Exchange for ETF specialists and registered traders effective July 1, 2007, and was to last through December 31, 2007, unless otherwise extended.[4] The RSP was subsequently extended through the end of September 2008.[5] The RSP was inadvertently allowed to lapse on September 30, 2008, without the Exchange filing to extend it, so the purpose of the instant filing is to restore the RSP on the terms described below on a prospective basis, effective immediately, through November 30, 2008, by which point the trading of ETFs currently listed on the Exchange is expected to terminate in favor of having willing issuers list and trade such products on NYSE Alternext's sister exchange NYSE Arca, Inc. (the ''ETF Transfer'').[6] The Exchange is making a separate filing to request retroactive application of the RSP for the period October 1, 2008, through November 13, 2008.

RSP payments will be made from the Exchange's general revenues and will not be limited to a particular revenue source. In order to continue to provide ETF quoting participants (ETF specialists, registered traders, and DARTs) with a source of payments to provide incentives to quote aggressively in Exchange-traded shares up until the ETF Transfer, the Exchange proposes to distribute revenue to quoting participants as outlined below:

- ETF specialists may receive an aggregate RSP payment (calculated monthly) of as much as $0.0024 per share (or 24 cents per 100 shares) whenever the specialist either buys or sells his specialty ETF on the Exchange *and* is a provider of liquidity in that transaction (e.g., whose quote is traded against or who offsets an order imbalance as part of an opening or closing transaction). The RSP payment is comprised of $0.0004 per share (or 4 cents per 100 shares) for all shares executed on the Exchange in their specialty ETF (irrespective of whether the specialist is the provider of liquidity), plus another $0.0020 (or 20 cents per 100 shares) if the specialist is the provider of liquidity in the transaction. If the specialist is not the liquidity provider, then the RSP payment is limited to $0.0004 per share executed on the Exchange in their specialty ETF.
- Registered traders in ETFs will receive an RSP payment of $0.0010 per share (or 10 cents per 100 shares) whenever the registered trader either buys or sells an ETF on the Exchange and is a provider of liquidity in that transaction.
- DARTS will receive an RSP payment of $0.0015 per share (or 15 cents per 100 shares) whenever the DART either buys or sells an ETF on the Exchange and is a provider of liquidity in that transaction.

No ETF quoting participant will receive an RSP payment when they are contra-parties to the same transaction. Further, RSP payments will only be made on transactions in securities trading at less than $1.00 in amounts proportionate to the amount on which the Exchange collects revenue. Finally, as customer transaction charges are capped at $100 per transaction, meaning that transaction charges are assessed on only the first 43,478 shares executed, ETF quoting participants will only

[4] Securities Exchange Act Release No. 55983 (June 29, 2007), 72 FR 37059 (July 6, 2007) (SR–Amex–2007–68). The RSP was subsequently extended to Designated Amex Remote Traders, now known as Designated NYSE Alternext Remote Traders (DARTs). Securities Exchange Act Release No. 57540 (March 20, 2008), 73 FR 16399 (March 27, 2008) (SR–Amex–2008–23).

[5] Securities Exchange Act Release No. 57541 (March 20, 2008), 73 FR 16400 (March 27, 2008) (SR–Amex–2008–25) (prospectively extending RSP from March 18, 2008, through end of September 2008). See also Securities Exchange Act Release No. 57794 (May 7, 2008), 73 FR 27582 (May 13, 2008) (SR–Amex–2008–34) (retroactively extending RSP from January 1, 2008, through March 17, 2008).

[6] Securities Exchange Act Release No. 58364 (August 14, 2008), 73 FR 49508 (August 21, 2008) (SR–Amex–2008–65) (describing process by which issuers of ETFs and structured products on the Exchange would voluntarily delist and transfer such listings to NYSE Arca).

receive RSP payments based on the first 43,478 shares executed.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act [7] in general and furthers the objectives of Section 6(b)(4) of the Act [8] in particular in that it is intended to assure the equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities. Specifically, the Exchange is extending a revenue sharing program to maintain incentives for an increase in order flow, up until the ETF Transfer.

*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 foregoing rule change has become effective immediately pursuant to Section 19(b)(3)(A)(ii) of the Act [9] and Rule 19b–4(f)(2) [10] thereunder. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary of appropriate in the public interest, for the protection of investors, or otherwise in the furtherance of the purposes of the Securities Exchange Act of 1934.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSEALTR–2008–04 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–2008–04. 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 self-regulatory organization. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEALTR–2008–04 and should be submitted on or before December 29, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

**Florence E. Harmon,**

*Acting Secretary.*

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[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(4).

[9] 15 U.S.C. 78s(b)(3)(A)(ii).

[10] 17 CFR 240.19b–4(f)(2).

[11] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–59020; File No. SR–NYSEALTR–2008–06]**

## Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval to a Proposed Rule Change by NYSE Alternext US LLC for Retroactive Application of a Previously Adopted Revenue Sharing Program for ETF Quoting Participants on the Exchange

November 26, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 17, 2008, NYSE Alternext US LLC (the ''Exchange'' or ''NYSE Alternext'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and to grant approval of the proposal on an accelerated basis.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes retroactive application of a previously adopted revenue sharing program for ETF quoting participants on the Exchange. The text of the proposed rule change is available at NYSE Alternext, the Commission's Public Reference Room, and *http://www.nyse.com.*

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

[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 Exchange proposes to retroactively apply a previously adopted revenue sharing program (RSP) for ETF quoting participants on the Exchange. The RSP was first put in place by the Exchange for ETF specialists and registered traders effective July 1, 2007, and was to last through December 31, 2007 unless otherwise extended.[3] The RSP was subsequently extended through the end of September 2008.[4] The RSP was inadvertently allowed to lapse on September 30, 2008, but was subsequently reinstated by filing effective November 14, 2008.[5] The purpose of the instant filing is to seek approval to retroactively apply the now-reinstated RSP for the time period October 1, 2008 through November 13, 2008 (the ''Retroactive Period'') in order to effectively assure continuity of the RSP from its inception for all ETF quoting participants on the Exchange, who have continued to quote aggressively in the expectation of receiving RSP payments flowing therefrom. To date, the Exchange believes that the current RSP has been beneficial in creating incentives for ETF quoting participants and does not believe it fair to withhold RSP payments from ETF quoting participants attributable to the Retroactive Period solely because of the Exchange's inadvertent error. Retroactive application of the RSP will preserve all ETF quoting participants' expectations.

For the Retroactive Period, the Exchange will apply the RSP in the same way the RSP was described in SR–NYSEALTR–2008–04 (see note 6 *supra*), to wit, that:

- RSP payments will be made from the Exchange's general revenues and will not be limited to a particular revenue source.
- ETF specialists may receive an aggregate RSP payment (calculated monthly) of as much as $0.0024 per share (or 24 cents per 100 shares) whenever the specialist either buys or sells his specialty ETF on the Exchange *and* is a provider of liquidity in that transaction (e.g., whose quote is traded against or who offsets an order imbalance as part of an opening or closing transaction). The RSP payment is comprised of $0.0004 per share (or 4 cents per 100 shares) for all shares executed on the Exchange in their specialty ETF (irrespective of whether the specialist is the provider of liquidity), plus another $0.0020 (or 20 cents per 100 shares) if the specialist is the provider of liquidity in the transaction. If the specialist is not the liquidity provider, then the RSP payment is limited to $0.0004 per share executed on the Exchange in their specialty ETF.
- Registered traders in ETFs will receive an RSP payment of $0.0010 per share (or 10 cents per 100 shares) whenever the registered trader either buys or sells an ETF on the Exchange and is a provider of liquidity in that transaction.
- DARTS will receive an RSP payment of $0.0015 per share (or 15 cents per 100 shares) whenever the DART either buys or sells an ETF on the Exchange and is a provider of liquidity in that transaction.
- No ETF quoting participant will receive an RSP payment when they are contra-parties to the same transaction.
- RSP payments will only be made on transactions in securities trading at less than $1.00 in amounts proportionate to the amount on which the Exchange collects revenue.

As customer transaction charges are capped at $100 per transaction, meaning that transaction charges are assessed on only the first 43,478 shares executed, ETF quoting participants will only receive RSP payments based on the first 43,478 shares executed.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act[6] in general and furthers the objectives of Section 6(b)(4) of the Act[7] in particular in that it is intended to assure the equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities. Specifically, the Exchange proposes to retroactively apply the RSP to assure continuity of the program from its inception and to assure fairness for the ETF quoting participants.

*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. 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–2008–06 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–2008–06. 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

[3] Securities Exchange Act Release No. 55983 (June 29, 2007), 72 FR 37059 (July 6, 2007) (SR–Amex–2007–68). The RSP was subsequently extended to Designated Amex Remote Traders, now known as Designated NYSE Alternext Remote Traders (DARTs). Securities Exchange Act Release No. 57540 (March 20, 2008), 73 FR 16399 (March 27, 2008) (SR–Amex–2008–23).

[4] Securities Exchange Act Release No. 57541 (March 20, 2008), 73 FR 16400 (March 27, 2008) (SR–Amex–2008–25)(prospectively extending RSP from March 18, 2008 through end of September 2008). See also Securities Exchange Act Release No. 57794 (May 7, 2008), 73 FR 27582 (May 13, 2008) (SR–Amex–2008–34) (retroactively extending RSP from January 1, 2008 through March 17, 2008).

[5] *See* SR–NYSEALTR–2008–04 (reinstating RSP effective November 14, 2008 to last through November 30, 2008, by which point the trading of ETFs currently listed on the Exchange is expected to terminate in favor of having willing issuers list and trade such products on NYSE Alternext's sister exchange NYSE Arca, Inc).

[6] 15 U.S.C. 78f(b)

[7] 15 U.S.C. 78f(b)(4).

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–2008–06 and should be submitted on or before December 29, 2008.

## IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[8] In particular, the Commission believes that the proposal is consistent with Section 6(b)(4) of the Act[9] in that it is intended to assure the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. The Commission notes that the proposal would retroactively apply the RSP to cure a lapse that occurred in the program from October 1, 2008 to November 13, 2008, but would not introduce any changes to the RSP program.

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. The Commission notes that it previously approved a similar proposal by the Exchange to retroactively cure an earlier lapse in the Exchange's RSP program.[10] The previous retroactive proposal was subject to the full comment period and did not generate any comments. Since this proposal is substantively the same as the previous retroactive proposal and in light of the hardship that the Exchange states members may face on account of the lapse of the RSP, the Commission believes that there is good cause to approve the proposal on an accelerated basis.

[8] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[9] 15 U.S.C. 78f(b)(4).

[10] *See* Securities Exchange Act Release No. 57794 (May 7, 2008), 73 FR 27582 (May 13, 2008) (SR–Amex–2008–34) (retroactively extending RSP from January 1, 2008 through March 17, 2008).

## V. Conclusion

*It is therefore ordered,* pursuant to Section 19(b)(2) of the Act,[11] that the proposed rule change (SR–NYSEALTR–2008–06) is hereby approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

**Florence E. Harmon,**

*Acting Secretary.*

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[11] 15 U.S.C. 78s(b)(2).

[12] 17 CFR 200.30–3(a)(12).

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–59036; File No. SR–OCC–2008–06]**

## Self-Regulatory Organizations; The Options Clearing Corporation; Order Granting Accelerated Approval of a Proposed Rule Change Relating to the Stock Loan/Hedge Program

December 1, 2008.

## I. Introduction

On February 25, 2008, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') and on October 7, 2008, amended proposed rule change File No. SR–OCC–2008–06 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'').[1] Notice of the proposal was published in the **Federal Register** on November 17, 2008.[2] No comment letters have been received to date. This order approves the proposed rule change on an accelerated basis.

## II. Description

OCC has decided to take certain steps to provide for the continued growth and development of its Stock Loan/Hedge Program (''Program''). These include (1) elimination of the ability of clearing members to carry stock loan and borrow positions without depositing risk margin and (2) adjusting the amount of required risk margin where stock loan collateral provided by the borrower to the lender exceeds the value of the borrowed stock.

*Background and General Description of the Proposed Rule Change*

The Program is provided for in Article XXI of OCC's By-Laws and Chapter XXII of the Rules. It provides a means for OCC clearing members to submit certain stock loan/borrow transactions (''stock loan transactions'') to OCC for clearance. The stock and the stock loan collateral move through the facilities of The Depository Trust Company from the lending clearing member (''lender'') to the borrowing clearing member (''borrower''), and vice versa when the stock is returned, in the same way that such transactions are ordinarily effected. Where the stock loan transaction is submitted to OCC for clearance, however, OCC is substituted as the lender to the borrower and the borrower to the lender. Thereafter, OCC guarantees performance of the stock loan transaction with respect to delivery and return of stock and collateral and the making of daily mark-to-market payments between the lender and borrower, which are effected through OCC's cash settlement system.

One advantage of submitting stock loan transactions to OCC is that the stock loan and borrow positions then reside in the clearing member's options accounts at OCC and to the extent that they offset the risk of options positions carried in the same account, may reduce the clearing member's margin requirement in the account. OCC's risk is, in turn, reduced by having the benefit of the hedge. Nevertheless, OCC currently permits qualified clearing members to elect to submit stock loan and borrow transactions to OCC on a ''margin ineligible basis,'' meaning that the positions are excluded from OCC's margin calculations for the account containing those positions. Margin-ineligible stock loan and borrow positions do not reduce the margin requirement for the account to reflect any offsetting value they might have, and OCC does not collect additional margin to reflect the risk of those positions. The election is made by each clearing member on an account-by-account basis so that all stock loan and borrow positions in a particular account are carried on a margin ineligible basis or none are. In order to carry stock loan and borrow positions on a margin ineligible basis, a clearing member must meet heightened standards of creditworthiness as set forth in Interpretation and Policy .06 under Section 1 of Article V of OCC's By-Laws.

While OCC believes that the current credit-based risk management approach has been adequate to date given historical Program activity levels, OCC also believes that a more conservative approach is warranted to provide for further growth of the Program and greater market volatility. OCC therefore seeks to better manage the market risk resulting from open stock loan and

[1] 15 U.S.C. 78s(b)(1).

[2] Securities Exchange Act Release No. 58901 (November 5, 2008), 73 FR 67918.

borrow positions by applying its standard margining approach to all such positions.

Another potential exposure that OCC seeks to address arises from the stock loan market practice of requiring the borrower to overcollateralize a position by giving the lender cash collateral equal to 102% of the position's current market value. OCC's rules provide that OCC's guarantee of Program transactions extends to the full value of the collateral exchanged as part of a stock loan transaction. Therefore, if a lender were to fail, even if the stock could be sold out at 100% of the marking price, the borrower would be left with a 2% deficiency for which OCC would be liable. Managing this potential exposure will be accomplished by (a) an additional margin charge to lenders executing stock loans at 102% in an amount equal to the 2% excess collateral and (b) borrowers receiving a margin credit in an equal amount. These new margin charges/credits are independent of and in addition to the risk margin determined by the ''STANS'' margining system that will be collected and maintained from both lenders and borrowers.

In connection with the submission of this filing, OCC has confirmed with the Commission staff that the proposed rule change would not have adverse consequences to clearing members under Rule 15c3–1, the Commission's net capital rule.[3] Specifically, where stock loan/borrow transactions are submitted to OCC for clearance through the Program, any additional amount of margin required to be deposited with OCC as a result of such transactions shall be treated the same as any other portion of the OCC margin deposit and therefore shall not constitute an unsecured receivable and shall not be required to be deducted from net capital.

In order to minimize any potential disruptive impact associated with these changes in the margin treatment of stock loan and borrow positions, OCC will utilize a two-step implementation plan. There will be a one-month grace period (beginning from the date of Commission approval of this rule filing) before the changes are applied to any positions. For the next two months, all new positions must be submitted on a margin-eligible basis and will be subject to the overcollateralization provisions, but positions that were carried on a margin-ineligible basis as of the date of the approval order will not be required to be margined or subject to the overcollateralization provisions. After the end of that initial three-month period, all stock loan and borrow positions in all accounts will be carried on a margin-eligible basis and will be subject to the overcollateralization provisions regardless of when the positions were established.

*Rule Amendments Applicable to Changes in the Program*

OCC proposes the following amendments to its Rules to achieve the above-referenced initiative and accommodate and facilitate the continued growth and development of the Program.

1. Margin Requirements—Rule 601

OCC will amend Rule 601(e) to eliminate its current category of ''margin-ineligible'' accounts and instead will apply its standard margining approach to all Program positions using its ''STANS'' system. This change will become effective three months following the date of the Commission's order approving this rule filing. In addition, a new interpretation .06 will be added to Rule 601 setting forth the additional margin charges and credits and the implementation schedule applicable to stock loan and borrow positions that have collateral set at 102%.

2. Instructions to the Corporation—Rule 2201

Rule 2201(a) will be amended to provide that with respect to standing instructions that clearing members provide to OCC, the requirement to notify OCC of the fact that the clearing member is approved to maintain stock loan positions and stock borrow positions in its accounts on a non-margined basis and the account or accounts that are to be margin-ineligible shall become inapplicable three months from the date of this order. After that time, OCC will have eliminated the ability to carry any stock loan or borrow positions on a ''margin-ineligible'' basis.

3. Initiation of Stock Loans—Rule 2202

Rule 2202(f) is being amended to specify that one month after the date of this order a member shall not be able to submit new stock loan transactions to OCC for clearance in a margin-ineligible account.

## III. Discussion

Section 19(b)(2)(B) of the Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization. Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of a clearing agency be designed to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible.[4] The proposed rule change eliminates the ability of members to carry stock loan/borrow positions on a ''margin ineligible'' basis which should enhance OCC's ability to assure that it has collected sufficient margin from its members in relation to such members' Program activity. This approach enhances OCC's ability to manage the risk of a clearing member's Program activity in relation to its general clearance and settlement activities and should better enable OCC to protect itself and its members from potential losses associated with the Program. The addition of implementation period should alleviate any potential disruptive effects for members in connection with the proposal. Accordingly, the Commission finds that the proposed rule change is designed to assure the safeguarding of securities and funds which are in OCC's custody or control or for which OCC is responsible.

OCC has requested that the Commission approve the proposed rule change prior to the thirtieth day after publication of the notice of filing. The Commission finds good cause for approving the proposed rule changes prior to the thirtieth day after publication of notice and prior to the expiration of the comment period because such approval will permit OCC to implement a risk-reduction proposal without unnecessary delay.

## IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule changes are consistent with the requirements of the Act and in particular Section 17A of the Act and the rules and regulations thereunder.[5]

*It is therefore ordered,* pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR–OCC–2008–06) be and hereby is approved on an accelerated basis.

[3] 17 CFR 240.15c–3–1.

[4] 15 U.S.C. 78q–1(b)(3)(F).

[5] In approving the proposed rule changes, the Commission considered the proposals' impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[6]

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8–28964 Filed 12–5–08; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–59031; File No. SR–SCCP–2008–02]**

## Self-Regulatory Organizations; Stock Clearing Corporation of Philadelphia; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Collection of Financial Industry Regulatory Authority Section 3 Regulatory Fees

December 1, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on October 3, 2008, Stock Clearing Corporation of Philadelphia (''SCCP'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which items have been prepared primarily by SCCP. SCCP filed the proposed rule change pursuant to Section 19(b)(3)(A)(ii) of the Act[2] and Rule 19b–4(f)(2) thereunder[3] so that the proposal was effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

SCCP proposes to amend the SCCP fee schedule to accommodate the collection of fees by the Financial Industry Regulatory Authority (''FINRA'')[4] pursuant to Section 3 of Schedule A to the FINRA By-Laws (''Section 3 Fees'') from certain SCCP Margin Members that are also FINRA members (''Joint Members'') through an agreement (''Agreement'') that will be entered into among SCCP, FINRA and The NASDAQ OMX Group, Inc. (''NASDAQ'').

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, SCCP included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. SCCP has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.[5]

*(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 the SCCP fee schedule to allow SCCP to collect Section 3 Fees from the Joint Members. Rule 31[6] under Section 31 of the Act[7] requires national securities associations and national securities exchanges to pay transaction fees (''Section 31 Fees'') to the Commission that are designed to recover the costs related to the government's supervision and regulation of the securities markets and security professionals. Currently SCCP members submit transactions to SCCP for clearance of equity trades executed through XLE, which is the equity trading system of NASDAQ OMX PHLX, Inc., (''PHLX''). Because all SCCP members' transactions executed on XLE must be submitted to SCCP for trade recording and confirmation,[8] SCCP creates and transmits to PHLX a monthly billing file of the Section 31 Fees for the SCCP members based on the ''covered sales'' executed through PHLX XLE.[9] As a result of the acquisition of PHLX by NASDAQ,[10] XLE will cease operations as of October 24, 2008.[11] Because certain SCCP Members who clear through SCCP will no longer be able to use XLE, they have decided to become members of FINRA. FINRA obtains the funds used to pay Section 31 Fees from its membership in accordance with Section 3 of Schedule A to the FINRA By-Laws. FINRA's Section 3 Fees apply to ''covered sales'' transactions effected otherwise than on a national securities exchange. FINRA members are required to report transactions subject to Section 3 Fees to FINRA in an automated manner using FINRA facilities, including among others, the FINRA/NASDAQ Trade Reporting Facility (''FINRA/NASDAQ TRF'').[12] FINRA uses the transaction data reported to its automated facilities to bill member firms at the self-clearing and clearing firm level. However, SCCP is not a member firm of FINRA. Therefore, SCCP, FINRA and NASDAQ will enter into the Agreement allowing FINRA to obtain Section 3 fees from certain Joint Members by debiting SCCP's omnibus account at the National Securities Clearing Corporation (''NSCC'') on a monthly basis for the aggregate amount of covered sales reported to the FINRA/NASDAQ TRF by such Joint Members. Because the Section 3 Fees are ultimately obligations of the Joint Member and not SCCP, the proposed rule filing will allow SCCP to recover the Section 3 Fees obtained by FINRA from SCCP's NSCC omnibus account directly from the Joint Member based on the transaction data reported to the FINRA/NASDAQ TRF.

2. Statutory Basis

SCCP believes that its proposal is consistent with Section 17A of the Act[13] in general, and with Section 17A(b)(3)(D) of the Act,[14] which requires that the rules of a registered clearing agency provide for the equitable allocation of reasonable fees and other charges among its participants. The filing will allow SCCP to provide a mechanism for collecting and remitting to FINRA the Section 3 Fees that FINRA charges to Joint Members.

*(B) Self-Regulatory Organization's Statement on Burden on Competition*

SCCP does not believe that the proposed rule change will impose any burden on competition not necessary or

[6] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78s(b)(3)(A)(i).

[3] 17 CFR 240.19b–4(f)(1).

[4] FINRA is a national securities association pursuant to 15 U.S.C. 78o–3.

[5] The Commission has modified the text of the summaries prepared by SCCP.

[6] 17 CFR 240.31.

[7] 15 U.S.C. 7ee.

[8] *See* SCCP Rule 6, Trade Recording and Confirmation of Transactions.

[9] ''Covered sales'' means a sale of a security, other than an exempt sale or a sale of a security future, occurring on a national securities exchange or by or through any member of a national securities association otherwise than on a national securities exchange. 17 CFR 31(6).

[10] *See* Securities Exchange Act Release Nos. 58179 (July 17, 2008), 73 FR 42874 (July 23, 2008) [SR–Phlx–2008–31]; 58180 (July 17, 2008), 73 FR 42890 (July 23, 2008) [SR–SCCP–2008–01]; and 58183 (July 17, 2008), 73 FR 42850 (July 23, 2008) [SR–NASDAQ–2008–035].

[11] *See* Securities Exchange Act Release No. 58613 (September 22, 2008), 73 FR 57181 (October 1, 2008) [SR–Phlx–2008–65].

[12] *See generally* Securities Exchange Act Release No. 53977 (June 12, 2006), 71 FR 34976 (June 16, 2006) [SR–NASD–2006–055]. Also, in limited instances FINRA members may report trades to FINRA using Form T.

[13] 15 U.S.C. 78q–1.

[14] 15 U.S.C. 78q–1(b)(3)(D).

appropriate in furtherance of the purposes of the Act.

*(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were either solicited or received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing proposed rule change has been designated as a fee change pursuant to Section 19(b)(3)(A)(ii) of the Act [15] and Rule 19b–4(f)(2) [16] thereunder. Accordingly, the proposal will take effect upon filing with the Commission. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*) or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–SCCP–2008–02 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–SCCP–2008–02. 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. The text of the proposed rule change is available at SCCP, the Commission's Public Reference Room, and *http://www.phlx.com/about/sccprulechanges.aspx.* 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–SCCP–2008–02 and should be submitted on or before December 29, 2008.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[17]

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8–28961 Filed 12–5–08; 8:45 am]

BILLING CODE 8011–01–P

[15] 15 U.S.C. 78s(b)(3)(A)(ii).

[16] 17 CFR 240.19b–4(f)(2).

[17] 17 CFR 200.30–3(a)(12).

## DEPARTMENT OF STATE

**[Public Notice: 6446]**

### Certification Concerning the Bolivian Military and Police Under the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2008 (Division J, Pub. L. 110–161)

Pursuant to the authority vested in the Secretary of State, including under the heading ''Andean Counterdrug Program'' of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2008 (Division J, Pub. L. 110–161) and State Department Delegation of Authority 245, I hereby certify that the Bolivian military and police are respecting human rights and cooperating fully with investigations and prosecutions by civilian judicial authorities of military and police personnel who have been implicated in gross violations of human rights.

This Determination shall be transmitted to the Congress and published in the **Federal Register**.

Dated: November 26, 2008.

**John D. Negroponte,**

*Deputy Secretary of State, Department of State.*

[FR Doc. E8–28976 Filed 12–5–08; 8:45 am]

BILLING CODE 4710–29–P

## DEPARTMENT OF STATE

**[Public Notice 6445]**

### APEC 2011 Leaders' Meeting Announcement of Deadline Extension

*Summary:* The deadline for United States cities and major resort/hotel destinations to submit proposals to hold the concluding series of meetings of the Asia Pacific Economic Cooperation (APEC) forum scheduled for November 12–20, 2011, has been extended from December 15, 2008, to January 5, 2009. The description of the request for proposals appeared in public notice 6428 published on November 19, 2008, in the **Federal Register**.

Dated: December 2, 2008.

**Edward Malcik,**

*Director, Office of International Conferences, Department of State.*

[FR Doc. E8–28975 Filed 12–5–08; 8:45 am]

BILLING CODE 4710–19–P

## DEPARTMENT OF TRANSPORTATION

**[Docket: OST–2008–0244]**

### Office of Small and Disadvantaged Business Utilization (OSDBU): Notice of Request for Renewal of Short Term Lending Program—Application for New Loan Guarantee and Application for Loan Guarantee Renewal

**AGENCY:** Office of the Secretary, DOT.

**ACTION:** Notice and request for comments.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995, Public Law 104–13, (44 U.S.C. 3501 *et seq.*) this notice announces that the Information Collection Request, abstracted below, is being forwarded to the Office of Management and Budget for Short Term Lending Program—Application for Loan Guarantee of currently approved. Earlier, a **Federal Register** Notice with a 60-day comment period was published October 10, 2008, (DOT–OST 2008–0244). The agency did not receive any comments to its previous notice.

**DATES:** Written comments should be submitted by January 7, 2009, and sent to OMB: Attention DOT/OST Desk Officer, Office of Information and Regulatory Affairs, Office of

Management and Budget, Docket Library, Room 10102, 725 17th Street, NW., Washington, DC 20503 or *oira_submission@omb.eop.gov* (e-mail).

**FOR FURTHER INFORMATION CONTACT:** Nancy Strine, Manager Financial Assistance Division, Office of Small and Disadvantaged Business Utilization, Office of the Secretary, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Room W56–497, Washington, DC 20590. Phone number (202) 366–1930, fax number (202) 366–7228. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

*Comments:* Comments should be sent to OMB at the address that appears below and should identify the associated OMB Approval Number 2105–0555 and Docket OST–2008–0244.

**SUPPLEMENTARY INFORMATION:**

*Number of Respondents:* 100.

*Number of Responses:* Once.

*Total Annual Burden:* 4525 hours.

*Respondents:* Certified Disadvantaged Business Enterprises (DBEs) and other Certified Small Businesses (8a, women-owned, small disadvantaged, HubZone, veteran owned, and service disabled veteran owned) interested in financing their transportation-related contracts.

*Form: Short-Term Lending Program Application for New Loan Guarantee DOT 2301–1(REV.1):* A potential STLP participant must submit a guaranteed loan application package, comprised of a loan application, with supporting documentation. The application may be obtained directly from OSDBU, from a current PL, or online from the agency's Web site currently at *http://osdbu.dot.gov/documents/pdf/stlp/stlpapp.pdf.*

*Respondents:* 100.

*Frequency:* Once.

*Estimated Average Burden per Response:* 2 hours.

*Estimated Total Annual Burden Hours:* 200 hours.

New loan application supporting documentation may include, but is not limited to, the following items:

a. Business, trade or job performance reference letters;

b. DBE or other eligible certification letters;

c. Signed and dated borrower certification that all federal, state and local taxes are current;

d. Business tax returns;

e. Business financial statements;

f. Personal income tax returns;

g. Personal financial statements;

h. Schedule of work in progress;

i. Signed and dated copy of transportation-related contracts to be used as collateral;

j. Business debt schedule;

k. Cash flow projections;

l. Evidence of bonding and insurance.

*Respondents:* 100.

*Frequency:* Once.

*Estimated Average Burden per Response:* 12 hours.

*Estimated Total Annual Burden Hours:* 1200 hours.

*Form: Short-Term Lending Program Application for Loan Guarantee Renewal DOT 2302–1.* A current STLP participant may submit a guaranteed loan renewal application package, comprised of an updated loan application, with supporting documentation. The application may be obtained directly from OSDBU, from a current PL, or online from the agency's Web site currently at *http://osdbu.dot.gov/documents/pdf/stlp/stlpapp.pdf.*

*Respondents:* 100.

*Frequency:* Annually, up to five years.

*Estimated Average Burden per Response:* 1 hour.

*Estimated Total Annual Burden Hours:* 100 hours.

Application supporting documentation. Supporting documentation may include, but is not limited to, the following items:

a. Current job performance reference letter (within the past 12 months);

b. Evidence of current DBE and/or other eligible certification;

c. Business tax returns for the most recent fiscal year;

d. Business financial statements for the most recent fiscal year;

e. If the business' last fiscal year has ended longer than 90 days at the time of application, then applicant must submit interim business financial statements to include balance sheet, P&L and updated aging reports of both receivables and payables;

f. Current work in progress schedule or statement;

g. Personal income tax returns;

h. Personal financial statements;

i. Signed and dated copy of transportation-related contracts to be used as collateral;

j. Updated cash flow projections;

*Respondents:* 100.

*Frequency:* Annually, up to five years.

*Estimated Average Burden per Response:* 4 hours.

*Estimated Total Annual Burden Hours:* 400 hours.

*Respondents:* Participating Lenders that are in the process or have entered into cooperative agreements with DOT's OSDBU under the STLP's governing policies and procedures and Proposed Short Term Lending Program Regulations.

*Form: Short-term Lending Program Bank Verification Loan Activation Form DOT F 2303–1.* The PL Respondent must submit to OSDBU a Loan Activation Form that indicates the date in which the loan has been activated/funded.

*Respondents:* 100.

*Frequency:* Annually, up to five years.

*Estimated Average Burden per Response:* ½ hour.

*Estimated Total Annual Burden Hours:* 50 hours.

*Form: Short-Term Lending Program Bank Verification Extension Request Form DOT 2310–1.* An extension of the original loan guarantee for a maximum period of ninety (90) days may be requested, in writing, by the PL Respondent using the STLP Extension Request Form.

*Respondents:* 100.

*Frequency:* Annually, up to five years.

*Estimated Average Burden per Response:* ½ hour.

*Estimated Total Annual Burden Hours:* 50 hours.

*Form: Short-Term Lending Program Bank Acknowledgement Loan Close-Out Form DOT F 2304–1.* The PL Respondent must submit to OSDBU a Loan Close-out Form upon full repayment of the STLP loan, or upon expiration of the loan guarantee.

*Respondents:* 100.

*Frequency:* Annually, up to five years.

*Estimated Average Burden per Response:* ½ hour.

*Estimated Total Annual Burden Hours:* 50 hours.

*Form: Guarantee Pending Loan Status Report Form DOT F 2306–1.* PL Respondent must submit each month to OSDBU a status report of pending loans and guaranteed loans including the previous month's activity for these loans.

*Respondents:* 100.

*Frequency:* Monthly.

*Estimated Average Burden per Response:* 1 hour.

*Estimated Total Annual Burden Hours:* 1200 hours.

*Form: Guarantee Loan Status Report DOT F 2305–1.* PL Respondent must submit each month to OSDBU a status report of pending loans and guaranteed loans including the previous month's activity for these loans.

*Respondents:* 100.

*Frequency:* Monthly.

*Estimated Average Burden per Response:* 1 hour.

*Estimated Total Annual Burden Hours:* 1200 hours.

*Form: Drug-Free Workplace Act Certification for a Grantee Other than an Individual Form DOT F 2307–1,* to certify that the PL Respondent is a drug-free workplace by executing a Certification of Compliance concerning a drug-free workplace.

*Respondents:* 100.
*Frequency:* Once.
*Estimated Average Burden per Response:* 15 minutes.
*Estimated Total Annual Burden Hours:* 25 hours.
*Form: Certification Regarding Lobbying for Contracts Grants, Loans, and Cooperative Agreement Form DOT F 2308–1.* PL Respondent must certify that no Federal funds will be utilized for lobbying by executing a Certificate Regarding Lobbying in compliance with Section 1352, Title 21, of the U.S. Code.
*Respondents:* 100.
*Frequency:* Once.
*Estimated Average Burden per Response:* 15 minutes.
*Estimated Total Annual Burden Hours:* 25 hours.
*Form: Certification Regarding Debarment, Suspension Form F 2309–1.* The PL Respondent must not currently be debarred or suspended from participation in a government contract or delinquent on a government debt by submitting a current SBA Form 1624 or its equivalent.
*Respondents:* 100.
*Frequency:* Once.
*Estimated Average Burden per Response:* 15 minutes.
*Estimated Total Annual Burden Hours:* 25 hours.
*OMB Approval No.* 2105–0555.
*Title:* Short Term Lending Program Application.
*Form No.* Short Term Lending Program.
*Type Of Review:* Renewal.
*Abstract:* The collection involves the use of the ''Short-term Lending Program Application for a New Loan Guarantee'' and the ''Application for Loan Guarantee Renewal''. The information to be collected will be used to determine the applicant's eligibility and is necessary to approve or deny a loan. We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995. OSDBU's Short-term Lending Program (STLP) offers certified Disadvantaged Business Enterprises (DBEs) and other Certified Small Businesses (8a, women-owned, small disadvantaged, HubZone, veteran owned, and service disabled veteran owned) the opportunity to obtain short-term working capital at variable interest rates for transportation-related projects. The STLP provides up to a 75% guaranteed revolving line of credit for a maximum of $750,000 to finance accounts receivable arising from transportation-related contracts. These loans are provided through banks that serve as STLP Participating Lenders (PL). The term of the line of credit is for one (1) year, which may be renewed up to a total of five (5) years. A potential STLP participant must submit a guaranteed loan application package, comprised of a loan application, with supporting documentation collected from the checklist on page seven (7) of the application. A current STLP participant may submit a guaranteed loan renewal application package, comprised of an updated loan application, with supporting documentation collected from the checklist on page seven (7) of the application. The Short-term Lending Program-Bank Verification Loan Activation Form; Bank Verification Extension Request Form; Bank Acknowledgement Loan Close-Out Form; Guarantee Loan Status Report; Pending Loan Status Report; Drug-Free Workplace Act Certification for a Grantee Other than an Individual; Certification Regarding Lobbying for Contracts Grants, Loans, and Cooperative Agreements; and Certification Regarding Debarment, Suspension are all documents used and required by our Participating Lenders. All the bank documentation is performed by the PLs. As part of the requirements for approval as a PL, banks must submit documentation that demonstrates it is a drug-free workplace by executing a Certification of Compliance concerning a drug-free workplace; that no Federal funds will be utilized for lobbying by executing a Certificate Regarding Lobbying in compliance with Section 1352, Title 21, of the U.S. Code; that it is not currently debarred or suspended from participation in a government contract or delinquent on a government debt by submitting a current SBA Form 1624 or its equivalent. The STLP is subject to the requirements of the Federal Credit Reform Act of 1990 (FCRA) that includes certain budgeting and accounting requirements for Federal credit programs. The PL must undertake processes to activate, monitor, service and close-out STLP loans. To fulfill the requirements of FCRA, the PL shall retain all documents, files, books, and records relevant to the administration of an STLP loan and must submit regular reports and required documentation to OSDBU on these processes. All information collected from the respondents on the Short-Term Lending Online Program Application for a New Loan Guarantee and the Application for Loan Guarantee Renewal is covered under the privacy act.

*Comments are invited on:* (a) 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; (b) the accuracy of the Departments estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility and clarity of the information collection; and d) ways to minimize the burden of the collection of information on respondents, by the use of electronic means, including the use of automated collection techniques or other forms of information technology.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Issued in Washington, DC, on December 1, 2008.

**Tracey M. Jackson,**
*Office of the Chief Information Officer.*

[FR Doc. E8–28919 Filed 12–5–08; 8:45 am]
BILLING CODE 4910–9X–P

## 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; Withdrawal

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

**ACTION:** Notice and request for comments; withdrawal.

**SUMMARY:** The FAA is withdrawing a previously published Notice of Intent to Request Revision From the Office of Management and Budget of a Currently Approved Information Collection Activity that proposed to extend without change the approved information collection titled ''Washington, DC Metropolitan Area Special Flight Rules'' (OMB Control Number 2120–0706). We are withdrawing the document because, while the collection activity has approval from the Office of Management and Budget, approval and publication of the final rule is still pending.

**FOR FURTHER INFORMATION CONTACT:** Carla Mauney on (202) 267–9895, or by e-mail at: *Carla.Mauney@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

### Background

On December 3, 2008, the FAA published a Notice of Intent to Request Revision from the Office of Management and Budget (OMB) of a Currently Approved Information Collection Activity (73 FR 73688). The notice

invited public comments about FAA's intention to request OMB to approve a current information collection. The information collection is required for compliance with the final rule that codifies special flight rules for certain operations in the Washington, DC Metropolitan Area.

**Reason for Withdrawal**

We are withdrawing the notice because, while the information collection requirement has been approved, approval and publication of the final rule is still pending. Therefore, the FAA withdraws the notice entitled, ''Notice of Intent to Request From the Office of Management and Budget of a Currently Approved Information Collection Activity, Request for Comments; Washington, DC Metropolitan Area Special Flight Rules,'' published on page 73688 in the **Federal Register** of December 3, 2008. If the final rule is adopted, we will re-publish the notice at that time.

Issued in Washington, DC, on December 3, 2008.

**Carla Mauney,**

*FAA Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.*

[FR Doc. E8–29007 Filed 12–3–08; 4:15 pm]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

**[FHWA Docket No. FHWA–2008–0158]**

### Surface Transportation Project Delivery Pilot Program; Caltrans Audit Report

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice; request for comment.

**SUMMARY:** Section 6005 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) established the Surface Transportation Project Delivery Pilot Program, codified at 23 U.S.C. 327. Section 327(g) of Title 23, United States Code mandates semiannual audits during each of the first 2 years of State participation to ensure compliance by each State participating in the Pilot Program. This notice announces and solicits comments on the second audit report for the California Department of Transportation (Caltrans).

**DATES:** Comments must be received on or before January 7, 2009.

**ADDRESSES:** Mail or hand deliver comments to Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590. You may also submit comments electronically at *http://www.regulations.gov*, or fax comments to (202) 493–2251.

All comments should include the docket number that appears in the heading of this document. All comments received will be available for examination and copying at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard or you may print the acknowledgment page that appears after submitting comments electronically. Anyone is able to search the electronic form of all comments in any one of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, or labor union). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70, Pages 19477–78) or you may visit *http://DocketsInfo.dot.gov.*

**FOR FURTHER INFORMATION CONTACT:** Ms. Ruth Rentch, Office of Project Development and Environmental Review, (202) 366–2034, *Ruth.Rentch@dot.gov*, or Mr. Michael Harkins, Office of the Chief Counsel, (202) 366–4928, *Michael.Harkins@dot.gov*, Federal Highway Administration, Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

**Electronic Access**

An electronic copy of this notice may be downloaded from the Office of the Federal Register's home page at *http://www.archives.gov* and the Government Printing Office's Web site at *http://www.access.gpo.gov*.

**Background**

Section 6005 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) (codified at 23 U.S.C. 327) established a pilot program to allow up to five States to assume the Secretary of Transportation's responsibilities for environmental review, consultation, or other actions under any Federal environmental law pertaining to the review or approval of highway projects. In order to be selected for the pilot program, a State must submit an application to the Secretary.

On June 29, 2007, Caltrans and FHWA entered into a Memorandum of Understanding (MOU) establishing the assignments to and assumptions of responsibility to Caltrans. Under the MOU, Caltrans assumed the majority of FHWA's responsibilities under the National Environmental Policy Act, as well as the FHWA's responsibilities under other Federal environmental laws for most highway projects in California.

Section 327(g) of Title 23, United States Code, requires the Secretary to conduct semiannual audits during each of the first 2 years of State participation, and annual audits during each subsequent year of State participation to ensure compliance by each State participating in the Pilot Program. The results of each audit must be presented in the form of an audit report and be made available for public comment. This notice announces the availability of the second audit report for Caltrans and solicits public comment on same.

**Authority:** Section 6005 of Pub. L. 109–59; 23 U.S.C. 315 and 327; 49 CFR 1.48.

Issued on: December 1, 2008.

**Thomas J. Madison, Jr.,**

*Federal Highway Administrator.*

[FR Doc. E8–29021 Filed 12–5–08; 8:45 am]

**BILLING CODE 4910–22–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

**[Docket No. FMCSA–2008–0343]**

### Agency Information Collection Activities; Revision of a Currently-Approved Information Collection: Inspection, Repair and Maintenance

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the Information Collection Request (ICR) described below to the Office of Management and Budget (OMB) for its review and approval and invites public comment on this submission. The information collection concerns records of inspection, repair, and maintenance of commercial motor vehicles (CMVs). The FMCSA requests approval to revise and renew an ICR entitled, ''Inspection, Repair and Maintenance.'' FMCSA collects this information to ensure that motor carriers have adequate

documentation of their systematic inspection, repair, and maintenance programs necessary to reduce the likelihood of CMV crashes.

**DATES:** We must receive your comments on or before February 6, 2009.

**ADDRESSES:** You may submit comments bearing the Federal Docket Management System (FDMS) Docket Number FMCSA–2008–0343 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington DC 20590–0001 between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal Holidays.
- *Fax:* 1–202–493–2251.

Each submission must include the Agency name and the docket number for this Notice. Note that DOT posts all comments received without change to *http://www.regulations.gov,* including any personal information included in a comment. Please see the Privacy Act heading below.

*Docket:* For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001 between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The FDMS is available 24 hours each day, 365 days each year. If you want acknowledgement that we received your comments, please include a self-addressed, stamped envelope or post card or print the acknowledgement page that appears after submitting your comments on-line.

*Privacy Act:* Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** on April 11, 2000 (65 FR 19476). This information is also available at *http://docketsinfo.dot.gov.*

**FOR FURTHER INFORMATION CONTACT:** Ms. Deborah M. Freund, Vehicle and Roadside Operations Division, Department of Transportation, Federal Motor Carrier Safety Administration, West Building 6th Floor, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001. Telephone: 202–366–5370.

**SUPPLEMENTARY INFORMATION:**

*Background:* The Secretary of Transportation (Secretary) is authorized under the provisions of 49 U.S.C. 31502 to prescribe requirements for the qualifications and maximum hours-of-service of employees, and safety and equipment standards for motor carriers that operate CMVs in interstate commerce. Under 49 U.S.C. 31136, the Secretary also has authority to prescribe regulations to ensure that CMVs are maintained, equipped, loaded and operated safely; and, under 49 U.S.C. 31143 to establish standards for annual or more frequent inspections of CMVs under the provisions of U.S.C. 31142. The Secretary's authority to establish improved standards or methods to ensure brakes and brake systems of CMVs are inspected by appropriate employees and maintained properly is provided under 49 U.S.C. 31137(b).

Motor carriers must maintain, or require maintenance of, records documenting the inspection, repair and maintenance activities performed on their owned and leased vehicles. There are no prescribed forms. Electronic recordkeeping is allowed (see § 390.31(d)) of title 49, Code of Federal Regulations (CFR). Documents requiring a signature must be capable of replication (i.e., photocopy, facsimile, etc.) in such form that will provide an opportunity for signature verification upon demand. Also, if electronic recordkeeping is used, all of the relevant data on the original documents must be included in the electronic transmission for the records to be valid.

The motor carrier industry has never questioned the need to keep CMV maintenance records. In fact, most motor carriers would keep some records without any regulatory requirements to do so. Records of inspection, repair, and maintenance; roadside inspection reports; driver vehicle inspection reports; the documentation of periodic inspections; the evidence of the qualifications of individuals performing periodic inspections; and the evidence of brake inspectors' qualifications contain the minimum amount of information necessary to document that a motor carrier has established a system of inspection, repair, and maintenance for its equipment which meets the standards in part 396.

FMCSA and its representatives use these records to verify motor carriers' compliance with the inspection, repair, and maintenance standards in part 396. This ICR supports the Department of Transportation's strategic goal of safety. The ICR also ensures that motor carriers have adequate records to document the inspection, repair, and maintenance of their CMVs, and to ensure that adequate measures are taken to keep their CMVs in safe and proper operating condition at all times. Compliance with the inspection, repair, and maintenance regulations helps to reduce the likelihood of accidents attributable, in whole or in part, to the mechanical condition of the CMV.

The Agency does not intend to revise the contents of this information collection, the frequency of information collection, or how it uses the information. This renewal would update the estimated annual burden and associated costs to reflect changes in the number of drivers and motor carrier entities subject to the part 396 records requirements since the current information collection was approved.

If the recordkeeping were required to be completed less frequently, it would greatly hinder the ability of FMCSA and State officials and representatives to ascertain that CMVs are satisfactorily maintained. The timely documentation of CMV inspection, repair, and maintenance enables FMCSA and State officials to evaluate the present state of a motor carrier's CMV maintenance program and to check the current level of regulatory compliance at any point in a carrier's maintenance schedule or program.

The FMCSA has identified duplicative periodic inspection standards. Periodic inspection programs of 23 States, the District of Columbia, the Alabama Liquefied Petroleum Gas Board, 10 Canadian Provinces, and one Canadian Territory were identified as comparable to, or as effective as, the Federal periodic inspection requirements. The FMCSA does not require Federal periodic inspections and the related recordkeeping for motor carriers that comply with these equivalent periodic inspection programs. In addition, CMVs passing certain roadside inspections are considered to have met the requirements of a periodic inspection; thus, there are no periodic inspection or recordkeeping requirements for these CMVs in most cases. The FMCSA is not aware of any other duplicative standards or recordkeeping requirements that apply to motor carriers.

The FMCSA does not publish this collection of information for statistical use.

*Title:* Inspection, Repair and Maintenance.

*OMB Control Number:* 2126–0003.

*Type of Request:* Revision of a currently-approved information collection.

*Respondents:* Motor carriers and commercial motor vehicle drivers.

*Estimated Number of Respondents:* 732,038.

*Estimated Time per Response:* Varies according to the requirements for specific records.

*Expiration Date:* April 30, 2009.

*Frequency of Response:* Varies according to requirements for specific records.

*Estimated Total Annual Burden:* 66,267,505 hours [3,991,851 hours for inspection, repair, and maintenance + 59,094,379 hours for driver inspection + 590,933 hours for certification of corrective action + 2,265,280 hours for review of driver inspection reports + 251,629 hours for disposition of roadside inspection reports + 34,798 hours for periodic inspections + 18,301 hours for records of inspector qualifications + 20,334 hours for records of brake inspector qualifications = 66,267,505].

*Public Comments Invited:* You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the performance of FMCSA's functions; (2) the accuracy of the estimated burden; (3) ways for the FMCSA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize or include your comments in the request for OMB's clearance of this information collection.

Issued on: December 2, 2008.

**Terry Shelton,**

*Associate Administrator for Research and Information Technology.*

[FR Doc. E8–28945 Filed 12–5–08; 8:45 am]

**BILLING CODE 4910–EX–P**

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## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

### Qualification of Drivers; Exemption Applications; Vision

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice of denials.

**SUMMARY:** FMCSA announces its denial of 112 applications from individuals who requested an exemption from the Federal vision standard applicable to interstate truck and bus drivers and the reasons for the denials. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has concluded that granting these exemptions does not provide a level of safety that will be equivalent to, or greater than, the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

**FOR FURTHER INFORMATION CONTACT:** Dr. Mary D. Gunnels, Director Medical Programs, 202–366–4001, U.S. Department of Transportation, FMCSA, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

### Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the Federal vision standard for a renewable two-year period if it finds ''such an exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such an exemption.'' The procedures for requesting an exemption are set out in 49 CFR part 381.

Accordingly, FMCSA evaluated 112 individual exemption requests on their merits and made a determination that these applicants do not satisfy the criteria eligibility or meet the terms and conditions of the Federal exemption program. Each applicant has, prior to this notice, received a letter of final disposition on his/her exemption request. Those decision letters fully outlined the basis for the denial and constitute final Agency action. The list published today summarizes the Agency's recent denials as required under 49 U.S.C. 31315(b)(4) by periodically publishing names and reasons for denials.

The following 13 applicants lacked sufficient driving experience during the three-year period prior to the date of their application:

Cehic, Muhamed
Emerson, Mark S.
Englis, James C.
Evans, Ronald P.
Fiddler, Eddie W.
Mears, Allan
Moon, Robert F.
Odom, Roy
Rugg, Thomas I.
Seyfried, Jr., William J.
Smith, Jr., Fornum J.
Sooy, Donna A.
Vanlier, James A.

The following 12 applicants did not have any experience operating a CMV.

Bomholt, Scott P.
Bradshaw, Owen D.
Fanton, Arthur
Garcia, Adrian
Kayvani, Ali A.
McEntee, Robert O.
Phinney, Michael S.
Romo, Manuel
Shoebridge, Nicholas R.
Solis, Rafael P.
Watson, Jeffrey K.
Youngblood, Justin P.

The following 19 applicants did not have 3 years of experience driving a CMV on public highways with the vision deficiency.

Bennett, Gerlad W.
Buderus, Dusty L.
Doolin, Roger B.
Frasier, Jason A.
Garcia, Francisco J.
Irving, Johnny L.
Jamal, Azizi A.
Kalenbaugh, Matthew C.
Klaska, Andrew C.
Larrow, Todd P.
Lawhorn, Larry D.
Long, Tina Y.
Luterbach, Douglas D.
Miller, James C.
Morales, David O.
Phillips, William E.
Richards, Jr., Joel
Rusin, Adam A.
Wilson, Jr., Thomas C.

The following 7 applicants did not have 3 years of recent experience driving a CMV with the vision deficiency.

Coffield, James J.
Czyz, Jean E.
Karow, Kevin G.
Klatt, Michael A.
Mieszala, Mark D.
Pena, Gonzalo
Snyder, Jr., Raymond L.

The following 21 applicants did not have sufficient driving experience over the past 3 years under normal highway operating conditions.

Bothwell, Robert L.
Covert, LyDale M.
Dosher, Jacob F.
Dugger, William W.
Greene, James P.
Gunn, Aubrey D.
Haman, Darin E.
Hillsman, Archie C.
Jackson, Donald E.
Lachney, Shelton R.
Marks, Michael D.
Martell, Yandy H.
Mast, Jennifer E.

Mathews, Keith D.
Motes, Marvin L.
Perrotta, Andrew C.
Picray, Jerald A.
Powell, James R.
Robertson, Kyle E.
Terry, Charles A.
White, Keith J.

The following 6 applicants had commercial driver's license suspensions during the three-year review period in relation to a moving violation. Applicants do not qualify for an exemption with a suspension during the three-year period.

Baillargeon, David L.
Nieves, Julio
Pete, Freddy H.
Shoemaker, Stephen K.
Taflinger, Sr., James B.
Torzon, Martin R.

One applicant, Gary E. Lathrop, did not have verifiable proof of commercial driving experience over the past 3 years under normal highway operating conditions that would serve as an adequate predictor of future safe performance.

One applicant, Randy A. Miller, did not demonstrate the level of safety required for interstate driving.

The following 5 applicants did not hold a license which allowed operation of vehicles over 10,000 pounds for all or part of the three-year period.

Bowman, Bruce E.
Boyce, Lennie J.
Gaines, Wilfred M.
Schmidt, Ronald D.
Steed, Marion D.

The following 9 applicants were denied for miscellaneous/multiple reasons.

Branham, Danny C.
Dinan, Patrick D.
Ellis, James
Holiday, Ryan L.
Hollister, Kevin B.
Norland, Anthony P.
Wellman, Carl F.
Westerbeck, Randolph A.
Whitehouse, Jayson M.

Two applicants, James O. Cook and Mark R. Kiser, were disqualified because their vision was not stable for the entire three-year review period.

One applicant, Mark G. Hurley, was a Canadian applicant.

Finally, the following 15 applicants met the current federal vision standards. Exemptions are not required for applicants that meet the current regulations for vision.

Adamire, Sr., Charles W.
Alvarez, Oscar O.
Blair, George E.
Denman, Irvin L.
Devine, David S.
Doucette, Joshua P.
Elbon, Richard L.
Guerrero, Alfonso
Jenkins, Jeannette D.
Kraft, Michael A.
Pruett, Jeffrey W.
Rose, Darryl W.
Thatcher, Dick J.
Thomas, Raymond L.
Watson, Norman J.

Issued on: November 28, 2008.

**Larry W. Minor,**

*Associate Administrator for Policy and Program Development.*

[FR Doc. E8–28942 Filed 12–5–08; 8:45 am]

BILLING CODE 4910–EX–P

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## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

**[Docket No. FMCSA–2008–0292]**

### Qualification of Drivers; Exemption Applications; Vision

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice of final disposition.

**SUMMARY:** FMCSA announces its decision to exempt 22 individuals from the vision requirement in the Federal Motor Carrier Safety Regulations (FMCSRs). The exemptions will enable these individuals to operate commercial motor vehicles (CMVs) in interstate commerce without meeting the prescribed vision standard. The Agency has concluded that granting these exemptions will provide a level of safety that is equivalent to, or greater than, the level of safety maintained without the exemptions for these CMV drivers.

**DATES:** The exemptions are effective December 8, 2008. The exemptions expire on December 8, 2010.

**FOR FURTHER INFORMATION CONTACT:** Dr. Mary D. Gunnels, Director, Medical Programs, (202)–366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

#### Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at *http://www.regulations.gov*

*Docket:* For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The FDMS is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

*Privacy Act:* Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19476). This information is also available at *http://Docketsinfo.dot.gov.*

#### Background

On October 17, 2008, FMCSA published a notice of receipt of exemption applications from certain individuals, and requested comments from the public (73 FR 61922). That notice listed 22 applicants' case histories. The 22 individuals applied for exemptions from the vision requirement in 49 CFR 391.41(b)(10), for drivers who operate CMVs in interstate commerce.

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.'' The statute also allows the Agency to renew exemptions at the end of the 2-year period. Accordingly, FMCSA has evaluated the 22 applications on their merits and made a determination to grant exemptions to all of them. The comment period closed on November 17, 2008.

#### Vision and Driving Experience of the Applicants

The vision requirement in the FMCSRs provides:

A person is physically qualified to drive a commercial motor vehicle if that person has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of a least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70 in the horizontal meridian

in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber (49 CFR 391.41(b)(10)).

FMCSA recognizes that some drivers do not meet the vision standard, but have adapted their driving to accommodate their vision limitation and demonstrated their ability to drive safely.

The 22 exemption applicants listed in this notice are in this category. They are unable to meet the vision standard in one eye for various reasons, including amblyopia, retinal detachment, optic neuropathy, macular degeneration, prosthesis, aphakia, and loss of vision due to trauma. In most cases, their eye conditions were not recently developed. All but eight of the applicants were either born with their vision impairments or have had them since childhood. The eight individuals who sustained their vision conditions as adults have had them for periods ranging from 4 to 20 years.

Although each applicant has one eye which does not meet the vision standard in 49 CFR 391.41(b)(10), each has at least 20/40 corrected vision in the other eye, and in a doctor's opinion, has sufficient vision to perform all the tasks necessary to operate a CMV. Doctors' opinions are supported by the applicants' possession of valid commercial drivers' licenses (CDLs) or non-CDLs to operate CMVs. Before issuing CDLs, States subject drivers to knowledge and skills tests designed to evaluate their qualifications to operate a CMV.

All these applicants satisfied the testing standards for their State of residence. By meeting State licensing requirements, the applicants demonstrated their ability to operate a commercial vehicle, with their limited vision, to the satisfaction of the State.

While possessing a valid CDL or non-CDL, these 22 drivers have been authorized to drive a CMV in intrastate commerce, even though their vision disqualified them from driving in interstate commerce. They have driven CMVs with their limited vision for careers ranging from 5 to 45 years. In the past 3 years, three of the drivers had convictions for traffic violations and two of them were involved in crashes.

The qualifications, experience, and medical condition of each applicant was stated and discussed in detail in the October 17, 2008 notice (73 FR 61922).

**Basis for Exemption Determination**

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the vision standard in 49 CFR 391.41(b)(10) if the exemption is likely to achieve an equivalent or greater level of safety than would be achieved without the exemption. Without the exemption, applicants will continue to be restricted to intrastate driving. With the exemption, applicants can drive in interstate commerce. Thus, our analysis focuses on whether an equal or greater level of safety is likely to be achieved by permitting each of these drivers to drive in interstate commerce as opposed to restricting him or her to driving in intrastate commerce.

To evaluate the effect of these exemptions on safety, FMCSA considered not only the medical reports about the applicants' vision, but also their driving records and experience with the vision deficiency.

To qualify for an exemption from the vision standard, FMCSA requires a person to present verifiable evidence that he/she has driven a commercial vehicle safely with the vision deficiency for the past 3 years. Recent driving performance is especially important in evaluating future safety, according to several research studies designed to correlate past and future driving performance. Results of these studies support the principle that the best predictor of future performance by a driver is his/her past record of crashes and traffic violations. Copies of the studies may be found at docket number FMCSA–98–3637.

We believe that we can properly apply the principle to monocular drivers, because data from the Federal Highway Administration's (FHWA) former waiver study program clearly demonstrate the driving performance of experienced monocular drivers in the program is better than that of all CMV drivers collectively. (See 61 FR 13338, 13345, March 26, 1996). The fact that experienced monocular drivers demonstrated safe driving records in the waiver program supports a conclusion that other monocular drivers, meeting the same qualifying conditions as those required by the waiver program, are also likely to have adapted to their vision deficiency and will continue to operate safely.

The first major research correlating past and future performance was done in England by Greenwood and Yule in 1920. Subsequent studies, building on that model, concluded that crash rates for the same individual exposed to certain risks for two different time periods vary only slightly. (See Bates and Neyman, University of California Publications in Statistics, April 1952.) Other studies demonstrated theories of predicting crash proneness from crash history coupled with other factors. These factors—such as age, sex, geographic location, mileage driven and conviction history—are used every day by insurance companies and motor vehicle bureaus to predict the probability of an individual experiencing future crashes. (See Weber, Donald C., ''Accident Rate Potential: An Application of Multiple Regression Analysis of a Poisson Process,'' Journal of American Statistical Association, June 1971) A 1964 California Driver Record Study prepared by the California Department of Motor Vehicles concluded that the best overall crash predictor for both concurrent and nonconcurrent events is the number of single convictions. This study used 3 consecutive years of data, comparing the experiences of drivers in the first 2 years with their experiences in the final year.

Applying principles from these studies to the past 3-year record of the 22 applicants, two of the applicants had a traffic violation for speeding, one of the applicants had a traffic violation for improper lane change, and two of the applicants were involved in crashes. The applicants achieved this record of safety while driving with their vision impairment, demonstrating the likelihood that they have adapted their driving skills to accommodate their condition. As the applicants' ample driving histories with their vision deficiencies are good predictors of future performance, FMCSA concludes their ability to drive safely can be projected into the future.

We believe the applicants' intrastate driving experience and history provide an adequate basis for predicting their ability to drive safely in interstate commerce. Intrastate driving, like interstate operations, involves substantial driving on highways on the interstate system and on other roads built to interstate standards. Moreover, driving in congested urban areas exposes the driver to more pedestrian and vehicular traffic than exists on interstate highways. Faster reaction to traffic and traffic signals is generally required because distances between them are more compact. These conditions tax visual capacity and driver response just as intensely as interstate driving conditions. The veteran drivers in this proceeding have operated CMVs safely under those conditions for at least 3 years, most for much longer. Their experience and driving records lead us to believe that each applicant is capable of operating in interstate commerce as safely as he/she has been performing in intrastate commerce. Consequently, FMCSA finds that exempting these applicants from the vision standard in 49 CFR 391.41(b)(10) is likely to achieve a level

of safety equal to that existing without the exemption. For this reason, the Agency is granting the exemptions for the 2-year period allowed by 49 U.S.C. 31136(e) and 31315 to the 22 applicants listed in the notice of October 17, 2008 (73 FR 61922).

We recognize that the vision of an applicant may change and affect his/her ability to operate a CMV as safely as in the past. As a condition of the exemption, therefore, FMCSA will impose requirements on the 22 individuals consistent with the grandfathering provisions applied to drivers who participated in the Agency's vision waiver program.

Those requirements are found at 49 CFR 391.64(b) and include the following: (1) That each individual be physically examined every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the standard in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the certification when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

**Discussion of Comments**

FMCSA received five comments in this proceeding. The comments were considered and discussed below.

Two of the comments were submitted in favor of granting the Federal vision exemption to all applicants that applied and one specifically referencing Mr. Jayland R. Siebers.

An anonymous individual commented that the Federal vision exemption should only be granted for one year instead of two. According to TEA-21, the Secretary of Transportation may grant a person an exemption for 2 years under section 31136 if the Secretary finds that the exemption will achieve a level of safety that is equivalent to or greater than the level that would be achieved absent of the exemption.

Dr. Richard C. Horn, an optometrist, commented that he does not believe that eye care providers should attest to the ability of a driver to operate a motor vehicle safely. FMCSA relies on the medical physician examining the driver to determine if the individual has sufficient vision to perform the tasks necessary to operate a commercial vehicle safely.

Advocates for Highway and Auto Safety (Advocates) expressed opposition to FMCSA's policy to grant exemptions from the FMCSRs, including the driver qualification standards. Specifically, Advocates: (1) Objects to the manner in which FMCSA presents driver information to the public and makes safety determinations; (2) objects to the Agency's reliance on conclusions drawn from the vision waiver program; (3) claims the Agency has misinterpreted statutory language on the granting of exemptions (49 U.S.C. 31136(e) and 31315); and finally (4) suggests that a 1999 Supreme Court decision affects the legal validity of vision exemptions.

The issues raised by Advocates were addressed at length in 64 FR 51568 (September 23, 1999), 64 FR 66962 (November 30, 1999), 64 FR 69586 (December 13, 1999), 65 FR 159 (January 3, 2000), 65 FR 57230 (September 21, 2000), and 66 FR 13825 (March 7, 2001). We will not address these points again here, but refer interested parties to those earlier discussions.

**Conclusion**

Based upon its evaluation of the 22 exemption applications, FMCSA exempts, Timothy S. Ballard, Paul W. Browning, Timothy D. Carle, Ronald W. Garner, Paul A. Gregerson, Benjamin P. Hall, Frank L. Langston, Bruce J. Lewis, John L. Lolley, Kenny Y. Louie, Josue Maqueira, Lido J. Martocchio, Michael W. McCann, Duffy P. Metrejean, Jr., Hudson M. Osborne, Stephen P. Preslopsky, Ross C. Rich, Melinda V. Salas, Jayland R. Siebers, Christopher G. Strand, Michael J. Welle, and Patricia A. White, from the vision requirement in 49 CFR 391.41(b)(10), subject to the requirements cited above (49 CFR 391.64(b)).

In accordance with 49 U.S.C. 31136(e) and 31315, each exemption will be valid for 2 years unless revoked earlier by FMCSA. The exemption will be revoked if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136 and 31315.

If the exemption is still effective at the end of the 2-year period, the person may apply to FMCSA for a renewal under procedures in effect at that time.

Issued on: November 28, 2008.

**Larry W. Minor,**

*Associate Administrator for Policy and Program Development.*

[FR Doc. E8–28947 Filed 12–5–08; 8:45 am]

BILLING CODE 4910–EX–P

## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

**[Docket No. FMCSA–98–3637; FMCSA–99–6156; FMCSA–00–7006; FMCSA–00–7165; FMCSA–00–8203; FMCSA–02–12294; FMCSA–04–18885; FMCSA–06–23773; FMCSA–06–24783]**

### Qualification of Drivers; Exemption Renewals; Vision

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice of final disposition.

**SUMMARY:** FMCSA previously announced its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 15 individuals. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has reviewed the comments submitted in response to the previous announcement and concluded that granting these exemptions will provide a level of safety that will be equivalent to, or greater than, the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

**FOR FURTHER INFORMATION CONTACT:** Dr. Mary D. Gunnels, Director, Medical Programs, (202)–366–4001, *fmcsamedical@dot.gov*, FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

**Electronic Access**

You may see all the comments online through the Federal Document Management System (FDMS) at *http://www.regulations.gov*.

**Background**

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.'' The statute also

allows the Agency to renew exemptions at the end of the 2-year period. The comment period ended on November 10, 2008.

**Discussion of Comments**

FMCSA received no comments in this proceeding.

**Conclusion**

The Agency has not received any adverse evidence on any of these drivers that indicates that safety is being compromised. Based upon its evaluation of the 15 renewal applications, FMCSA renews the Federal vision exemptions for Donald O. Clopton, Richard B. Eckert, Charles B. Edwards, Gary R. Evan, George R. Gorsuch, Jr., Harlan L. Gunter, Steven H. Heidorn, Danny E. Hillier, Jimmy D. Johnson, II., Gary L. Killian, Volga Kirkwood, Garry R. Setters, Jimmy E. Settle, Noel S. Wangerin, and Hubert Whittenburg.

In accordance with 49 U.S.C. 31136(e) and 31315, each renewal exemption will be valid for 2 years unless revoked earlier by FMCSA. The exemption will be revoked if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136 and 31315.

Issued on: November 28, 2008.

**Larry W. Minor,**

*Associate Administrator for Policy and Program Development.*

[FR Doc. E8–28948 Filed 12–5–08; 8:45 am]

**BILLING CODE 4910–EX–P**

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## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

### Reports, Forms and Recordkeeping Requirements; Agency Information Collection Activity under OMB Review

**AGENCY:** Maritime Administration, DOT.

**ACTION:** Notice and request for comments.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995, this notice announces that the Information Collection abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and approval. The nature of the information collection is described as well as its expected burden. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on September 2, 2008. No comments were received.

**DATES:** Comments must be submitted on or before January 7, 2009.

**FOR FURTHER INFORMATION CONTACT:** Thomas Christensen, Maritime Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590. Telephone: (202) 366–5909; or e-mail: *tom.christensen@dot.gov.* Copies of this collection also can be obtained from that office.

**SUPPLEMENTARY INFORMATION:** Maritime Administration.

*Title:* Effective U.S. Control (EUSC)/Parent Company.

*OMB Control No.:* 2133–0511.

*Type of Request:* Extension of currently approved collection.

*Affected Public:* U.S. citizens who own foreign-registered vessels.

*Forms:* None.

*Abstract:* The effective U.S. Control (EUSC)/Parent Company collection consists of an inventory of foreign-registered vessel owned by U.S. citizens. Specifically, the collection consists of responses from vessel owners verifying or correcting vessel ownership data and characteristics found in commercial publications. The information obtained could be vital in a national or international emergency and is essential to the logistical support planning operation conducted by Maritime Administration officials.

*Annual Estimated Burden Hours:* 60 hours.

**ADDRESSES:** Send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention: Maritime Administration Desk Officer.

*Comments are invited on:* Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate 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. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

Dated: November 24, 2008.

**Leonard Sutter,**

*Secretary, Maritime Administration.*

[FR Doc. E8–28898 Filed 12–5–08; 8:45 am]

**BILLING CODE 4910–81–P**

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## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

**[Docket No. MARAD–2008 0108]**

### Requested Administrative Waiver of the Coastwise Trade Laws

**AGENCY:** Maritime Administration, Department of Transportation.

**ACTION:** Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel BOLGESKREKK (Sheets To The Wind).

**SUMMARY:** As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket MARAD–2008–0108 at *http://www.regulations.gov*. Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

**DATES:** Submit comments on or before January 7, 2009.

**ADDRESSES:** Comments should refer to docket number MARAD–2008–0108. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov*. All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., e.t., Monday through Friday, except federal holidays. An electronic version of this

document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979.

**SUPPLEMENTARY INFORMATION:** As described by the applicant the intended service of the vessel BOLGESKREKK (Sheets To The Wind) is:

*Intended Use:* ''Six-pack charter and sailing tours. Day use only.''

*Geographic Region:* ''S.F. Bay and local tributaries.''

**Privacy Act**

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Dated: November 25, 2008.

By order of the Maritime Administrator.

**Leonard Sutter,**

*Secretary, Maritime Administration.*

[FR Doc. E8–28921 Filed 12–5–08; 8:45 am]

**BILLING CODE 4910–81–P**

## DEPARTMENT OF THE TREASURY

### Submission for OMB Review; Comment Request

December 2, 2008.

The Department of the Treasury will submit the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13 on or after the date of publication of this notice. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, and 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

**DATES:** Written comments should be received on or before January 7, 2009 to be assured of consideration.

**Internal Revenue Service (IRS)**

*OMB Number:* 1545–1942.

*Type of Review:* Extension.

*Title:* Notice 2005–44, Charitable Contributions of Certain Motor Vehicles, Boats, and Airplanes.

*Description:* The notice provides guidance under new Subsection 170(f)(12) and 6720 regarding how to determine the amount of a charitable contribution for certain vehicles and the related substantiation and information reporting requirements.

*Respondents:* Individuals or Households.

*Estimated Total Burden Hours:* 3,041 hours.

*OMB Number:* 1545–2117.

*Type of Review:* Extension.

*Title:* TD 9423 (Final)—Implementation of Form 990 (REG–142333–07 (Prop & Temp)).

*Description:* This document contains final and temporary regulations necessary to implement the redesigned Form 990, ''Return of Organization Exempt From Income Tax.'' All tax exempt organizations required under section 6033 of the Internal Revenue Code (Code) to file annual information returns are affected by these temporary regulations. These regulations are applicable to taxable years beginning after December 31, 2007. Because these regulations are already applicable, taxpayers.

*Respondents:* Private Sector.

*Estimated Total Burden Hours:* 1 hours.

*OMB Number:* 1545–1660.

*Type of Review:* Extension.

*Title:* Notice 99–43 Nonrecognition Exchanges under Section 897.

*Description:* Notice 99–43 This notice announces a modification of the current rules under Temporary Regulation Sec. 1.897–6T(a)(1) regarding transfers, exchanges, and other dispositions of U.S. real property interests in nonrecognition transactions occurring after June 18, 1980. The new rule will be included in regulations finalizing the temporary regulations.

*Respondents:* Private Sector.

*Estimated Total Burden Hours:* 200 hours.

*OMB Number:* 1545–1505.

*Type of Review:* Extension.

*Form:* 8820.

*Title:* Orphan Drug Credit.

*Description:* Filers use this form to elect to claim the orphan drug credit, which is 50% of the qualified clinical testing expenses paid or incurred with respect to low or unprofitable drugs for rare diseases and conditions, as designated under section 526 of the Federal Food, Drug, and Cosmetic Act.

*Respondents:* Private Sector.

*Estimated Total Burden Hours:* 266 hours.

*OMB Number:* 1545–1221.

*Type of Review:* Extension.

*Title:* EE–147–87 (Final) Qualified Separate Lines of Business.

*Description:* The affected public includes employers who maintain qualified employee retirement plans. Were applicable, the employer must furnish notice to the IRS that the employer treats itself as operating qualified separate lines of business and some may request an IRS determination that such lines satisfy administrative scrutiny.

*Respondents:* Private Sector.

*Estimated Total Burden Hours:* 899 hours.

*OMB Number:* 1545–0499.

*Type of Review:* Extension.

*Form:* 5305–SEP.

*Title:* Simplified Employee Pension—Individual Retirement Accounts Contribution Agreement.

*Description:* This form is used by an employer to make and agreement to provide benefits to all employees under a Simplified Employee Pension (SEP) described in section 408(k). This form is not to be filed with the IRS but to be retained in the employer's records as proof of establishing a SEP and justifying a deduction for contributions to the SEP. The data is used to verify the deduction.

*Respondents:* Private Sector.

*Estimated Total Burden Hours:* 495,000 hours.

*Clearance Officer:* Glenn P. Kirkland, (202) 622–3428, Internal Revenue Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.

*OMB Reviewer:* Nicholas A. Fraser, (202) 395–5887, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

**Celina Elphage,**

*Treasury PRA Clearance Officer.*

[FR Doc. E8–28943 Filed 12–5–08; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF THE TREASURY

### Office of Investment Security; Guidance Concerning the National Security Review Conducted by the Committee on Foreign Investment in the United States

**AGENCY:** Department of the Treasury.

**ACTION:** Notice.

**SUMMARY:** This notice provides guidance to U.S. businesses and foreign persons that are parties to transactions that are

covered by section 721 of the Defense Production Act of 1950, as amended by the Foreign Investment and National Security Act of 2007, and the regulations at 31 CFR part 800. The guidance is issued pursuant to section 721(b)(2)(E), which requires the Chairperson of the Committee on Foreign Investment in the United States to publish guidance regarding the types of transactions that it has reviewed and that have presented national security considerations.

**FOR FURTHER INFORMATION CONTACT:** Nova Daly, Deputy Assistant Secretary, U.S. Department of the Treasury, 1500 Pennsylvania Avenue, NW., Washington, DC 20220, telephone: (202) 622–2752, e-mail: *Nova.Daly@do.treas.gov;* or Welby Leaman, Senior Advisor, telephone: (202) 622–0099, e-mail: *Welby.Leaman@do.treas.gov.*

## I. Legislative Mandate for Guidance

Consistent with section 721(b)(2)(E) of the Defense Production Act of 1950 (''section 721'') (50 U.S.C. App. 2170), as amended by the Foreign Investment and National Security Act of 2007 (''FINSA''), the U.S. Department of the Treasury, as the chair of the Committee on Foreign Investment in the United States (''CFIUS''), is issuing the following guidance regarding the types of transactions that CFIUS has reviewed and that have presented national security considerations.[1]

To place this guidance in context, the following three sections provide an overview of the purpose and nature of the foreign investment review process that CFIUS administers. This guidance does not create any rights for, or confer any rights on, any person, nor operate to bind the U.S. Government.

## II. Purpose and Nature of the CFIUS Process

### *A. Purpose of the CFIUS Process*

The United States has a longstanding commitment to welcoming foreign investment. In May 2007, the President's Statement on Open Economies reaffirmed that commitment, recognizing that ''our prosperity and security are founded on our country's openness.'' CFIUS carries out its responsibilities within the context of this open investment policy. In the preamble to FINSA, Congress states that the purpose of the Act is ''[t]o ensure national security while promoting foreign investment and the creation and maintenance of jobs [and] to reform the process by which such investments are examined for any effect they may have on national security.''

The rules governing the CFIUS process are set forth in section 721; in Executive Order 11858, as amended most recently by Executive Order 13456 of January 23, 2008 (''Executive Order 11858''); and in regulations found at 31 CFR part 800, as amended most recently by the Final Rule published at 73 FR 70702 (Nov. 21, 2008) (''Regulations''). These provisions establish CFIUS and provide the President and CFIUS with the authority to review any ''covered transaction,'' defined in the Regulations as ''any transaction that is proposed or pending after August 23, 1988, by or with any foreign person, which could result in control of a U.S. business by a foreign person.''[2] The purpose of the national security reviews conducted by CFIUS is to allow CFIUS to identify and address any national security risk that arises as a result of a covered transaction, and, in the circumstances described in § 800.506(b) of the Regulations, to request that the President determine whether to suspend or prohibit a covered transaction or take other action.

### *B. Nature of the CFIUS Process*

#### 1. CFIUS Reviews Are Limited to National Security Considerations

CFIUS focuses solely on any genuine national security concerns raised by a covered transaction, not on other national interests. The requirements, described below, that CFIUS or the President must satisfy in order to take action with respect to a covered transaction, demonstrate this narrow focus on national security alone.

Section 721 requires CFIUS to complete a review of a covered transaction within a 30-day period. CFIUS concludes action on the vast majority of transactions within this initial 30-day review period. In limited cases, following a review, CFIUS may initiate an investigation, which it must complete within a subsequent 45-day period. CFIUS initiates an investigation only where: (1) CFIUS or a member of CFIUS believes that the transaction threatens to impair the national security of the United States and that threat has not been mitigated; (2) an agency designated by the Department of the Treasury as a lead agency recommends, and CFIUS concurs, that an investigation be undertaken; (3) the transaction is a foreign government-controlled transaction; or (4) the transaction would result in foreign control of any critical infrastructure of or within the United States, if CFIUS determines that the transaction could impair national security and that risk has not been mitigated. With respect to transactions described in (3) and (4) above, CFIUS would not initiate an investigation if the Treasury Department and any lead agency it has designated determine, at the Deputy Secretary level or higher, that the transaction will not impair the national security of the United States.[3]

CFIUS concludes action under section 721 on a covered transaction only if it has determined that there are no unresolved national security concerns. That determination must be certified to Congress after CFIUS concludes action. CFIUS is authorized to enter into or impose, and enforce, agreements or conditions to mitigate any national security risk posed by the covered transaction. Section 721 and Executive Order 11858, however, contain important conditions on CFIUS's exercise of this authority. First, before CFIUS may pursue a risk mitigation agreement or condition, the agreement or condition must be justified by a written analysis that identifies the national security risk posed by the covered transaction and sets forth the risk mitigation measures that the CFIUS member(s) preparing the analysis believe(s) are reasonably necessary to address the risk. CFIUS must agree that risk mitigation is appropriate and must approve the proposed mitigation measures. Second, CFIUS may pursue a risk mitigation measure intended to address a particular risk only if provisions of law other than section 721 do not adequately address the risk. Such other laws include, for example, the International Traffic in Arms Regulations (''ITAR''), Export Administration Regulations (''EAR''), and the National Industrial Security Program Operating Manual (''NISPOM''). Accordingly, for example, if the NISPOM provides adequate authority to address the risk posed by a transaction—*e.g.*, the possibility in a

[1] ''National security considerations'' are facts and circumstances, with respect to a transaction, that have potential national security implications and that therefore are relevant for CFIUS to analyze in determining whether a transaction threatens to impair U.S. national security, *i.e.*, whether the transaction poses ''national security risk.'' The term ''national security concerns'' is used in this document to describe those circumstances where CFIUS (or any CFIUS member) has unresolved questions about whether the transaction poses national security risk or where CFIUS (or any CFIUS member) has identified national security risks and those risks have not yet been mitigated.

[2] The terms ''U.S. business'' and ''foreign person'' are defined at 31 CFR 800.226 and 800.216, respectively.

[3] The terms ''foreign government-controlled transaction'' and ''critical infrastructure'' are defined at 31 CFR 800.214 and 800.208, respectively.

particular case that a foreign government may use a foreign company to obtain classified government information concerning systems critical to U.S. national defense—then CFIUS would not pursue its own risk mitigation measures under section 721 to address that risk.[4]

Only the President has the authority to suspend or prohibit a covered transaction. Pursuant to section 6(c) of Executive Order 11858, CFIUS refers a covered transaction to the President if CFIUS or any member of CFIUS recommends suspension or prohibition of the transaction, or if CFIUS otherwise seeks a Presidential determination on the transaction.

In order to exercise the authority to suspend or prohibit a covered transaction under section 721, the President is required to make two findings: (1) That there is credible evidence that leads the President to believe that the foreign interest exercising control might take action that threatens to impair the national security; and (2) that provisions of law, other than section 721 and the International Emergency Economic Powers Act (''IEEPA''), do not, in the judgment of the President, provide adequate and appropriate authority for the President to protect the national security.

2. The CFIUS Process Is Based on a Voluntary Notice System

CFIUS administers a voluntary notice system, allowing parties to a transaction to decide whether to initiate a CFIUS review by filing a voluntary notice under section 721. This distinguishes the CFIUS process from investment screening used in some countries, where all transactions that meet specified value thresholds or other criteria are subject to mandatory review by government agencies.

To reassure parties that choose to file voluntarily with CFIUS that the sensitive and proprietary business information that they submit to CFIUS will be protected, section 721(c) prohibits CFIUS from disclosing to the public any information filed with CFIUS under section 721, except in certain legal proceedings. This includes the identity of filers and details of a notified transaction, as well as information provided to CFIUS in connection with a transaction never formally notified to CFIUS.

[4] In addition, pursuant to section 7(c) of Executive Order 11858, CFIUS may not, except in extraordinary circumstances, require that a party to a transaction recognize, state its intent to comply with, or consent to the exercise of any authorities under existing provisions of law.

In making their decision about whether to submit a voluntary notice of a transaction to CFIUS, parties to a transaction may wish to consider whether their transaction could present national security considerations, since CFIUS focuses solely on national security. A covered transaction that has been notified to CFIUS, and on which CFIUS has concluded action under section 721 after determining that there were no unresolved national security concerns, qualifies for a ''safe harbor,'' as described in § 800.601 of the Regulations and section 7(f) of Executive Order 11858. Thus, subject to the terms of the safe harbor and any mitigation agreement or conditions imposed by CFIUS, the transaction can proceed without the possibility of subsequent suspension or prohibition under section 721. A covered transaction that CFIUS has not reviewed and cleared without objection does not qualify for the safe harbor, and CFIUS has the authority to initiate review of the transaction on its own, even after the transaction has been concluded, which CFIUS may choose to do if it believes the transaction presents national security considerations.

## III. National Security Considerations

### *A. The Process for Analyzing National Security Risk*

Section 721 requires CFIUS to review covered transactions notified to it ''to determine the effects of the transaction[s] on the national security of the United States,'' but does not define ''national security,'' other than to note that the term includes issues relating to homeland security. Instead, section 721 provides an illustrative list of factors, listed below, for CFIUS and the President to consider in assessing whether the transaction poses national security risks.

CFIUS considers the national security factors identified in section 721 and all other national security factors that are relevant to a covered transaction it is reviewing. In the context of these factors, CFIUS identifies all national security considerations (*i.e.*, facts and circumstances that have potential national security implications) in order to assess whether the transaction poses national security risk (*i.e.*, whether the foreign person that exercises control over the U.S. business as a result of the transaction might take action that threatens to impair U.S. national security). In conducting its analysis of whether the transaction poses national security risk, CFIUS assesses whether a foreign person has the capability or intention to exploit or cause harm (*i.e.*, whether there is a threat) and whether the nature of the U.S. business, or its relationship to a weakness or shortcoming in a system, entity, or structure, creates susceptibility to impairment of U.S. national security (*i.e.*, whether there is a vulnerability). National security risk is a function of the interaction between threat and vulnerability, and the potential consequences of that interaction for U.S. national security. This national security risk assessment is conducted based on information provided by the parties, public sources, and government sources, including a classified National Security Threat Assessment that, as required by section 721, the Director of National Intelligence prepares for CFIUS within twenty days after a notice of a transaction is accepted.

### *B. Statutory List of National Security Factors*

Section 721(f) provides the following illustrative list of factors for consideration by CFIUS and the President in determining whether a covered transaction poses national security risk:

- The potential effects of the transaction on the domestic production needed for projected national defense requirements.
- The potential effects of the transaction on the capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services.
- The potential effects of a foreign person's control of domestic industries and commercial activity on the capability and capacity of the United States to meet the requirements of national security.
- The potential effects of the transaction on U.S. international technological leadership in areas affecting U.S. national security.
- The potential national security-related effects on U.S. critical technologies.
- The potential effects on the long-term projection of U.S. requirements for sources of energy and other critical resources and material.
- The potential national security-related effects of the transaction on U.S. critical infrastructure, including [physical critical infrastructure such as] major energy assets.
- The potential effects of the transaction on the sales of military goods, equipment, or technology to countries that present concerns related to terrorism; missile proliferation;

chemical, biological, or nuclear weapons proliferation; or regional military threats.

- The potential that the transaction presents for transshipment or diversion of technologies with military applications, including the relevant country's export control system.
- Whether the transaction could result in the control of a U.S. business by a foreign government or by an entity controlled by or acting on behalf of a foreign government.
- The relevant foreign country's record of adherence to nonproliferation control regimes and record of cooperating with U.S. counterterrorism efforts.

Section 721 also provides that CFIUS may consider any other factors that the Committee finds appropriate in determining whether a transaction poses national security risk.

## IV. Types of Transactions That CFIUS Has Reviewed and That Have Presented National Security Considerations

As discussed above, CFIUS analyzes the particular facts and circumstances of each transaction it reviews in order to identify what national security considerations, if any, are presented by the transaction. Thus, while the guidance provided in this section is drawn from CFIUS's extensive experience in reviewing voluntary notices regarding foreign investment transactions both prior and subsequent to the enactment of FINSA, it is necessarily illustrative and does not purport to describe all national security considerations that CFIUS may identify and analyze in reviewing a transaction. Accordingly, this discussion does not provide comprehensive guidance on all types of covered transactions that have presented national security considerations.

Furthermore, the fact that a transaction presents national security considerations does not mean that CFIUS will necessarily determine that the transaction poses national security risk. This guidance does not identify the types of transactions that pose national security risk, and it should not be used for that purpose. In addition, this guidance should not be interpreted to suggest that the U.S. Government encourages or discourages the types of transactions described in this section.

The national security considerations presented by transactions that CFIUS has reviewed pertain to one or both of the following: (1) The nature of the U.S. business over which foreign control is being acquired, and (2) the nature of the foreign person that acquires control over a U.S. business. Again, this does not mean that a transaction that corresponds to one or the other, or both, of these categories was necessarily determined by CFIUS to pose national security risk, but it does mean that the facts and circumstances surrounding the transaction implicated national security factors that CFIUS considered.

### *A. Transactions That Have Presented National Security Considerations Because of the Nature of the U.S. Business Over Which Control Is Being Acquired*

This section describes covered transactions that CFIUS has reviewed (having received voluntary notices regarding the transactions) and that have presented national security considerations because the transaction involves a U.S. business that provides goods or services that directly or indirectly contribute to U.S. national security. As noted above, CFIUS is focused on identifying and addressing national security risks posed by covered transactions, regardless of the industry of the parties to the transaction. Accordingly, CFIUS does not focus on any one U.S. business sector or group of sectors. Since its inception, CFIUS has received and reviewed voluntary notices regarding transactions across a broad spectrum of the U.S. economy. The following description of covered transactions that CFIUS has reviewed and that have presented national security considerations is illustrative only.

A significant number of covered transactions that CFIUS has reviewed and that have presented national security considerations involve foreign control of U.S businesses that provide products and services—either as prime contractors or as subcontractors or suppliers to prime contractors—to agencies of the U.S. Government and state and local authorities, including, but not limited to, sole-source arrangements. These notices have sometimes involved companies with access to classified information, often included U.S. businesses in the defense, security, and national security-related law enforcement sectors, and covered such industry segments as weapons and munitions manufacturing, aerospace, and radar systems. They have also included U.S. businesses that supply goods and services with broader applicability to a variety of U.S. Government agencies that have functions that are relevant to national security. Such goods and services may involve information technology (consulting, hardware, or software), telecommunications, energy, natural resources, industrial products, and a range of goods and services that affect the national security-relevant functions of the U.S. Government agency or create vulnerability to sabotage or espionage.

CFIUS has also reviewed numerous covered transactions that have presented national security considerations because of the nature of the U.S. businesses, but without regard to government contracts. The U.S. businesses in these cases have operations, or produce or supply products or services, the security of which may have implications for U.S. national security. For example, some of these transactions involved U.S. businesses in the energy sector at various stages of the value chain: The exploitation of natural resources, the transportation of these resources (*e.g.*, by pipeline), the conversion of these resources to power, and the provision of power to U.S. Government and civilian customers. Other transactions have involved U.S. businesses that affect the nation's transportation system, including maritime shipping and port terminal operations and aviation maintenance, repair, and overhaul. Transactions involving U.S. businesses that could significantly and directly affect the U.S. financial system have also accounted for a number of covered transactions reviewed by CFIUS that have presented national security considerations.

Some covered transactions that CFIUS has reviewed have presented national security considerations because they involve infrastructure that may constitute United States critical infrastructure, including major energy assets, which section 721 identifies as presenting national security considerations.[5] As defined in section 721 and further explained in the regulations, CFIUS determines whether a transaction involves critical infrastructure on a case-by-basis, depending on the importance of the particular assets involved in the transaction.

CFIUS has also reviewed numerous covered transactions that have presented national security considerations related to the U.S. businesses' production of certain types of advanced technologies that may be useful in defending, or in seeking to impair, U.S. national security. Many of these U.S. businesses are engaged in the design and production of semiconductors and other equipment or components that have both commercial

[5] As described in Section II.B.1 above, section 721 also prescribes special procedural rules for certain covered transactions involving ''critical infrastructure of or within the United States.''

and military applications. Others are engaged in the production or supply of goods and services involving cryptography, data protection, Internet security, and network intrusion detection, and they may or may not have contracts with U.S. Government agencies.

More generally, a significant portion of the covered transactions that CFIUS has reviewed and that have presented national security considerations have involved U.S. businesses that are engaged in the research and development, production, or sale of technology, goods, software, or services that are subject to U.S. export controls.

The report that CFIUS is required to submit to Congress each year, consistent with section 721(m), contains further information regarding the types of transactions that CFIUS has reviewed. An unclassified version of this report is released publicly.

*B. Transactions That Have Presented National Security Considerations Because of the Identity of the Foreign Person That Is Acquiring Control of a U.S. Business*

1. Generally

Among the national security factors listed in section 721 for CFIUS's consideration are factors related to the identity of the foreign person that is acquiring control of a U.S. business. For example, the factors include whether a transaction is a foreign government-controlled transaction, and, particularly in the case of foreign government-controlled transactions, what the record of the country of the investor is with regard to nonproliferation and other national security-related matters. CFIUS has reviewed covered transactions that have presented this sort of national security consideration. CFIUS has also reviewed covered transactions that have presented national security considerations because of the track record or intentions of the foreign person and its personnel with regard to actions that could impair U.S. national security, including whether the foreign person acquiring control of the U.S. business had plans to terminate contracts between the U.S. business and U.S. Government agencies for goods and services relevant to national security.

However, as emphasized previously, the fact that a transaction presents a national security consideration does not necessarily mean that it poses a national security risk. First, risk requires not only threat, but also a vulnerability in U.S. national security. Second, the applicability of laws other than section 721 has often resolved any national security concerns identified by CFIUS when considering relevant national security factors.

2. Foreign Government-Controlled Transactions

Whether a covered transaction is a ''foreign government-controlled transaction'' is one of the national security factors listed in section 721 for consideration by CFIUS. The regulations define a foreign government-controlled transaction as ''any covered transaction that could result in control of a U.S. business by a foreign government or a person controlled by or acting on behalf of a foreign government.'' 31 CFR 800.214. Foreign government-controlled transactions may include transactions resulting in control of a U.S. business by, among others, foreign government agencies, state-owned enterprises, government pension funds, and sovereign wealth funds.

Although foreign government control is clearly a national security factor to be considered, the fact that a transaction is a foreign government-controlled transaction does not, in itself, mean that it poses national security risk. In reviewing foreign government-controlled transactions, as with all other covered transactions, CFIUS considers all facts and circumstances relevant to national security in assessing whether the foreign person that could exercise control has the capability to use its control of a U.S. business to take action to impair U.S. national security and whether the foreign person may seek to do so.

In reviewing foreign government-controlled transactions, CFIUS considers, among all other relevant facts and circumstances, the extent to which the basic investment management policies of the investor require investment decisions to be based solely on commercial grounds; the degree to which, in practice, the investor's management and investment decisions are exercised independently from the controlling government, including whether governance structures are in place to ensure independence; the degree of transparency and disclosure of the purpose, investment objectives, institutional arrangements, and financial information of the investor; and the degree to which the investor complies with applicable regulatory and disclosure requirements of the countries in which they invest.

CFIUS has reviewed and concluded action on numerous foreign government-controlled transactions, determining that there were no unresolved national security concerns. These transactions varied significantly with regard to several of the facts and circumstances described above.

3. Exceptional Corporate Reorganizations in Which a New Foreign Person That Raises National Security Considerations Acquires Control of a U.S. Business

A corporate reorganization normally involves the realignment of a company's structure to achieve some legal, financial, or other business objective. It is only in exceptional cases that a corporate reorganization would present national security considerations. Even where a corporate reorganization results in a new foreign person obtaining control over a U.S. business—by becoming, for example, an intermediate parent of the U.S. business—the corporate reorganization usually would not result in a change in the ultimate parent of the U.S. business and, therefore, generally would not present national security considerations.

In considering whether a covered transaction that arises in the context of a corporate reorganization is an exceptional case that would present national security considerations, CFIUS considers all relevant national security factors, including those listed in section 721, with respect to any new foreign person that gains control of the U.S. business as a result of the transaction. In cases in which a corporate reorganization results in a new foreign person obtaining control of a U.S. business, the reorganization is unlikely to raise national security considerations if it does not result in any change in the relevant national security factors presented by the ownership structure of the U.S. business.

One example of an exceptional corporate reorganization that would raise national security considerations would be the following: Control of a U.S. business is transferred from Corporation A, a foreign person, to Corporation B, another foreign person, both of which are wholly-owned subsidiaries of Corporation C. Although Corporation C continues to be the ultimate parent of the U.S. business, the facts and circumstances related to the actions, policies, and personnel of the new intermediate controlling entity, Corporation B, raise national security considerations that were not raised by the facts and circumstances related to control of the U.S. business by Corporation A, the previous intermediate controlling entity.

**V. Information Regarding Transactions That May Present National Security Considerations**

CFIUS review of notified transactions is an intensive process, involving over a dozen U.S. Government agencies, departments, and offices. CFIUS reviews are limited to 30 days, absent the initiation of an investigation. Thus, it is important that, at the time of filing a voluntary notice, parties provide CFIUS with the information needed for its review, including regarding the parties' products, services, and business operations, and the transaction itself.

Section 800.402 of the Regulations, as recently amended, requires parties to include in their notice certain information that CFIUS normally requires to complete its review of any transaction. This includes, for example, a listing of certain contracts with the U.S. Government, products that the parties produce or sell, the foreign person's plans with respect to the U.S. business, and the parties and individuals involved with the transaction.

The regulations require parties to provide information regarding any other applicable national security-related regulatory authorities, such as the ITAR, EAR, and NISPOM. Some of the regulatory review processes under these authorities may have longer deadlines than the CFIUS process, and parties to transactions affected by these other reviews may wish to start or complete these processes prior to submitting a voluntary notice to CFIUS under section 721.

In CFIUS's experience, the efficiency of reviews is also enhanced when parties to transactions voluntarily provide in their notice additional information that may be relevant to the notified transaction but which is not listed in § 800.402 of the Regulations. A list of such information, which may be updated from time to time, is provided on the CFIUS Web site (*http://www.ustreas.gov/offices/international-affairs/cfius/*). Examples of such information include: Information regarding whether the U.S. business develops or provides cyber systems, products, or services (including business systems used to manage or support common business processes and operations, such as enterprise resource planning, e-commerce, e-mail, and database systems; telecommunications or Internet systems; control systems used to monitor, assess, and control sensitive processes and physical functions, such as supervisory control, data acquisition, and process and distributed control systems; or safety, security, support, and other specialty systems, such as fire, intrusion detection, access control, people mover, and heating, ventilation, and air conditioning systems); information regarding whether the U.S. business processes natural resources and material or produces and transports energy; and information on any required regulatory reviews, on-going dealings, or outstanding issues that the parties have with other U.S. Government agencies with national security responsibilities.

Where CFIUS requires additional information to enable it to review a notified transaction, CFIUS may request such additional information of the parties. Section 800.403(a)(3) of the Regulations authorizes the Staff Chairperson to reject any voluntary notice if the parties do not provide follow-up information within three business days of the request, or within a longer time frame if the parties so request in writing and the Staff Chairperson grants that request in writing.

**VI. Conclusion**

CFIUS does not issue advisory opinions as to whether a covered transaction raises national security considerations. Rather, it conducts full reviews of specific covered transactions that are notified to CFIUS pursuant to § 800.401 of the Regulations. This guidance may provide assistance to parties as they consider whether to file a voluntary notice with CFIUS. Additional information is available on the CFIUS Web site, *http://www.ustreas.gov/offices/international-affairs/cfius/.*

**Clay Lowery,**

*Assistant Secretary (International Affairs).*

[FR Doc. E8–28791 Filed 12–5–08; 8:45 am]

BILLING CODE 4810–25–P

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## DEPARTMENT OF THE TREASURY

### Office of Foreign Assets Control

### Additional Designation of Four Individuals Pursuant to Executive Order 13224

**AGENCY:** Office of Foreign Assets Control, Treasury.

**ACTION:** Notice.

**SUMMARY:** The Treasury Department's Office of Foreign Assets Control (''OFAC'') is publishing the name of four newly-designated individuals whose property and interests in property are blocked pursuant to Executive Order 13224 of September 23, 2001, ''Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism.''

**DATES:** The designation by the Director of OFAC of the four individuals identified in this notice, pursuant to Executive Order 13224, is effective on November 20, 2008.

**FOR FURTHER INFORMATION CONTACT:** Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, tel.: 202/622–2490.

**SUPPLEMENTARY INFORMATION:**

**Electronic and Facsimile Availability**

This document and additional information concerning OFAC are available 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 September 23, 2001, the President issued Executive Order 13224 (the ''Order'') pursuant to the International Emergency Economic Powers Act, 50 U.S.C. 1701–1706, and the United Nations Participation Act of 1945, 22 U.S.C. 287c. In the Order, the President declared a national emergency to address grave acts of terrorism and threats of terrorism committed by foreign terrorists, including the September 11, 2001, terrorist attacks in New York, Pennsylvania, and at the Pentagon. The Order imposes economic sanctions on persons who have committed, pose a significant risk of committing, or support acts of terrorism. The President identified in the Annex to the Order, as amended by Executive Order 13268 of July 2, 2002, 13 individuals and 16 entities as subject to the economic sanctions. The Order was further amended by Executive Order 13284 of January 23, 2003, to reflect the creation of the Department of Homeland Security.

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, of: (1) Foreign persons listed in the Annex to the Order; (2) foreign persons determined by the Secretary of State, in consultation with the Secretary of the Treasury, the Secretary of the Department of Homeland Security and the Attorney General, to have committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United

States; (3) persons determined by the Director of OFAC, in consultation with the Departments of State, Homeland Security and Justice, to be owned or controlled by, or to act for or on behalf of those persons listed in the Annex to the Order or those persons determined to be subject to subsection 1(b), 1(c), or 1(d)(i) of the Order; and (4) except as provided in section 5 of the Order and after such consultation, if any, with foreign authorities as the Secretary of State, in consultation with the Secretary of the Treasury, the Secretary of the Department of Homeland Security and the Attorney General, deems appropriate in the exercise of his discretion, persons determined by the Director of OFAC, in consultation with the Departments of State, Homeland Security and Justice, to assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism or those persons listed in the Annex to the Order or determined to be subject to the Order or to be otherwise associated with those persons listed in the Annex to the Order or those persons determined to be subject to subsection 1(b), 1(c), or 1(d)(i) of the Order.

On November 20, 2008, the Director of OFAC, in consultation with the Departments of State, Homeland Security, Justice and other relevant agencies, designated, pursuant to one or more of the criteria set forth in subsections 1(b), 1(c) or 1(d) of the Order, four individuals whose property and interests in property are blocked pursuant to Executive Order 13224.

The designees are as follows:

1. AW-MOHAMED, Ahmed Abdi (a.k.a. ABUZUBAIR, Muktar Abdulrahim; a.k.a. AW MOHAMMED, Ahmed Abdi; a.k.a. ''ABU ZUBEYR''; a.k.a. ''GODANE''; a.k.a. ''GODANI''; a.k.a. ''SHAYKH MUKHTAR''); DOB 10 Jul 1977; POB Hargeysa, Somalia; nationality Somalia (individual) [SDGT]

2. ISSA, Issa Osman (a.k.a. ATTO, Abdullah; a.k.a. BUR, Abdullah; a.k.a. SUDANI, Abdala; a.k.a. ''AFADEY''; a.k.a. ''MUSSE''); DOB 1973; POB Malindi, Kenya; nationality Kenya (individual) [SDGT]

3. ROBOW, Mukhtar (a.k.a. ALI, Mujahid Mukhtar Robow; a.k.a. ALI, Mukhtar Abdullahi; a.k.a. ALI, Shaykh Mukhtar Robo; a.k.a. RUBU, Mukhtar Ali; a.k.a. ''ABU MANSOUR''; a.k.a. ''ABU MANSUR''); DOB 1969; alt. DOB 10 Oct 1969; POB Xudur, Somalia; alt. POB Keren, Eritrea; nationality Eritrea; National ID No. 1372584 (Kenya); Passport 0310857 (Eritrea) issued 21 Aug 2006 expires 20 Aug 2008; (Following data derived from an Eritrean passport issued under the alias name of Mukhtar Abdullahi Ali: Alt. DOB: 10 October 1969; Alt. POB: Keren Eritrea; nationality: Eritrean; National ID No.: 1372584, Kenya; Passport No.: 0310857, Eritrea) (individual) [SDGT]

4. EL HABHAB, Redouane (a.k.a. ''ABDELRAHMAN''), Iltisstrasse 58, Kiel 24143, Germany; DOB 20 Dec 1969; POB Casablanca, Morocco; nationality Germany; National ID No. 1007850441 (Germany) issued 27 Mar 2001 expires 26 Mar 2011; Passport 1005552350 (Germany) issued 27 Mar 2001 expires 26 Mar 2011; currently incarcerated in Lubeck, Germany (individual) [SDGT]

Dated: November 20, 2008.

**Adam J. Szubin,**

*Director, Office of Foreign Assets Control.*

[FR Doc. E8–28944 Filed 12–5–08; 8:45 am]

**BILLING CODE 4811–45–P**

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## DEPARTMENT OF THE TREASURY

### Office of Thrift Supervision

### Savings and Loan Holding Company Registration Statement—H–(b)10

**AGENCY:** Office of Thrift Supervision (OTS), Treasury.

**ACTION:** Notice and request for comment.

**SUMMARY:** The proposed information collection request (ICR) described below has been submitted to the Office of Management and Budget (OMB) for review and approval, as required by the Paperwork Reduction Act of 1995. OTS is soliciting public comments on the proposal.

**DATES:** Submit written comments on or before January 7, 2009. A copy of this ICR, with applicable supporting documentation, can be obtained from RegInfo.gov at *http://www.reginfo.gov/public/do/PRAMain.*

**ADDRESSES:** Send comments, referring to the collection by title of the proposal or by OMB approval number, to OMB and OTS at these addresses: Office of Information and Regulatory Affairs, Attention: Desk Officer for OTS, U.S. Office of Management and Budget, 725 17th Street, NW., Room 10235, Washington, DC 20503, or by fax to (202) 395–6974; and Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, by fax to (202) 906–6518, or by e-mail to *infocollection.comments@ots.treas.gov.* OTS will post comments and the related index on the OTS Internet Site at *http://www.ots.treas.gov.* In addition, interested persons may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment, call (202) 906–5922, send an e-mail to *public.info@ots.treas.gov*, or send a facsimile transmission to (202) 906–7755.

**FOR FURTHER INFORMATION CONTACT:** For further information or to obtain a copy of the submission to OMB, please contact Ira L. Mills at *ira.mills@ots.treas.gov* (202) 906–6531, or facsimile number (202) 906–6518, Regulations and Legislation Division, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

**SUPPLEMENTARY INFORMATION:** OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

*Title of Proposal:* Savings and Loan Holding Company Registration Statement—H–(b)10.

*OMB Number:* 1550–0020.

*Form Number:* H–(b)10.

*Description:* The Statement is used to collect information concerning the acquisition, as well as any changes to intercompany relationships of the savings and loan holding company and its subsidiaries since submission of the holding company acquisition application.

OTS reviews the Statement for adequacy of answers to items and completeness in all material respects. In particular, OTS reviews each Statement to determine whether there has been adequate disclosure of pertinent facts. The Statement provides factual information concerning the date of consummation of transactions and the number of shares acquired whereas estimates of such information are provided in the application. In addition, a requirement is contained in the Statement concerning changes to information filed during the application process.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit.

*Estimated Number of Respondents:* 65.

*Estimated Number of Responses:* 65.

*Estimated Burden Hours per Response:* 8 hours.

*Estimated Frequency of Response:* Other; Once, on becoming an S& L holding company.

*Estimated Total Burden:* 520 hours.

*Clearance Officer:* Ira L. Mills, (202) 906–6531, Office of Thrift Supervision,

1700 G Street, NW., Washington, DC 20552.

Dated: December 2, 2008.

**Deborah Dakin,**

*Senior Deputy Chief Counsel, Regulations and Legislation Division.*

[FR Doc. E8–28895 Filed 12–5–08; 8:45 am]

**BILLING CODE 6720–01–P**

## DEPARTMENT OF VETERANS AFFAIRS

### Privacy Act of 1974; System of Records

**AGENCY:** Department of Veterans Affairs (VA).

**ACTION:** Notice of Amendment to Systems of Records.

**SUMMARY:** As required by the Privacy Act of 1974, 5 U.S.C. 552a(e), notice is hereby given that the Department of Veterans Affairs (VA) is amending two existing systems of records 04VA115, ''Blood Donor Information—VA'' and 69VA131, ''Ionizing Radiation Registry—VA'' to: Add a routine use relating to the release of information from VA to the Department of Justice (DoJ); add a routine use relating to releasing information to agencies in the event of fraud or abuse; and add a routine use relating to disclosing information when there is a risk of embarrassment or harm to the reputations of the record subjects.

**DATES:** Comments on the amendment of this system of records must be received no later than January 7, 2009. If no public comment is received, the amended system will become effective January 7, 2009.

**ADDRESSES:** Written comments may be submitted through *http://www.Regulation.gov*; by mail or hand-delivery to Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue, NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461–4902 (this is not a toll-free number) for an appointment. In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *http://www.Regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** Veterans Health Administration (VHA) Privacy Officer, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420; telephone (704) 245–2492.

**SUPPLEMENTARY INFORMATION:** VA provides health care services to many of America's veterans through the Veterans Health Administration. During the course of providing health care, VHA collects medical and health information on veterans. In order to protect veteran's medical or health information, VHA is adding three routine uses to two existing systems of records (04VA115 and 69VA131).

*Additional Routine Uses:*

The routine use added to 04VA115 and 69VA131 would permit VA to disclose information from these system of records to the Department of Justice (DoJ), either on VA's initiative or in response to DoJ's request for the information, after either VA or DoJ determines that such information is relevant to DoJ's representation of the United States or any of its components in legal proceedings before a court or adjudicative body, provided that, in each case, the agency also determines prior to disclosure that release of the records to the DoJ is a use of the information contained in the records that is compatible with the purpose for which VA collected the records. VA, on its own initiative, may also disclose records in this system of records in legal proceedings before a court or administrative body after determining that the disclosure of the records to the court or administrative body is a use of the information contained in the records that is compatible with the purpose for which VA collected the records.

According to VA leadership, this mandatory new routine use is added to comply to new Federal policy and guidelines.

The second routine use allows VA to disclosure to other Federal agencies may be made to assist such agencies in preventing and detecting possible fraud or abuse by individuals in their operations and programs.

The routine use added to these two systems of records would permit VA to disclose information in its files in the event of fraud or abuse.

The third routine use allows VA, on its own initiative, to disclose any information or records to appropriate agencies, entities, and persons when (1) VA suspects or has confirmed that the integrity or confidentiality of information in the system of records has been compromised; (2) the Department has determined that as a result of the suspected or confirmed compromise, there is a risk of embarrassment or harm to the reputations of the record subjects, harm to economic or property interests, identity theft or fraud, or harm to the security, confidentiality, or integrity of this system or other systems or programs (whether maintained by the Department or another agency) or disclosure is to agencies, entities, or persons whom VA determines are reasonably necessary to assist or carry out the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm. This routine use permits disclosures by the Department to respond to a suspected or confirmed data breach, including the conduct of any risk analysis or provision of credit protection services as provided in 38 U.S.C. 5724, as the terms are defined in 38 U.S.C. 5727.

According to VA leadership this mandatory new routine use is added to comply to new Federal policy and guidelines.

The Report of Intent to Amend a System of Records Notice and an advance copy of the system notice have been sent to the appropriate Congressional committees and to the Director of the Office of Management and Budget (OMB) as required by 5 U.S.C. 552a(r) (Privacy Act) and guidelines issued by OMB (65 FR 77677), December 12, 2000.

Approved: November 14, 2008.

**Gordon H. Mansfield,**

*Deputy Secretary of Veterans Affairs.*

### Notice of Amendment of Systems of Records

1. In the system identified as 04VA115, ''Blood Donor Information—VA,'' as set forth in the **Federal Register**, 40 FR 38095, and last amended in the **Federal Register**, 66 FR 20860 (Apr. 25, 2001). Three new routine uses are added as follows:

**04VA115**

**SYSTEM NAME:**

Blood Donor Information—VA.

* * * * *

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

* * * * *

8. VA may disclose information from this system of records to the Department of Justice (DoJ), either on VA's initiative or in response to DoJ's request for the information, after either VA or DoJ determines that such information is relevant to DoJ's representation of the United States or any of its components in legal proceedings before a court or adjudicative body, provided that, in each case, the agency also determines

prior to disclosure that release of the records to the DoJ is a use of the information contained in the records that is compatible with the purpose for which VA collected the records. VA, on its own initiative, may disclose records in this system of records in legal proceedings before a court or administrative body after determining that the disclosure of the records to the court or administrative body is a use of the information contained in the records that is compatible with the purpose for which VA collected the records.

9. Disclosure to other Federal agencies may be made to assist such agencies in preventing and detecting possible fraud or abuse by individuals in their operations and programs.

10. VA may, on its own initiative, disclose any information or records to appropriate agencies, entities, and persons when (1) VA suspects or has confirmed that the integrity or confidentiality of information in the system of records has been compromised; (2) the Department has determined that as a result of the suspected or confirmed compromise, there is a risk of embarrassment or harm to the reputations of the record subjects, harm to economic or property interests, identity theft or fraud, or harm to the security, confidentiality, or integrity of this system or other systems or programs (whether maintained by the Department or another agency or disclosure is to agencies, entities, or persons whom VA determines are reasonably necessary to assist or carry out the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm. This routine use permits disclosures by the Department to respond to a suspected or confirmed data breach, including the conduct of any risk analysis or provision of credit protection services as provided in 38 U.S.C. 5724, as the terms are defined in 38 U.S.C. 5727.

2. In the system identified as 69VA131, ''Ionizing Radiation Registry—VA,'' as set forth in the **Federal Register** 56 FR 26186 dated June 6, 1991, and last amended in the **Federal Register** 66 FR 30271–30273 dated June 5, 2001. Three new routine uses are added as follows:

**69VA131**

**SYSTEM NAME:**

Ionizing Radiation Registry—VA.

* * * * *

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

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11. VA may disclose information from this system of records to the Department of Justice (DoJ), either on VA's initiative or in response to DoJ's request for the information, after either VA or DoJ determines that such information is relevant to DoJ's representation of the United States or any of its components in legal proceedings before a court or adjudicative body, provided that, in each case, the agency also determines prior to disclosure that release of the records to the DoJ is a use of the information contained in the records that is compatible with the purpose for which VA collected the records. VA, on its own initiative, may disclose records in this system of records in legal proceedings before a court or administrative body after determining that the disclosure of the records to the court or administrative body is a use of the information contained in the records that is compatible with the purpose for which VA collected the records.

12. Disclosure to other Federal agencies may be made to assist such agencies in preventing and detecting possible fraud or abuse by individuals in their operations and programs.

13. VA may, on its own initiative, disclose any information or records to appropriate agencies, entities, and persons when (1) VA suspects or has confirmed that the integrity or confidentiality of information in the system of records has been compromised; (2) the Department has determined that as a result of the suspected or confirmed compromise, there is a risk of embarrassment or harm to the reputations of the record subjects, harm to economic or property interests, identity theft or fraud, or harm to the security, confidentiality, or integrity of this system or other systems or programs (whether maintained by the Department or another agency or disclosure is to agencies, entities, or persons whom VA determines are reasonably necessary to assist or carry out the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm. This routine use permits disclosures by the Department to respond to a suspected or confirmed data breach, including the conduct of any risk analysis or provision of credit protection services as provided in 38 U.S.C. 5724, as the terms are defined in 38 U.S.C. 5727.

[FR Doc. E8–29016 Filed 12–5–08; 8:45 am]

BILLING CODE 8320–01–P

## DEPARTMENT OF VETERANS AFFAIRS

### Privacy Act of 1974

**AGENCY:** Department of Veteran Affairs.

**ACTION:** Notice of Amendment to an Existing System of Records.

**SUMMARY:** The Privacy Act of 1974 (5 U.S.C. 552(e)(4)) requires that all agencies publish in the **Federal Register** a notice of the existence and character of their systems of records. Notice is hereby given that the Department of Veterans Affairs (VA) is amending the system of records entitled ''Claimant Private Relief Legislative Files-VA'' (06VA026) as set forth in the **Federal Register** on January 13, 1982 [47 F.R. 1463]. VA is amending the system by revising the routine uses of records maintained in the system, deleting three routine uses and adding eight new routine uses. The Authority for Maintenance of the System is revised to reflect current legislation authorizing collection of this information. VA is republishing the system notice in its entirety.

**DATES:** Interested persons are invited to submit comments, suggestions, or objections regarding these changes. To assure consideration, written comments on this revised system of records must be postmarked no later than January 7, 2009, and written comments hand delivered to the Department and comments submitted electronically must be received as provided below, no later than 5 p.m. Eastern Time on January 7, 2009. If no public comment is received, the system will become effective January 7, 2009.

**ADDRESSES:** Written comments may be submitted through *www.Regulations.gov*, by mail or hand-delivery to the Director, Regulations Management (00REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8:00 a.m. and 4:30 p.m. Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment. In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS).

**FOR FURTHER INFORMATION CONTACT:** Susan Sokoll, Privacy Officer, (202) 461–7623, Office of the General Counsel (026C), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420.

**SUPPLEMENTARY INFORMATION:** ''Claimant Private Relief Legislative Files—VA'' (06VA026), was amended January 13, 1982, at 47 **Federal Register** 1460.

## I. Description of the System of Records

The VA Claimant Private Relief Legislative Files reports the introduction, documentation, and passage of private relief bills on behalf of veterans, their beneficiaries, and their dependents. Private relief legislation is used to bring relief to those who have suffered a bona fide loss but have no recourse through the existing legal system at that time. The system includes bills, Congressional reports, agency reports, testimony, and copies of remarks made in Congress in support of the bill. Most of the files contain legislation granting individuals relief in situations that currently would be handled through administrative error (equitable relief) provisions at 38 U.S.C. 503 or as torts against the government at 28 U.S.C. 2671–2680.

## II. Proposed Amendments to Routine Use Disclosures of Data in the System

VA is amending, deleting, rewriting and reorganizing the order of the routine uses in this system of records. Accordingly, the following changes are made to the current routine uses and are incorporated into the amended system of records notice.

Current routine uses 2 through 4 are being combined and revised into new routine use 4. This routine use is amended to more accurately reflect the conditions under which VA, on its own initiative, may disclose information from this system of records for law enforcement purposes.

New routine use number 2 is being added to authorize disclosure to the National Archives and Records Administration and the General Services Administration to allow the performance of records management inspections conducted under authority of Title 44, Chapter 29, of the United States Code.

New routine use 3 is added to reflect VA's authorization to disclose individually-identifiable information to contractors or other entities that will provide services to VA for which the recipient needs that information in order to perform the services.

Current routine use number 5 is being renumbered as routine use number 10. New routine use 5 is added to state when VA may disclose information in legal proceedings, and VA may disclose information to the Department of Justice. In determining whether to disclose records under this routine use, VA will comply with the guidance promulgated by the Office of Management and Budget (OMB) in a May 24, 1985, memorandum entitled ''Privacy Act Guidance—Update'' currently posted at *http://www.whitehouse.gov/omb/inforeg/guidance1985.pdf.*

VA is adding a new routine use 6 that authorizes the circumstances, and to whom, VA may disclose records in order to respond to, and minimize possible harm to, individuals as a result of a data breach. This routine use is promulgated in order to meet VA's statutory duties under 38 U.S.C. 5724 and the Privacy Act, 5 U.S.C. 552a, as amended.

VA is adding new routine use 7 to disclose information to the Merit Systems Protection Board or the Office of Special Counsel, where officials of those agencies determine, or VA determines the disclosure is necessary to perform duties imposed by 5 U.S.C. sections 1205 and 1206, or as may be authorized by law.

VA is adding new routine use 8 to disclose information to the Equal Employment Opportunity Commission when requested in connection with investigations of alleged or possible discriminatory practices, examination of Federal affirmative employment programs, or for other functions of the Commission as authorized by law or regulation.

VA is adding new routine use 9 to disclose information to the Federal Labor relations Authority, where officials of those agencies determine, or VA determines the disclosure is necessary to perform duties imposed by the enabling statutes and legislation of that agency.

## III. Compatibility of the Proposed Routine Uses

Release of information from these records, pursuant to routine uses, will be made only in accordance with the provisions of the Privacy Act of 1974. The Privacy Act of 1974 permits agencies to disclose information about individuals, without their consent, for a routine use when the information will be used for a purpose for which the information was collected. VA has determined that the disclosure of information for the above purposes in the proposed amendment to routine uses is a proper and necessary use of the information collected by the Claimant Private Relief Legislative Files.

The report of intent to publish and an advance copy of the system notice have been sent to the appropriate Congressional committees and to the Director of the Office of Management and Budget (OMB) as required by 5 U.S.C. 552a(r) (Privacy Act) and guidelines issued by OMB (65 FR 77677), December 12, 2000.

Approved: November 14, 2008.

**Gordon H. Mansfield,**

*Deputy Secretary of Veterans Affairs.*

**SYSTEM NAME:**

Claimant Private Relief Legislative Files—VA (06VA026).

**SYSTEM LOCATION:**

The system of records is located in the Office of the General Counsel, Professional Staff Group VI (026), U.S. Department of Veterans Affairs (VA), 810 Vermont Avenue, NW., Washington, DC 20420.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

The following categories of individuals are covered by this system: (1) Veterans; (2) their beneficiaries; and, (3) their dependents. These individuals are those on behalf of whom private relief bills are introduced, or proposed for introduction, in Congress.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Records (or information contained in records) may include information pertinent to private relief bills such as: (1) The bill for relief (containing name, other personal identifying information, personal data, and the claim for a particular legislative relief); (2) reports of other Federal agencies pertaining to the relief bill; (3) VA reports pertaining to the relief bill; (4) Congressional Committee reports; and, (5) excerpts from the Congressional Record.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

Title 38, United States Code, Section 503, and 28, United States

**PURPOSE(S):**

This system documents the efforts of VA and Congress to provide benefits and monetary relief to veterans, their dependents and beneficiaries outside those granted in public legislation.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEMS, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

1. VA may disclose information to a congressional office in response to an inquiry from the congressional office on behalf of and at the request of that individual.

2. VA may disclose information to the National Archives and Records Administration (NARA) and the General Services Administration (GSA) as required to comply with statutory requirements to disclose information to NARA and GSA for them to perform their statutory records management

activities and inspections under authority of Title 44, Chapter 29, of the United States Code.

3. VA may disclose information to individuals, organizations, private or public agencies, other entities with whom VA has a contract or agreement to perform such services as VA may deem practicable for the purposes of laws administered by VA, in order for the contractor, subcontractor, public or private agency, or other entity or individuals with whom VA has contract or agreement. This routine use includes disclosures by the individual or entity performing the service for VA to any secondary entity or individual to perform an activity that is necessary for individuals, organizations, private or public agencies, or other entities or individuals with whom VA has a contract or agreement to provide the service to VA.

4. VA may disclose on its own initiative any information in this system, except the names, home addresses or other personally identifiable information of veterans and their dependents, which is relevant to a suspected or reasonably imminent violation of law, whether civil, criminal or regulatory in nature and whether arising by general or program statute or by regulation, rule or order issued pursuant thereto, to a Federal, State, local, tribal, or foreign agency charged with the responsibility of investigating or prosecuting such violation, or charged with enforcing or implementing the statute, regulation, rule, or order. On its own initiative, VA may also disclose the names and addresses of veterans and their dependents to a Federal agency charged with the responsibility of investigating or prosecuting civil, criminal or regulatory violations of law, or charged with enforcing or implementing the statute, regulation, rule or order issued pursuant thereto.

5. VA may provide Department of Justice (DoJ) with information needed to represent the United States in litigation. VA may also disclose the information for this purpose in proceedings in which DoJ is not representing the Agency.

6. VA may, on its own initiative, disclose any information or records to appropriate agencies, entities, or persons when (1) VA suspects or has confirmed that the integrity or confidentiality of information in the system of records has been compromised; (2) the Department has determined that as a result of the suspected or confirmed compromise there is a risk of embarrassment or harm to the reputation of the record subjects, harm to economic or property interests, identity theft or fraud, or harm to the security, confidentiality, or integrity of this system or other systems of programs (whether maintained by the Department or another agency or entity) that rely upon potentially compromised information; and (3) the disclosure is to agencies, entities, or persons whom VA determines are reasonably necessary to assist or carry out the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm. This routine use permits disclosures by the Department to respond to a suspected or confirmed data breach, including the provision of credit protection services or any risk analysis services when necessary to respond to, and if necessary, mitigate damages that might arise from a data breach involving data covered by this system of records.

7. VA may disclose information to officials of the Merit Systems Protection Board or the Office of Special Counsel when requested in connection with appeals, special studies of the civil service and other merit systems, review of rules and regulations, investigation of alleged or possible prohibited personnel practices, and such other functions promulgated in 5 U.S.C. sections 1205 and 1206, or as may be authorized by law.

8. VA may disclose information to the Equal Employment Opportunity Commission when requested in connection with investigations of alleged or possible discriminatory practices, examination of Federal affirmative employment programs, or for other functions of the Commission as authorized by law or regulation.

9. VA may disclose to the Federal Labor Relations Authority (including its General Counsel) information related to the establishment of jurisdiction, the investigation and resolution of allegations of unfair labor practices, or information in connection with the resolution of exceptions to arbitration awards when a question of material fact is raised; to disclose information in matters properly before the Federal Services Impasses Panel, and to investigate representation petitions and conduct or supervise representation elections.

10. VA may disclose, on its own initiative, records pertinent to consideration of private relief bills to Congressional members in their elected representative capacity and to other Federal agencies to enable them to aid or comment on whether the petitioning individual should obtain the requested relief and to facilitate the preparation and release of reports regarding this matter.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Records are maintained in individual file folders. The information in each folder is summarized and placed on file cards. Both the file cards and the file folders are kept in storage cabinets.

**RETRIEVABILITY:**

Records and file cards are indexed by the last name and bill number of the individual(s) covered by the system of records.

**SAFEGUARDS:**

Records and file cards are maintained in a manned room during working hours. During nonworking hours, the file area is locked, and the building is protected by uniformed guards. Access to the records is only authorized to VA personnel on a ''need to know'' basis.

**RETENTION AND DISPOSAL:**

Records and file cards which result in Private Relief Bills are maintained permanently in the Office of General Counsel. Records and file cards for relief efforts which do not result in enacted legislation will be maintained for a period of ten years and then destroyed.

**SYSTEM MANAGER(S) AND ADDRESS(ES):**

Assistant General Counsel, Professional Staff Group VI (026), Office of General Counsel, United States Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420.

**NOTIFICATION PROCEDURE:**

An individual who wishes to determine whether a record is being maintained in this system under his or her name or other personal identifier, or wants to determine the contents of such record, should submit a written request to the Assistant General Counsel, Professional Staff Group VI (026), Office of General Counsel, U.S. Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420. Such requests must contain a reasonable description of the records requested. All inquiries must reasonably identify the information involved and should include the individual's full name, return address, and telephone number.

**RECORD ACCESS PROCEDURES:**

Individuals seeking information regarding access to VA information maintained by the Office of General Counsel may send a request by mail to the Assistant General Counsel, Professional Staff Group VI (026), Office of the General Counsel, Department of Veterans Affairs, 810 Vermont Avenue,

NW., Washington, DC, 20420, or may send a fax to the Assistant General Counsel, Professional Staff Group VI, 1–202–273–6645.

**CONTESTING RECORD PROCEDURES:**

Individuals seeking information regarding contesting or amending VA information maintained by the Office of General Counsel may send a request by mail to the Assistant General Counsel, Professional Staff Group VI (026), Office of the General Counsel, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, or may send a fax to the Assistant General Counsel, Professional Staff Group VI, 1–202–273–6645.

**RECORDS SOURCE CATEGORIES:**

Courts, veterans, beneficiaries and dependents of veterans, litigants and their attorneys, Federal agencies, insurance carriers, witnesses, or any other interested participants to the proceedings.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

[FR Doc. E8–29020 Filed 12–5–08; 8:45 am]

**BILLING CODE 8320–01–P**

## DEPARTMENT OF VETERANS AFFAIRS

## Privacy Act of 1974: System of Records

**AGENCY:** Department of Veterans Affairs (VA).

**ACTION:** Notice of Amendment of System of Records—VA Police Badge and Training Records System—VA (83VA07).

**SUMMARY:** As required by the Privacy Act of 1974, Title 5 United States Code, Section 552a(e), notice is hereby given that the Department of Veterans Affairs (VA) is amending VA Police Badge and Training Records System—VA (83VA07) as set forth in 67 FR 49747 dated November 3, 1992. VA is republishing this system notice in its entirety.

**DATES:** Comments on the amended system of records must be received no later than January 7, 2009. If no public comment is received during the period allowed for comment or unless otherwise published in the **Federal Register** by VA, the amended system will become effective January 7, 2009.

**ADDRESSES:** Written comments may be submitted through *www.Regulations.gov*; by mail or hand-delivery to the Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m. Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment. In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *www.Regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** Director, Law Enforcement Training Center (07A2), Department of Veterans Affairs 2200 Fort Roots Drive, Bldg 104, North Little Rock, AR 72114.

**SUPPLEMENTARY INFORMATION:**

### I. Description of the Systems of Records

This system of records contains information regarding VA Police Officers who have attended the Basic VA Police Training Course and supplemental professional training held at the VA Law Enforcement Training Center. Specifically, this system of records contains each VA police officer's name, Social Security number, badge number, date of birth, sex, examination scores and class standing, entry-on-duty date, and their duty station. The following routine uses for information in this system are added or restate existing uses to this system.

1. The record of an individual covered by this system of records may be disclosed to a Member of Congress, or a staff person acting for the Member, when the Member or staff person requests the record on behalf of and at the written request of the individual.

2. Disclosure may be made to the National Archives and Records Administration in records management inspections conducted under the authority of Title 44 U.S.C.

3. VA may disclose information from this system of records to the Department of Justice (DoJ), either on VA's initiative or in response to DoJ's request for the information, after either VA or DoJ determines that such information is relevant to DoJ's representation of the United States or any of its components in legal proceedings before a court or adjudicative body, provided that, in each case, the agency also determines prior to disclosure that release of the records to the DoJ is a use of the information contained in the records that is compatible with the purpose for which VA collected the records. VA, on its own initiative, may disclose records in this system of records in legal proceedings before a court or administrative body after determining that the disclosure of the records to the court or administrative body is a use of the information contained in the records that is compatible with the purpose for which VA collected the records.

4. Disclosure of relevant information may be made to individuals, organizations, private or public agencies, or other entities with whom VA has a contract or agreement or where there is a subcontract to perform such services as VA may deem practicable for purposes of laws administered by VA, in order for the contractor or sub-contractor to perform the services of the contract or agreement.

5. VA may disclose on its own initiative any information in the system, except the names and home addresses of veterans and their dependents, that is relevant to a suspected or reasonably imminent violation of the law whether civil, criminal, or regulatory in nature and whether arising by general or program statute or by regulation, rule, or order issued pursuant thereto, to a Federal, state, local, tribal, or foreign agency charged with the responsibility of investigating or prosecuting such violation, or charged with enforcing or implementing the statute, regulation, rule or order. VA may also disclose on its own initiative the names and addresses of veterans and their dependents to a Federal agency charged with the responsibility of investigating or prosecuting civil, criminal, or regulatory violations of law, or charged with enforcing or implementing the statute, regulation, or order issued pursuant thereto.

6. Disclosure to other Federal agencies may be made to assist such agencies in preventing and detecting possible fraud or abuse by individuals in their operations and programs.

7. VA may, on its own initiative, disclose any information or records to appropriate agencies, entities, and persons when (1) VA suspects or has confirmed that the integrity or confidentiality of information in the system of records has been compromised; (2) the Department has determined that as a result of the suspected or confirmed compromise, there is a risk of embarrassment or harm to the reputations of the record subjects, harm to economic or property interests, identity theft or fraud, or harm to the security, confidentiality, or integrity of this system or other systems or programs (whether maintained by the Department or another agency or entity) that rely upon the potentially compromised information; and (3) the disclosure is to agencies, entities, or persons whom VA determines are reasonably necessary to assist or carry

out the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm. This routine use permits disclosures by the Department to respond to a suspected or confirmed data breach, including the conduct of any risk analysis or provision of credit protection services as provided in 38 U.S.C. 5724, as the terms are defined in 38 U.S.C. 5727.

**Compatibility of the Proposed Routine Uses**

The Privacy Act permits disclosure of information about individuals without their consent for a routine use when the information will be used for a purpose that is compatible with the purpose for which the information is collected. In all of the routine use disclosures described above, either the recipient of the information will use the information in connection with a matter relating to one of VA's programs; to provide a benefit to VA; or because disclosure is required by law.

The notice of intent to amend and an advance copy of the system notice have been sent to the appropriate Congressional committees and to the Administrator of Office of Management and Budget (OMB) as required by 5 U.S.C. 552a(r) (Privacy Act) and guidelines issued by OMB (65 FR 77677), December 12, 2000.

Approved: November 14, 2008.

**Gordon H. Mansfield,**

*Deputy Secretary of Veterans Affairs.*

**83VA07**

**SYSTEM NAME:**

VA Police Badge and Training Records System—VA

**SYSTEM LOCATION:**

VA Law Enforcement Training Center, VA Medical Center, 2200 Fort Roots Drive, Bldg 104, North Little Rock, AR 72114.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

VA Police Officers who have attended the Basic VA Police Training Course and supplemental professional training held at the VA Law Enforcement Training Center.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

This system of records contains each VA police officer's name, social security number, badge number, date of birth, sex, examination scores and class standing, entry-on-duty date, and their duty station.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

38 U.S.C. 501 and 902

**PURPOSE(S):**

The records and information contained in this system of records are necessary for the effective administration and management of the Department's nationwide Security and Law Enforcement Program. The collection and use of accurate, up-to-date data are necessary for the purpose of enforcing the law and protecting persons and property on VA property and at VA Central Office.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

1. The record of an individual who is covered by this system of records may be disclosed to a Member of Congress, or a staff person acting for the Member, when the Member or staff person requests the record on behalf of and at the written request of the individual.

2. Disclosure may be made to the National Archives and Records Administration in records management inspections conducted under the authority of Title 44 U.S.C.

3. VA may disclose information from this system of records to the Department of Justice (DoJ), either on VA's initiative or in response to DoJ's request for the information, after either VA or DoJ determines that such information is relevant to DoJ's representation of the United States or any of its components in legal proceedings before a court or adjudicative body, provided that, in each case, the agency also determines prior to disclosure that release of the records to the DoJ is a use of the information contained in the records that is compatible with the purpose for which VA collected the records. VA, on its own initiative, may disclose records in this system of records in legal proceedings before a court or administrative body after determining that the disclosure of the records to the court or administrative body is a use of the information contained in the records that is compatible with the purpose for which VA collected the records.

4. Disclosure of relevant information may be made to individuals, organizations, private or public agencies, or other entities with whom VA has a contract or agreement or where there is a subcontract to perform such services as VA may deem practicable for the purposes of laws administered by VA, in order for the contractor or sub-contractor to perform the services of the contract or agreement.

5. VA may disclose on its own initiative any information in the system, except the names and home addresses of veterans and their dependents, that is relevant to a suspected or reasonably imminent violation of the law whether civil, criminal, or regulatory in nature and whether arising by general or program statute or by regulation, rule, or order issued pursuant thereto, to a Federal, state, local, tribal, or foreign agency charged with the responsibility of investigating or prosecuting such violation, or charged with enforcing or implementing the statute, regulation, rule or order. VA may also disclose on its own initiative the names and addresses of veterans and their dependents to a Federal agency charged with the responsibility of investigating or prosecuting civil, criminal, or regulatory violations of law, or charged with enforcing or implementing the statute, regulation, or order issued pursuant thereto.

6. Disclosure to other Federal agencies may be made to assist such agencies in preventing and detecting possible fraud or abuse by individuals in their operations and programs.

7. VA may, on its own initiative, disclose any information or records to appropriate agencies, entities, and persons when (1) VA suspects or has confirmed that the integrity or confidentiality of information in the system of records has been compromised; (2) the Department has determined that as a result of the suspected or confirmed compromise, there is a risk of embarrassment or harm to the reputations of the record subjects, harm to economic or property interests, identity theft or fraud, or harm to the security, confidentiality, or integrity of this system or other systems or programs (whether maintained by the Department or another agency or entity) that rely upon the potentially compromised information; and (3) the disclosure is to agencies, entities, or persons whom VA determines are reasonably necessary to assist or carry out the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm. This routine use permits disclosures by the Department to respond to a suspected or confirmed data breach, including the conduct of any risk analysis or provision of credit protection services as provided in Title 38 U.S.C. 5724, as the terms are defined in Title 38 U.S.C. 5727.

8. Disclosure may be made to the DoJ and United States attorneys in defense or prosecution of litigation involving the United States, and to Federal agencies upon their request in connection with review of administrative tort claims filed under the Federal Tort Claims Act, Title 28 United States Code, Section 2672.

9. Any information in this system, except the name and address of a veteran, may be disclosed to a Federal, State, or local agency maintaining civil or criminal violation records or other pertinent information such as prior employment history, prior Federal employment background investigations, and/or personal or educational background in order for VA to obtain information relevant to the hiring, transfer, or retention of an employee, the letting of a contract, the granting of a security clearance, or the issuance of a grant or other benefit. The name and address of a veteran may be disclosed to a Federal agency under this routine use if this information has been requested by the Federal agency in order to respond to the VA inquiry.

10. Information in this system regarding traffic accidents may be disclosed to private insurance companies for use in determining payment of a claim under a policy.

11. To assist attorneys in representing their clients, any information in this system may be disclosed to attorneys representing veterans, U.S. government employees, retirees, volunteers, contractors, subcontractors, or private citizens being investigated and prosecuted for violating the law, except where VA has decided release is inappropriate under Title 5 United States Code, Section 552a(j) and (k).

12. Disclosure of information to the Federal Labor Relations Authority (including its General Counsel) when requested in connection with the investigation and resolution of allegations of unfair labor practices; in connection with the resolution of exceptions to arbitrator awards when a question of material fact is raised; in connection with matters before the Federal Service Impasses Panel; and to investigate representation petitions and conduct or supervise representation elections.

13. Information may be disclosed to the Equal Employment Opportunity Commission when requested in connection with investigations of alleged or possible discrimination practices, examination of Federal affirmative employment programs, compliance with the Uniform Guidelines of Employee Selection Procedures, or other functions vested in the Commission by the President's Reorganization Plan No. 1 of 1978.

14. Information may be disclosed to officials of the Merit Systems Protection Board, and the Office of the Special Counsel, when requested in connection with appeals, special studies of the civil service and other merit systems, review of rules and regulations, investigation of alleged or possible prohibited personnel practices, and such other functions, promulgated in Title 5 United States Code, Sections 1205 and 1206, or as may be authorized by law.

15. Disclosure may be made to the VA-appointed representative of an employee of all notices, determinations, decisions, or other written communications issued to the employee in connection with an examination ordered by VA under medical evaluation (formerly fitness-for-duty) examination procedures or Department-filed disability retirement procedures.

16. To the Office of Management and Budget when necessary to the review of private relief legislation pursuant to OMB Circular No. A–19.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

The VA Law Enforcement Training Center maintains the information on the mainframe Information Resources Management System which will subsequently be transferred to hard disk.

**RETRIEVABILITY:**

Information is retrieved by the VA police officer's name, badge number or class number.

**SAFEGUARDS:**

Information is under the control of the Deputy Assistant Secretary for Security and Law Enforcement and staff members who have a legitimate need to know the contents of the system of records in order to perform their duties. Computer records are stored in a computer network to which only these individuals have access. No personal identifiers are used in statistical and management reports.

**RETENTION AND DISPOSAL:**

These records are retained and disposed of in accordance with General Records Schedule 18, item 22a, approved by the National Archives and Records Administration (NARA). Records are destroyed upon notification of death or not later than five years after separation or transfer of employee, whichever is applicable. The records are disposed of by electronic erasure, shredding, or burning.

**SYSTEM MANAGER(S) AND ADDRESS:**

Director, Law Enforcement Training Center, 2200 Fort Roots Drive, North Little Rock, AR 72214.

**NOTIFICATION PROCEDURE:**

Individuals desiring to know whether this system of records contains a record pertaining to him or her, how he or she may gain access to such a record, and how he or she may contest the content of such a record may write to the following address: Director, Law Enforcement Training Center, 2200 Fort Roots Drive, North Little Rock, AR 72214. The following information, or as much as is available, should be furnished in order to identify the record: Name of individual, class number, or badge number in order to identify the record.

**RECORDS ACCESS PROCEDURES:**

Same as notification procedures. Requesters should also reasonably specify the record contents being sought. Rules regarding access to Privacy Act records appear in Title 5 CFR part 552d. If additional information or assistance is required, contact the Director, Law Enforcement Training Center, 2200 Fort Roots Drive, North Little Rock, AR 72114, 501–257–4160.

**CONTESTING RECORD PROCEDURES:**

Same as notification procedures. Requesters should also reasonably identify the record, specify the information they are contesting, state the corrective action sought and the reasons for the correction along with supporting justification showing why the record is not accurate, timely, relevant, or complete. Rules regarding amendment of Privacy Act records appear in Title 5 CFR part 552d. If additional information or assistance is required, contact the Director, Law Enforcement Training Center, 2200 Fort Roots Drive, North Little Rock, AR 72114, 501–257–4160.

**RECORD SOURCE CATEGORIES:**

Personal information is furnished by medical center personnel submitting names of newly hired VA police officers for training and may be furnished or corrected subsequently by trainees themselves. Assigned badge numbers for police officers are assigned by the VA Law Enforcement Training Center and entered into the record.

[FR Doc. E8–29022 Filed 12–5–08; 8:45 am]

**BILLING CODE 8320–01–P**

## DEPARTMENT OF VETERANS AFFAIRS

### Privacy Act of 1974: System of Records

**AGENCY:** Department of Veterans Affairs (VA).

**ACTION:** Notice of Amendment of System of Records—Police and Security Records—VA (103VA07B).

**SUMMARY:** As required by the Privacy Act of 1974, 5 U.S.C. 552a(e), notice is hereby given that the Department of Veterans Affairs (VA) is amending the system of records entitled ''Police and Security Records—VA'' (103VA07B) as set forth in 67 FR 77737 dated December 19, 2002. VA is amending the system of records by revising the section of Routine Uses of Records Maintained in the System; as such VA is republishing the system notice in its entirety.

**DATES:** Comments on the amended system of records must be received no later than January 7, 2009. If no public comment is received during the period allowed for comment or unless otherwise published in the **Federal Register** by VA, the amended system will become effective January 7, 2009.

**ADDRESSES:** Written comments may be submitted through *www.Regulations.gov*; by mail or hand-delivery to the Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m. Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment. In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *www.Regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** Director, Police Service (07B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, telephone (202) 461–5544.

**SUPPLEMENTARY INFORMATION:**

## Description of the Amended Systems of Records

The Office of Security and Law Enforcement oversees the maintenance of law and order and the protection of persons and property on Department property at facilities nationwide and at the Central Office facilities in Washington, DC metropolitan area. This amended system of records covers veterans, U.S. government employees, retirees, volunteers, contractors, subcontractors, or private citizens involved in certain Police Services activities at field facilities and Office of Security and Law Enforcement activities at VA Central Office. The records contained in the system will be comprised of the Police and Security Software Package (PSSP) that contains information retrieved by name or personal identifier (master name index file, quick name check, offense reports, violations, motor vehicle registrations, wants and warrants, police daily operations journal, and police officer training records); and records not contained in the PSSP at all facilities and are retrieved by name or personal identifier may be photographs, uniform offense reports, accident reports, information on identification cards, records of evidence and property, and records of citations. The authority to maintain these records is Title 38, United States Code (U.S.C.), Section 501 and 901–905. The records and information contained in this system of records are necessary for the effective administration and management of the Department's nationwide Security and Law Enforcement program. This requires the collection and use of accurate, up-to-date data for the purpose of enforcing the law and protecting persons and property on VA property and at VA Central Office in accordance with Title 38, U.S.C., Chapter 9. Records in the system are maintained electronically and on paper and are retrieved by the name of the individual or personal identifier such as partial or full social security number.

The following routine uses for information in this system are added or restate existing uses to this system.

1. The record of an individual covered by this system of records may be disclosed to a Member of Congress, or a staff person acting for the Member, when the Member or staff person requests the record on behalf of and at the written request of the individual.

2. Disclosure may be made to the National Archives and Records Administration in records management inspections conducted under the authority of Title 44 U.S.C.

3. VA may disclose information from this system of records to the Department of Justice (DoJ), either on VA's initiative or in response to DoJ's request for the information, after either VA or DoJ determines that such information is relevant to DoJ's representation of the United States or any of its components in legal proceedings before a court or adjudicative body, provided that, in each case, the agency also determines prior to disclosure that release of the records to the DoJ is a use of the information contained in the records that is compatible with the purpose for which VA collected the records. VA, on its own initiative, may disclose records in this system of records in legal proceedings before a court or administrative body after determining that the disclosure of the records to the court or administrative body is a use of the information contained in the records that is compatible with the purpose for which VA collected the records.

4. Disclosure of relevant information may be made to individuals, organizations, private or public agencies, or other entities with whom VA has a contract or agreement or where there is a subcontract to perform such services as VA may deem practicable for the purposes of laws administered by VA, in order for the contractor or sub-contractor to perform the services of the contract or agreement.

5. VA may disclose on its own initiative any information in the system, except the names and home addresses of veterans and their dependents, that is relevant to a suspected or reasonably imminent violation of the law whether civil, criminal, or regulatory in nature and whether arising by general or program statute or by regulation, rule, or order issued pursuant thereto, to a Federal, state, local, tribal, or foreign agency charged with the responsibility of investigating or prosecuting such violation, or charged with enforcing or implementing the statute, regulation, rule or order. VA may also disclose on its own initiative the names and addresses of veterans and their dependents to a Federal agency charged with the responsibility of investigating or prosecuting civil, criminal, or regulatory violations of law, or charged with enforcing or implementing the statute, regulation, or order issued pursuant thereto.

6. Disclosure to other Federal agencies may be made to assist such agencies in preventing and detecting possible fraud or abuse by individuals in their operations and programs.

7. VA may, on its own initiative, disclose any information or records to appropriate agencies, entities, and persons when (1) VA suspects or has confirmed that the integrity or confidentiality of information in the system of records has been compromised; (2) the Department has determined that as a result of the suspected or confirmed compromise, there is a risk of embarrassment or harm to the reputations of the record subjects, harm to economic or property interests, identity theft or fraud, or harm to the security, confidentiality, or integrity of this system or other systems or programs (whether maintained by the Department or another agency or entity) that rely upon the potentially compromised information; and (3) the disclosure is to agencies, entities, or persons whom VA determines are reasonably necessary to assist or carry out the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or

remedy such harm. This routine use permits disclosures by the Department to respond to a suspected or confirmed data breach, including the conduct of any risk analysis or provision of credit protection services as provided in 38 U.S.C. 5724, as the terms are defined in 38 U.S.C. 5727.

**Compatibility of the Proposed Routine Uses**

The Privacy Act permits disclosure of information about individuals without their consent for a routine use when the information will be used for a purpose that is compatible with the purpose for which the information is collected. In all of the routine use disclosures described above, either the recipient of the information will use the information in connection with a matter relating to one of VA's programs; to provide a benefit to VA; or because disclosure is required by law.

The notice of intent to amend and an advance copy of the system notice have been sent to the appropriate Congressional committees and to the Administrator of Office of Management and Budget (OMB) as required by 5 U.S.C. 552a(r) (Privacy Act) and guidelines issued by OMB (65 FR 77677), December 12, 2000.

Approved: November 13, 2008.

**Gordon H. Mansfield,**

*Deputy Secretary of Veterans Affairs.*

**103VA07B**

**SYSTEM NAME:**

Police and Security Records—VA.

**SYSTEM LOCATION:**

VA Police personnel maintain electronic and paper records at VA field facilities and VA Central Office, 810 Vermont Ave, NW., Washington, DC 20420. Address locations for VA facilities can be found at *http://www.va.gov.*

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Veterans, VA Police officers, U.S. government employees, retirees, contractors, subcontractors, volunteers, and other individuals, including private citizens, who:

1. Have been a complainant, a witness, a victim, or a subject of an investigation of a violation or of an alleged violation of a law on VA property;
2. Have been a witness or a victim when there has been a VA police response to a report of a missing patient;
3. Have been witness to, or involved in, a motor vehicle accident on VA property;
4. Have been a witness, victim, or subject when there has been a VA police response to provide assistance to VA employees;
5. Have registered a motor vehicle with VA police;
6. Have had property confiscated by VA police or whose property has been given to VA police for safekeeping; or
7. For whom a VA identification card has been prepared.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Police and law enforcement records, containing specific identification of persons, can be found in electronic and/or paper medium:

1. Master Name Index contains demographic information (i.e., name, address, date of birth, sex) and descriptive information such as height, weight, hair color, eye color, and scars or marks.
2. Quick Name Check allows for the immediate retrieval of information based on a name from files contained within the law enforcement records subject to this system of records notice.
3. VA Police Uniform Offense Reports, Investigative Notes, Case Log, and other documentation assembled during an investigation. Uniform Offense Reports contain information of all types of offenses and incidents, criminal and non-criminal, that occur at a facility and to which VA Police respond (e.g., criminal investigations, investigative stops, patient and staff assistance calls, missing patient searches, and motor vehicle accidents).
4. All violation information and copies of U.S. District Court Violation Notices and Courtesy Warnings issued by VA Police.
5. On-station vehicle registration records used for identifying vehicle owners at a facility.
6. Records pertaining to individuals with outstanding warrants, summons, court commitments, or other types of legal process.
7. Daily Operations Journal records include names and other personal identifying information of persons with whom VA police have had official, duty-related contact.
8. VA Police officer training records.
9. Photographs of any and all persons and/or scenes pertinent to an incident or investigation;
10. Motor vehicle registrations;
11. Identification cards with photographic images for veterans, U.S. government employees, retirees, volunteers, contractors, subcontractors, or private citizens;
12. Records of evidence, confiscated property, or property being held for safekeeping.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

Title 38 United States Code (U.S.C), Section 501 and Sections 901–905.

**PURPOSE(S):**

The records and information contained in this system of records are necessary for the effective administration and management of the Department's nationwide Security and Law Enforcement Program. The collection and use of accurate, up-to-date data is necessary for the purpose of enforcing the law and protecting persons and property on VA property. Examples: ID cards are used to visibly identify employees, contractors, students, and other designated individuals from the general public. ID cards also serve as a means of access control to a facility. Motor vehicle registration records serve to accurately identify the owner of a vehicle and the suitability of its presence on VA grounds. These records are also used for a VA facility's ride sharing program. Evidence or confiscated property records are used to accurately track and record the chain of custody maintained by the VA police.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

1. The record of an individual who is covered by this system of records may be disclosed to a Member of Congress, or a staff person acting for the Member, when the Member or staff person requests the record on behalf of and at the written request of the individual.
2. Disclosure may be made to the National Archives and Records Administration in records management inspections conducted under the authority of Title 44 U.S.C.
3. VA may disclose information from this system of records to the Department of Justice (DoJ), either on VA's initiative or in response to DoJ's request for the information, after either VA or DoJ determines that such information is relevant to DoJ's representation of the United States or any of its components in legal proceedings before a court or adjudicative body, provided that, in each case, the agency also determines prior to disclosure that release of the records to the DoJ is a use of the information contained in the records that is compatible with the purpose for which VA collected the records. VA, on its own initiative, may disclose records in this system of records in legal proceedings before a court or administrative body after determining that the disclosure of the records to the court or administrative body is a use of the information contained in the records

that is compatible with the purpose for which VA collected the records.

4. Disclosure of relevant information may be made to individuals, organizations, private or public agencies, or other entities with whom VA has a contract or agreement or where there is a subcontract to perform such services as VA may deem practicable for the purposes of laws administered by VA, in order for the contractor or subcontractor to perform the services of the contract or agreement.

5. VA may disclose on its own initiative any information in the system, except the names and home addresses of veterans and their dependents, that is relevant to a suspected or reasonably imminent violation of the law whether civil, criminal, or regulatory in nature and whether arising by general or program statute or by regulation, rule, or order issued pursuant thereto, to a Federal, State, local, tribal, or foreign agency charged with the responsibility of investigating or prosecuting such violation, or charged with enforcing or implementing the statute, regulation, rule or order. VA may also disclose on its own initiative the names and addresses of veterans and their dependents to a Federal agency charged with the responsibility of investigating or prosecuting civil, criminal, or regulatory violations of law, or charged with enforcing or implementing the statute, regulation, or order issued pursuant thereto.

6. Disclosure to other Federal agencies may be made to assist such agencies in preventing and detecting possible fraud or abuse by individuals in their operations and programs.

7. VA may, on its own initiative, disclose any information or records to appropriate agencies, entities, and persons when (1) VA suspects or has confirmed that the integrity or confidentiality of information in the system of records has been compromised; (2) the Department has determined that as a result of the suspected or confirmed compromise, there is a risk of embarrassment or harm to the reputations of the record subjects, harm to economic or property interests, identity theft or fraud, or harm to the security, confidentiality, or integrity of this system or other systems or programs (whether maintained by the Department or another agency or entity) that rely upon the potentially compromised information; and (3) the disclosure is to agencies, entities, or persons whom VA determines are reasonably necessary to assist or carry out the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm. This routine use permits disclosures by the Department to respond to a suspected or confirmed data breach, including the conduct of any risk analysis or provision of credit protection services as provided in Title 38 U.S.C. 5724, as the terms are defined in Title 38 U.S.C. 5727.

8. Disclosure may be made to the DoJ and United States attorneys in defense or prosecution of litigation involving the United States, and to Federal agencies upon their request in connection with review of administrative tort claims filed under the Federal Tort Claims Act, Title 28 United States Code, Section 2672.

9. Any information in this system, except the name and address of a veteran, may be disclosed to a Federal, State, or local agency maintaining civil or criminal violation records or other pertinent information such as prior employment history, prior Federal employment background investigations, and/or personal or educational background in order for VA to obtain information relevant to the hiring, transfer, or retention of an employee, the letting of a contract, the granting of a security clearance, or the issuance of a grant or other benefit. The name and address of a veteran may be disclosed to a Federal agency under this routine use if this information has been requested by the Federal agency in order to respond to the VA inquiry.

10. Information in this system regarding traffic accidents may be disclosed to private insurance companies for use in determining payment of a claim under a policy.

11. To assist attorneys in representing their clients, any information in this system may be disclosed to attorneys representing veterans, U.S. government employees, retirees, volunteers, contractors, subcontractors, or private citizens being investigated and prosecuted for violating the law, except where VA has decided release is inappropriate under Title 5 United States Code, Section 552a(j) and (k).

12. Disclosure of information to the Federal Labor Relations Authority (including its General Counsel) when requested in connection with the investigation and resolution of allegations of unfair labor practices; in connection with the resolution of exceptions to arbitrator awards when a question of material fact is raised; in connection with matters before the Federal Service Impasses Panel; and to investigate representation petitions and conduct or supervise representation elections.

13. Information may be disclosed to the Equal Employment Opportunity Commission when requested in connection with investigations of alleged or possible discrimination practices, examination of Federal affirmative employment programs, compliance with the Uniform Guidelines of Employee Selection Procedures, or other functions vested in the Commission by the President's Reorganization Plan No. 1 of 1978.

14. Information may be disclosed to officials of the Merit Systems Protection Board, and the Office of the Special Counsel, when requested in connection with appeals, special studies of the civil service and other merit systems, review of rules and regulations, investigation of alleged or possible prohibited personnel practices, and such other functions, promulgated in Title 5 United States Code, Sections 1205 and 1206, or as may be authorized by law.

15. Disclosure may be made to the VA-appointed representative of an employee of all notices, determinations, decisions, or other written communications issued to the employee in connection with an examination ordered by VA under medical evaluation (formerly fitness-for-duty) examination procedures or Department-filed disability retirement procedures.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

VA Police Services maintain electronic and paper records at each VA facility and VA Central Office.

**RETRIEVABILITY:**

Information is retrieved by name or personal identifier of partial or full social security number.

**SAFEGUARDS:**

Access to working areas where information is maintained in VA facilities and VA Central Office is controlled and restricted to VA employees and VA contractors on a need-to-know basis. Paper document files are locked in a secure container when files are not being used and when work area is not occupied. VA facilities are protected from outside access after normal duty hours by police or security personnel. Access to information on electronic media is controlled by individually unique passwords and codes. Computer access authorizations, computer applications available and used, information access attempts, frequency and time of use are recorded and monitored.

**RETENTION AND DISPOSAL:**

Records will be maintained and disposed of in accordance with the

records disposition authority approved by the Archivist of the United States.

**SYSTEM MANAGER(S) AND ADDRESS:**

Director, Police Service (07B), 810 Vermont Avenue, NW., Washington, DC 20420.

**NOTIFICATION PROCEDURE:**

An individual who wishes to determine whether a record is being maintained under his or her name in this system or wishes to determine the contents of such records should submit a written request or apply in person to the VA facility where the records are located. Addresses of VA facilities may be found at *http://www.va.gov.* A majority of records in this system are exempt from record access and amendment provisions of Title 5 U.S.C., Sections 552a(j) and (k). To the extent that records in this system are not subject to exemption, individuals may request access and/or amendment. A determination as to whether an exemption applies shall be made at the time a request for access or contest is received.

**RECORD ACCESS PROCEDURE:**

Individuals seeking information regarding access to and amendment of records in this system may write, call or visit the VA facility where the records are maintained.

**CONTESTING RECORD PROCEDURES:**

(*See* Record Access Procedure above)

**RECORD SOURCE CATEGORIES:**

Information is obtained from veterans, VA police officers, U.S. government employees, retirees, volunteers, contractors, subcontractors, other law enforcement agencies, and private citizens.

**SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:**

Under Title 5 U.S.C., Section 552a(j)(2), the head of any agency may exempt any system of records within the agency from certain provisions of the Privacy Act, if the agency or component that maintains the system performs as its principal function any activities pertaining to the enforcement of criminal laws. The function of the Police Service is to provide for the maintenance of law and order and the protection of persons and property on Department property. This system of records has been created, in major part, to support the law enforcement related activities assigned by the Department under the authority of Title 38 U.S.C., Section 901 to the Police Service. These activities constitute the principal function of this staff.

In addition to principal functions pertaining to the enforcement of criminal laws, the Police Service may receive and investigate complaints or information from various sources concerning the possible existence of activities constituting noncriminal violations of law, rules, or regulations or substantial and specific danger to the public and safety.

Based upon the foregoing, the Secretary of Veterans Affairs (VA) has exempted this system of records, to the extent that it encompasses information pertaining to criminal law enforcement related activities from the following provisions of the Privacy Act of 1974, as permitted by 5 U.S.C. 552a(j)(2):

5 U.S.C. 552a(c)(3) and (4).

5 U.S.C. 552a(d)(1) through (4).

5 U.S.C. 552a(e)(1), (2) and (3).

5 U.S.C. 552a(e)(4)(G), (H) and (I).

5 U.S.C. 552a(e)(5) and (8).

5 U.S.C. 552a(f).

5 U.S.C. 552a(g).

The Secretary of Veterans Affairs has exempted this system of records, to the extent that it does not encompass information pertaining to criminal law enforcement related activities under 5 U.S.C. 552a(j)(2), from the following provisions of the Privacy Act of 1974, as permitted by 5 U.S.C. 552a(k)(2):

5 U.S.C. 552a(c)(3).

5 U.S.C. 552a(d)(1) through (4).

5 U.S.C. 552a(e)(1).

5 U.S.C. 552a(e)(4)(G), (H) and (I).

5 U.S.C. 552a(f).

Reasons for exemptions: The exemption of information and material in this system of records is necessary in order to accomplish the law enforcement functions of the Police Service, to prevent subjects of investigations from frustrating the investigatory process, to prevent the disclosure of investigative techniques, to fulfill commitments made to protect the confidentiality of sources, to maintain access to sources of information, and to avoid endangering these sources and Police personnel.

[FR Doc. E8–29029 Filed 12–5–08; 8:45 am]

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Federal Register

Monday,
December 8, 2008

# Part II

# Department of Transportation

## 14 CFR Parts 234, 259, and 399

## Enhancing Airline Passenger Protections; Proposed Rule

**DEPARTMENT OF TRANSPORTATION**

**Office of the Secretary**

**14 CFR Parts 234, 259, and 399**

**[Docket No. DOT–OST–2007–0022]**

**RIN No. 2105–AD72**

## Enhancing Airline Passenger Protections

**AGENCY:** Office of the Secretary (OST), Department of Transportation (DOT).

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The Department of Transportation seeks comment on rules it is proposing to enhance airline passenger protections in the following ways: by requiring air carriers to adopt contingency plans for lengthy tarmac delays and incorporate them in their contracts of carriage, by requiring air carriers to respond to consumer problems, by deeming the continued operation of a flight that is chronically late to be unfair and deceptive in violation of 49 U.S.C. 41712, by requiring air carriers to publish information on flight delays on their Web sites, and by requiring air carriers to adopt customer service plans, incorporate these into their contracts of carriage, and audit their own compliance with their plans. The Department takes this action on its own initiative in response to the many recent instances when passengers have been subject to waits on airport tarmacs for very long periods and also in response to the ongoing high incidence of flight delays.

**DATES:** Comments should be filed by February 6, 2009. Late-filed comments will be considered to the extent practicable.

**ADDRESSES:** You may file comments identified by the docket number DOT–OST–2007–0022 by any of the following methods:

○ *Federal eRulemaking Portal:* go to *http://www.regulations.gov* and follow the online instructions for submitting written comments. A standard form has been created for those who wish to use it in submitting comments.

○ *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave., SE., Room W12–140, Washington, DC 20590–0001.

○ *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Ave., SE., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal Holidays.

○ *Fax:* (202) 493–2251.

*Instructions:* We strongly encourage you to use the standard form to submit comments. To access the form, go to *http://www.regulations.gov* and use the SEARCH DOCUMENTS field provided to input the docket number for this rulemaking. Then, you can search the index for ''Public comment standard form.'' This form may then be moved to your computer desktop, where you can type in your comments. You may then attach the form when you submit your comments to the docket.

Using the standard form will eliminate the need for you to type a title, headings and questions since the form identifies the rulemaking on which you are commenting, sets out the headings identified in the **SUPPLEMENTARY INFORMATION** section of this document and lists the questions that we have asked in the NPRM. It will also make it easier for you, other commenters and the Department to easily search or sort the comments submitted on the various issues in the rulemaking.

If you do not use the standard form, you must include the agency name and docket number DOT–OST–2007–0022 or the Regulatory Identification Number (RIN) for the rulemaking at the beginning of your comment. All comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.

*Privacy Act:* Anyone is able to search the electronic form of all comments received in any of our dockets by the name of the individual submitting the comment (or signing the comment if submitted on behalf of an association, a business, a labor union, *etc.*). You may review DOT's complete Privacy Act statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit *http://DocketsInfo.dot.gov*.

*Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* or to the street address listed above. Follow the online instructions for accessing the docket.

**FOR FURTHER INFORMATION CONTACT:** Daeleen Chesley or Blane A. Workie, Office of the Assistant General Counsel for Aviation Enforcement and Proceedings, U.S. Department of Transportation, 1200 New Jersey Ave., SE., Washington, DC 20590, 202–366–9342 (phone), 202–366–7152 (fax), *betsy.wolf@dot.gov* or *blane.workie@dot.gov* (e-mail).

**SUPPLEMENTARY INFORMATION:**

### Background

On November 15, 2007, the Department of Transportation (DOT or Department) issued an Advance Notice of Proposed Rulemaking (ANPRM) in Docket DOT–OST–2007–22 entitled ''Enhancing Airline Passenger Protections.'' This ANPRM was published in the **Federal Register** five days later. *See* ''Department of Transportation, Office of the Secretary, 14 CFR Parts 234, 253, 259, and 399 [Docket No. DOT–OST–2007–0022], RIN No. 2105–AD72, 72 FR 65233 *et seq.* (November 20, 2007).'' We announced in the ANPRM that we were considering adopting or amending rules to address several concerns, including, among others, the problems consumers face when aircraft sit for hours on airport tarmacs and the growing incidence of flight delays. We observed that beginning in December of 2006 and continuing through the early spring of 2007, weather problems had kept more than a few aircraft sitting for long hours on airport tarmacs, causing the stranded passengers undue discomfort and inconvenience. We observed further that passengers were also being harmed by the high incidence of less extreme flight delays: In the first seven months of 2007, only 72.23 percent of flights arrived on time, a lower percentage than for the same period in any of the previous 12 years. (On-time arrival performance remains problematic: It has improved only slightly since the issuance of the ANPRM. For the first five months of 2008, it was the second worst for these months in 14 years.) We acknowledged that the industry and interested observers have attributed both the marathon tarmac waits and the epidemic of flight delays to a number of factors besides weather, such as capacity and operational constraints, for example. Some of these are being addressed by the Federal Aviation Administration (FAA) and certain airports in other contexts, but in the meantime, we decided to explore the adoption of regulatory measures to address passengers' concerns.

Thus, citing our authority and responsibility under 49 U.S.C. 41712, in concert with 49 U.S.C. 40101(a)(4) and 40101(a)(9) and 49 U.S.C. 41702, to protect consumers from unfair or deceptive practices and to ensure safe and adequate service in air transportation, we called for comment on seven potential measures. We intended these measures to ameliorate difficulties that passengers experience without creating undue burdens for the carriers. We also posed questions for commenters to answer and invited them

to suggest other measures to address the problems at issue.

The measures proposed in the ANPRM covered the following subjects: Contingency plans for lengthy tarmac delays, carriers' responses to consumer problems, chronically delayed flights, delay data on Web sites, complaint data on Web sites, reporting of on-time performance of international flights, and customer service plans. The specifics of the ANPRM's proposals are set forth below in the context of the measures we are proposing—or not proposing—in this notice.

We received approximately 200 comments in response to the ANPRM. Of these, 13 came from members of the industry—*i.e.*, air carriers, air carrier associations, and other industry trade associations—and the rest came from consumers, consumer associations, and two U.S. Senators. On the consumer side, some 131 individual members of the Coalition for an Airline Passengers Bill of Rights (CAPBOR) filed identical or nearly identical comments. CAPBOR's founder and spokesperson, Kate Hanni, also filed comments with additional material on behalf of both CAPBOR and the Aviation Consumer Action Project (ACAP). Another 34 unaffiliated individuals filed comments, as did five other consumer associations: ACAP, the National Business Travel Association (NBTA), the Federation of State Public Interest Research Groups (US PIRG), Public Citizen, and the National Consumers League.

On the industry side, four carriers filed comments: Jet Airways (India), Ltd., Delta Air Lines, Inc., China Eastern Airlines, and Virgin Atlantic Airways, Ltd. Five carrier associations filed comments: The Association of Asia Pacific Airlines (AAPA), the National Air Carrier Association (NACA), the International Air Transport Association (IATA), the Air Transport Association of America (ATA), and the Air Carrier Association of America (ACAA). Two travel agency associations, the American Society of Travel Agents (ASTA) and the Interactive Travel Services Association (ITSA) also filed comments, as did the Airport Council International, North America (ACI–NA).

In general, the consumers and consumer associations maintained that the Department's proposals do not go far enough, while the carriers and carrier associations attributed the current problems mostly to factors beyond their control such as weather and the air traffic control system and tended to characterize the proposals as unnecessary and unduly burdensome. The travel agency associations expressed support for consumer protections but not at their members' expense. The commenters' positions that are germane to the issues raised in the ANPRM are set forth below in the context of the measures we are proposing—or not proposing—here.

**Notice of Proposed Rulemaking**

Having considered the comments, we have decided to propose rules to do the following: (1) Require air carriers to adopt contingency plans for lengthy tarmac delays and to incorporate these plans in their contracts of carriage, (2) require air carriers to respond to consumer problems, (3) declare the operation of flights that remain chronically delayed to be an unfair and deceptive practice and an unfair method of competition, (4) require air carriers to publish delay data on their Web sites, and (5) require air carriers to adopt customer service plans, incorporate these in their contracts of carriage, and audit their adherence to their plans. We have decided not to propose rules to require air carriers to publish complaint data on their Web sites or to report on-time performance of international flights. We are proposing that the rules take effect 180 days after their publication.

We invite all interested persons to comment on the proposals set forth in this notice. Our final action will be based on the comments and supporting evidence filed in this docket, on our own analysis and regulatory evaluation, and on the ongoing work of our National Task Force to Develop Model Contingency Plans to Deal with Lengthy Airline On-Board Ground Delays (Tarmac Delay Task Force).

**Proposals**

*1. Contingency Plans*

The ANPRM: We stated in the ANPRM that we were considering requiring every certificated or commuter air carrier[1] that operates domestic scheduled passenger service using any aircraft with more than 30 passenger seats to develop and implement a contingency plan for lengthy tarmac delays. (This plan would apply to all of the carrier's flights, including those involving aircraft with 30 or fewer seats.) Each covered carrier would be required to incorporate its plan in its contract of carriage. This would enable passengers to sue for breach of contract in the event that a carrier fails to adhere to its plan. Each plan would have to include at least the following: The maximum tarmac delay that the carrier will permit, the amount of time on the tarmac that triggers the plan's terms, assurance of adequate food, water, lavatory facilities, and medical attention, if needed, while the aircraft remains on the tarmac, assurance of sufficient resources to implement the plan, and assurance that the plan has been coordinated with airport authorities at medium and large hub airports. Carriers would also be required to make their complete contracts of carriage, including contingency plans, available on their Web sites and to retain for two years the following information for any ground delay that either triggers their contingency plans or lasts at least four hours: The length of the delay, the cause of the delay, and the actions taken to minimize hardships for passengers. Our proposal did not contemplate that the Department would review or approve the plans, but we stated that the Department would consider failure to comply with any of the above requirements—including implementing the plan as written—to be an unfair and deceptive practice within the meaning of 49 U.S.C. 41712 and therefore subject to enforcement action.

The Comments: CAPBOR and its members believe that this proposal does not go far enough. They maintain that the Department should establish minimum standards for contingency plans via regulation and should also review and approve the plans rather than allow each carrier the leeway to set what might well be overly lax standards. They also maintain that the Department should monitor carriers' performance under their plans. In their view, requiring carriers to incorporate their contingency plans into their contracts of carriage will not protect passengers, because as a practical matter these contracts cannot be enforced. They do support publication of contingency plans in contracts of carriage, however, and they argue that these plans should be airport-specific to account for differences among airports. CAPBOR and its members contend that because an airport's concessions are often closed by the time that a flight is cancelled and passengers allowed to deplane, we

[1] A certificated air carrier is a U.S. direct air carrier that holds a certificate issued under 49 U.S.C. 41102 to operate passenger and/or cargo and mail service. Air taxi operators and commuter air carriers operating under 14 CFR part 298 are exempted from the certification requirements of 49 U.S.C. 41102. Some carriers that would otherwise be eligible for the air taxi or commuter exemption have opted to be certificated. An air taxi operator is an air carrier that transports passengers or property and is not a commuter air carrier as defined in 14 CFR part 298. A commuter air carrier is an air taxi operator that carries passengers on at least five round trips per week on at least one route between two or more points according to a published flight schedule, using small aircraft—*i.e.*, aircraft originally designed with the capacity for up to 60 passenger seats. *See* 14 CFR 298.2.

should require airports to contract with their vendors to require that concessions remain open during lengthy tarmac delays. They request that in any rule proposed or adopted, we refer to ''potable water'' and ''operable lavatories'' rather than simply ''water'' and ''lavatory facilities,'' respectively, and that we include a requirement for adequate ventilation.

Individual commenters make similar points. For example, they, too, tend to oppose allowing the carriers to set their own standards, particularly those involving the amount of time that triggers the provisions of the contingency plans or the maximum amount of time on the tarmac before the carrier must return to a gate and allow passengers to deplane.

Of the other consumer associations, ACAP concurs with CAPBOR, as does U.S. PIRG. The latter suggests three hours as the maximum interval before passengers are allowed to deplane. Also concurring with CAPBOR are Public Citizen and the National Consumers League. NBTA has a different point of view: It contends that customer service is by nature market driven and that airlines are better situated than the government to gauge both their customers' expectations and whether putative protective measures afford benefits that outweigh their costs—costs that will inevitably be passed on to the traveling public. NBTA does not support requiring the carriers to develop and publish contingency plans, but it believes that carriers that do not do so will provide poorer service and thus lose business. What NBTA does support is a requirement that carriers provide what it calls ''baseline passenger's rights'' in whatever way they find most effective and cost efficient. NBTA's list of these rights includes access to lavatory facilities, access to water or other liquids, access to food for tarmac delays lasting more than six hours, ways for passengers with medical emergencies to request and receive medical attention, and cabin temperature suitable for normal travel attire. NBTA also supports requiring carriers to maintain records on lengthy tarmac delays as a tool for the Department and others to use for analyzing airline performance.

Senators Barbara Boxer and Olympia Snowe take the position that the Department should set minimum standards for protecting passengers during lengthy tarmac delays. They believe that passengers should be permitted to deplane after three hours on the tarmac.

As for members of the industry, Delta, the sole carrier that commented individually on this proposal, both supports the principle of contingency plans for lengthy tarmac delays and states that it has one already. Its plan does not have a time limit for tarmac delays, however, because in Delta's judgment passengers fare better overall if Delta retains the flexibility to respond to each situation as it deems appropriate at the time. It contends, for example, that categorically requiring the return of planes to the gate after a specified interval would probably result in more flight cancellations than occur now. Delta opposes mandating coordination with airport authorities in the preparation of a contingency plan as ''unnecessary and potentially unmanageable.'' Delta does not object to a record-retention requirement, but it believes that two years' retention is too long and that six months would suffice. It maintains that any such requirement should be triggered by a uniform delay interval, set by the Department, rather than be permitted to vary from carrier to carrier according to disparate contingency plans; Delta itself believes four hours to be a reasonable standard. Delta does not address whether the contingency plans should be incorporated into the contracts of carriage.

Of the carrier associations that commented on this proposal, NACA agrees in principle that carriers should meet their passengers' needs for food, water, lavatories, and, if necessary, medical attention during extraordinary ground delays and that they should formulate contingency plans for achieving this goal. NACA thinks that the Department should work with the carriers to develop guidance on the following questions: What kinds of food should passengers reasonably expect during a long delay; what should be required on flights whose aircraft have limited or no kitchen resources because no food service is provided in normal circumstances; what should be expected of carriers whose aircraft lack storage capability for additional ''emergency'' food and that have no catering facilities and no contract for catering services at the airport at which they are delayed; and what sort of medical attention and supplies can passengers reasonably expect? NACA opposes inclusion of carriers' contingency plans in their contracts of carriage, because the contracts are legally binding, so passengers would have a private right of action against any carrier that did not adhere to the provisions of its plan. ''Given the vagaries of what would constitute appropriate emergency services,'' NACA states, ''and in the absence of a specific statutory mandate, we believe that the inclusion of such provisions within the contract of carriage exposes carriers to a myriad of unfounded lawsuits.'' In lieu of incorporation of the contingency plans in the contracts of carriage, NACA supports requiring that each carrier provide public notice of its plan—for example, by including a notice on its Web site, by posting notices at check-in counters, or by including a notice in its in-flight magazine or in other materials available to passengers on the plane. It suggests that the Department could require all carriers to provide it with copies of their plans and then itself make the plans available to the public. NACA's comments are endorsed by ACAA.

ATA commented extensively on this proposal, and IATA supports ATA's comments. ATA prefaced its comments by asserting that the Department should focus on addressing the root causes of delays, which it characterizes as ''insufficient airspace capacity and an operating environment handcuffed by outdated radar technology,'' in addition to calling for passenger protections. ATA agrees in principle that carriers should have contingency plans for lengthy tarmac delays, provided that each air carrier is permitted to decide on the details of its own plan based on its own unique facilities, equipment, operating procedures, and network. ATA not only supports the Department's proposal not to prescribe the terms of carriers' contingency plans, but it particularly opposes a set interval of time after which an aircraft must be returned to the gate, claiming that such a requirement would do passengers more harm than good. Among the potential negative consequences ATA lists are the required return to the gate when the aircraft is next in line for takeoff, potential conflicts with governmental orders during a pandemic that passengers be kept on aircraft, and conservative decisions that result in wasting passenger, aircraft, and crew time and affect downstream connecting passengers adversely. ATA also argues that a strict requirement that aircraft return to the gate after a set interval would stifle competition: It reasons that carriers might otherwise choose alternate ways to address the competing passenger interests and needs that arise during a lengthy tarmac delay.

ATA reports that carriers already have both general contingency plans and airport-specific contingency plans. It states that carriers do not intend to publish the latter, and it recommends that the Department allow them flexibility in how they notify consumers

of the former. Most carriers, it assumes, would post their contingency plans on their Web sites. ATA opposes requiring carriers to include their contingency plans in their contracts of carriage and in fact doubts that the Department has the authority to do this in the aftermath of deregulation. As a practical matter, ATA claims, inclusion of carriers' general contingency plans in their contracts of carriage would require the deletion of technical and operational terms that do not belong in a contract and the addition of qualifying statements so that carriers would retain the flexibility to make different operational decisions depending on the facts of the situation, including extraordinary circumstances. ATA also opposes requiring incorporation of contingency plans in carriers' contracts of carriage because this would expose them to litigation under inconsistent standards among the states and among foreign countries. It predicts that standards would fluctuate as carriers took steps to minimize their exposure. ATA opposes the proposed recordkeeping requirement as redundant of other existing and proposed regulations.

RAA prefaced its comments by asking the Department to keep in mind, when proposing rules, what it characterizes as ''the unique relationship between most regional airlines subject to the proposals * * * and their passengers.'' RAA states that over 90 percent of its members' passengers fly under ticketing, marketing, scheduling, and passenger processing and handling arrangements that are controlled by the major-carrier partners of RAA's members—in fact, these passengers' contracts of carriage are with the major carrier, not the regional airlines. RAA states further that while its members are responsible for operating their flights safely and can cancel or divert them for reasons of safety, most delays, diversions, and cancellations are determined by the FAA or the regional airlines' major-carrier partners. RAA opposes regulations that would burden its members *vis-à-vis* the railroads and bus companies with which they compete for passengers.

Regarding contingency plans, RAA asks the Department to let airlines adopt plans that reflect their own circumstances, capabilities, and passenger service standards. It asks the Department to apply requirements for contingency plans and recordkeeping only to the airline that has a contract of carriage with the passenger and also to require contingency plans of ''other critical parties such as the FAA and the airports.'' In RAA's view, requiring enforceable contingency plans would be contrary to deregulation and as a practical matter would prevent carriers from responding flexibly to the many kinds of delays that occur. It states that because contingency planning varies from airport to airport, requiring a contingency plan for each airport to be published and enforced through the contract of carriage would be both impracticable and burdensome. RAA opposes requiring carriers to retain records on delayed flights, both as redundant of existing requirements of the Department's Bureau of Transportation Statistics and as a burden that would yield little if any public benefit. RAA contends that its members are constrained not only by their major-carrier partners' control over delay decisions and their differing standards for passenger service but also by the capacity constraints of their own aircraft—aircraft with limited capacity for food, water, and lavatory facilities. If contingency plans are to be required, RAA takes the position that they should only be required of major carriers, with implementation to be arranged by the major carrier and its regional airline partners on flights operated with aircraft with more than 30 passenger seats. RAA opposes coverage of flights operated with smaller aircraft.

ACI–NA supports this proposal and states that it recently convened a meeting of more than 100 officials from airports, airlines, passenger organizations, and the federal government to develop an outline for a contingency plan. Along with ''best practices'' in place at North American airports, this plan will be provided to the Department's Tarmac Delay Task Force.

Of the travel agency associations, ASTA strongly favors requiring carriers to adopt contingency plans and requiring the incorporation of these plans in air carriers' contracts of carriage, but it believes that the proposal in the ANPRM does not go far enough. ASTA implies, without explanation, that even with the plans incorporated in the contracts of carriage, they will not be enforceable unless the Department reviews them. ASTA suggests that any rule that we adopt ''require very specific plans in the general mode of 'if this happens, we will take the following specific steps to assure proper care of passengers.' '' ASTA also supports the recordkeeping requirement and suggests that it be triggered by a delay of three hours. Also, ASTA believes that carriers should be required to coordinate not only with airport authorities at medium and large hub airports but with the authorities at ''all primary airports.'' ITSA did not address this proposal.

Proposed Rule: We have decided to propose a rule along the lines set forth in the ANPRM, and we invite comment from all interested persons. Specifically, we propose to adopt a new rule, 14 CFR part 259, which, among other things, would require any certificated or commuter air carrier that operates domestic passenger service using any aircraft with a design capacity of more than 30 passenger seats to develop a contingency plan for long tarmac delays of scheduled and public charter flights and to adhere to this plan's terms. This plan would apply to all of the carrier's scheduled and public charter flights, including those with aircraft having a design capacity of 30 or fewer seats. We are not proposing that the rule cover single-entity charters and other charters in which consumers have some bargaining leverage. The rule would require each carrier to incorporate its contingency plan in its contract of carriage. At a minimum, each plan must include the following: The maximum tarmac delay that the carrier will permit, the amount of time on the tarmac that will trigger the plan's terms, the assurance of adequate food, water, and lavatory facilities, as well as medical attention if needed, while the aircraft remains on the ground, assurance of sufficient resources to implement the plan, and assurance that the plan has been coordinated with airport authorities at medium and large hub airports. The rule would require carriers to retain for two years the following information on any on-ground delay that either triggers their contingency plans or lasts at least four hours: The length of the delay, the cause of the delay, and the steps taken to minimize hardships for passengers (including providing food and water, maintaining lavatories, and providing medical assistance). Failure to do any of the above would be considered an unfair and deceptive practice within the meaning of 49 U.S.C. 41712 and subject to enforcement action, which could result in an order to cease and desist as well as the imposition of civil penalties.

In adopting this approach, we are tentatively rejecting the suggestions of those consumers and groups who believe that the Department should set minimum standards for the contingency plans rather than allow each carrier to set its own standards based on its particular circumstances. We continue to be of the tentative view based on the information available to us that the Department should not substitute its judgment in this area for that of the air carriers. Nevertheless, we ask interested

persons to comment on whether any final rule that we may adopt should include either or both of the following: A uniform standard for the time interval that would trigger the terms of carriers' contingency plans and a uniform standard for the time interval after which carriers would be required to allow passengers to deplane. Commenters who support the adoption of either or both requirements by rulemaking should propose specific amounts of time and state why they believe these intervals to be appropriate.

As for incorporation of the contingency plans in carriers' contracts of carriage, at this stage we are tentatively rejecting consumers' arguments that this requirement would be ineffectual, because no commenter has provided any support for its assertion that as a practical matter the contracts of carriage cannot be enforced, particularly where class-action litigation is available. We are also tentatively rejecting carriers' arguments that we should not require incorporation because this would subject them to the risk of inconsistent standards among the various jurisdictions. This risk exists already, since the carriers' contracts of carriage are enforceable in state courts, and it is not increased with the addition of new enforceable terms to these contracts. ATA has failed to establish that we lack the authority to require that contingency plans be incorporated in carriers' contracts of carriage. Our broad authority under 49 U.S.C. 41712 to prohibit unfair and deceptive practices encompasses this power. Indeed, 14 CFR part 253 shows that we have the authority not only to require that contracts of carriage include specified terms but also to regulate the means by which contract terms are disclosed to consumers. We tentatively believe that in providing for private enforcement of the plans as well as enforcement action by the Department, we are creating a stronger incentive for carriers to adhere to their plans. We invite interested persons to comment on the implications of our creating a private right of action based on a carrier's failure to follow the terms of its contingency plan. Commenters should address the potential for multiple lawsuits by classes as well as individual plaintiffs and the potential for inconsistent judicial decisions among the various jurisdictions. Commenters should also address whether and to what extent requiring the incorporation of contingency plans in carriers' contracts of carriage might weaken existing plans: That is, would the requirement encourage carriers to exclude certain key terms from their plans in order to avoid compromising their flexibility to deal with circumstances that are both multifarious and unpredictable?

As for the other points made by consumers, we are not proposing to require the plans to be airport-specific, although carriers may choose to adopt different standards for each airport in their plans. We are not proposing here to require airports to provide for concessions to remain open during lengthy tarmac delays, in part because we doubt that we have the authority to do so. Our proposed rule does not refer to ''potable water'' or ''operable lavatories,'' because water and lavatory facilities that are ''adequate'' are necessarily potable and operable, respectively. Furthermore, the quality of drinking water on aircraft is regulated by the Environmental Protection Agency (EPA). Our proposed rule does not address ventilation, because we have no basis at this stage to assess the adequacy of ventilation or to require potentially significant modifications to aircraft.

As for the other points made by carriers, those that rank operational flexibility as their highest priority are free to adopt a relatively long interval as their standard for returning a plane to the gate and allowing passengers to deplane. Were a carrier to follow this strategy only to see its market shares declining *vis-á-vis* its competitors with shorter intervals in their contingency plans, the carrier could amend its plan accordingly. Conversely, were a carrier to decide that it wanted to amend its plan to allow itself more time before returning the aircraft to the gate, the proposed rule provides that the amended plan would only apply to flights that the carrier has not yet offered for sale. This condition would protect consumers who have booked flights under the impression that they will not be kept on the tarmac more than, say, three hours from the unpleasant discovery that by the time they actually fly the carrier has amended its contingency plan to make that interval six hours.

As for RAA's requests that we treat regional carriers and their larger-carrier code-share partners differently, we have decided not to do so at this stage in the rulemaking process. The rule that we are proposing would apply to both partners in a code-share arrangement, because even if the determination to cancel a flight or keep it on the tarmac is made by the major carrier or results from action by the FAA, it is the carrier operating the flight that remains directly responsible for the passengers for the duration of the delay. We expect that the major carriers and their regional code-share partners would collaborate on their contingency plans to come up with standards that suit both parties. We recognize that the regional carriers' plans would reflect the limited size and capacity of their aircraft, and nothing in the rule would bar a regional carrier from providing differently for aircraft of different sizes.

Nevertheless, while we are proposing here not to treat regional carriers and larger carriers differently in the rule, we invite interested persons to comment on whether, in the event that we adopt a rule requiring contingency plans, we should limit its applicability to carriers that operate large aircraft—*i.e.*, aircraft originally designed to have a maximum passenger capacity of more than 60 seats. Proponents of this alternative approach should provide arguments and evidence in support of their position, as should opponents.

*2. Response to Consumer Problems*

The ANPRM: This proposal would require every certificated and commuter air carrier that operates domestic scheduled passenger service using any aircraft with a design capacity of more than 30 passenger seats to address mounting consumer problems in the following ways: At its system operations center and at each airport dispatch center, designate an employee to be responsible for monitoring the effects of flight delays, flight cancellations, and lengthy tarmac delays on passengers and have input into decisions such as which flights are cancelled and which are subject to the longest delays; on its Web site, on all e-ticket confirmations, and, on request, at each ticket counter and gate, inform consumers how to file a complaint with the carrier (name of person or office, address, and telephone number); and send a response to each consumer complaint received within 30 days of receipt.

The Comments: CAPBOR and its members support the proposal and take the position that carriers should be required to provide postal addresses, telephone numbers, and e-mail addresses for customer service, to acknowledge receipt of a complaint within 24 hours, to resolve the complaint within 30 days of receiving it, and to notify the Department if the passenger disagrees with the resolution. In addition, CAPBOR calls for a requirement that consumers' complaints to the carriers and complaints that the Department refers to the carriers be combined and tabulated by category, with the results made available to the public every month.

Of the individual commenters, one agrees in principle with the proposal

but voices concern over the cost of creating a position at each airport for responding to complaints, reasoning that this would not affect delays. Another voices concern that not all consumers have access to the Internet and favors requiring travel agents to provide the information on where to complain as well.

Of the other consumer associations, ACAP and U.S. PIRG concur with CAPBOR, Public Citizen concurs with CAPBOR and U.S. PIRG, and the National Consumer League concurs with U.S. PIRG. NBTA, in contrast, characterizes the proposal as micromanagement of airline customer service. NBTA maintains that most if not all carriers have customer service departments to address problems that arise and that poor responses will affect consumers' business decisions.

Delta is again the only carrier that commented individually on this issue. Delta deems a regulation requiring the designation of carrier employees responsible for what it characterizes as responding to and managing extended ground delays and flight cancellations, and prescribing such employees' locations, to be unnecessary, because such a requirement is implicit if the Department mandates contingency plans. Delta is concerned, moreover, that the proposal could work to undermine carriers' ability to establish processes and management hierarchies that ensure compliance with their contingency plans. Delta states that it is committed to providing multiple customer-friendly channels for complaints, and given the rapid development of communication technologies, the carrier opposes making the use of particular channels mandatory. Delta opposes a 30-day requirement for responding to consumer complaints and posits 60 days as the current industry standard. It cautions that in cases involving international travel, particularly under code-sharing arrangements, ''coordinating the best solution for the customer may require more than 30 days, especially if a detailed investigation is needed.'' In addition, Delta is concerned that seasonal surges in complaint volume or unexpected events could mean financial hardship for a carrier that was required to increase staffing temporarily to respond to all complaints within 30 days.

Of the carrier associations, NACA states that its members already monitor their flight operations at each airport and maintains that it should be up to each carrier to decide if it wants to have this be one employee's sole responsibility or include it with an employee's other responsibilities. As for responding to complaints, NACA contends that the Department should specify how complaints are to be lodged with the carriers if it is going to require a response to each complaint. Whether the complaint is handed to an airline agent at the airport, submitted via e-mail, or sent by U.S. mail, the complainant should be required to have proof that the carrier received the complaint. NACA believes 30 days to be insufficient for responding to complaints but would accept a 45-day requirement even though it prefers 60 days. NACA's comments are endorsed by ACAA.

ATA, with IATA's endorsement, supports requiring carriers to respond to consumer problems and cites the voluntary commitments to do so that a number of carriers have long had in place. ATA states that its members agree that consumers should receive responses to their complaints within 30 days when practicable, provided that by ''response'' the Department means notification that a complaint has been received and is being reviewed and that by ''complaint'' the Department means a passenger's complaint that raises customer service concerns and that is submitted to the carrier's customer relations department. It contends, however, that resolving complaints in only 30 days is difficult if not impossible. ATA supports the idea of designating an employee at a carrier's systems operations center to monitor the effects of flight delays and cancellations, provided that the designee is a current employee who carries out other responsibilities as well. It does not support requiring such an employee at each airport dispatch center, claiming that this would duplicate existing procedures and would strain carriers' resources without lessening the problems that consumers face. ATA supports allowing each carrier to choose the means by which it receives complaints and responds to them, and it supports requiring carriers to post information on contacts for complaints on their Web sites. It opposes requiring this information on e-tickets as redundant, if the information is on the carriers' Web sites, and burdensome, as carriers would have to change the printing format for e-tickets to accommodate the new information. Thus, ATA argues, the benefit of including complaint information on e-tickets would outweigh the cost, particularly in the absence of any evidence that users of e-tickets are experiencing any difficulty in finding this information at present.

RAA urges the Department to let carriers monitor the effects on passengers of flight delays, flight cancellations, and lengthy tarmac delays by whatever means they choose, given the wide variety of circumstances among all carriers and between major and regional carriers. It asserts that for its members, designating a single person rather than making all employees responsible for taking passengers' interests into account might be wasteful if not counterproductive given how they may well have little if any control over decisions on delays, diversions, and cancellations. As far as consumer complaints are concerned, RAA asserts that the best means for giving contact information may similarly vary among carriers and between major and regional carriers. Tickets for RAA's members' code-share services are typically sold and issued by their major-carrier partners, which often staff the ticket counters and gates that consumers use as well. Under these circumstances, RAA contends, its member carriers should not be held responsible for telling consumers how to file complaints. RAA states that when a major carrier receives a complaint that involves its regional carrier partner, it coordinates with the latter to gather facts so that it can respond to the consumer. Like ATA, RAA maintains that 30 days is sufficient for acknowledging receipt of a complaint but too little time for resolving one. Finally, RAA takes the position that any requirements adopted should only apply to flights operated with aircraft seating at least 30 passengers and not to flights operated with smaller aircraft.

ACI–NA supports this proposal but did not specifically address it.

Of the travel agency associations, ASTA agrees in principle with carriers' having an employee responsible for monitoring the effects of schedule disruptions on passengers and having input in the decisions made but doubts that this requires as many individuals as the proposal contemplates given current communications technology. ASTA supports a period of 30 days for responding substantively to consumer complaints. It opposes allowing individual carriers to choose how complaints may be filed, supporting instead a uniform requirement that complaints be accepted by telephone, by U.S. mail, and by e-mail. ITSA did not address this issue.

Proposed Rule: We have decided to propose a rule along the lines set forth in the ANPRM, and again we invite comment from all interested persons. Specifically, our proposed new rule, 14 CFR part 259, includes a requirement

that every certificated and commuter air carrier that operates scheduled domestic passenger service using any aircraft with a design capacity of more than 30 passenger seats respond to consumer problems concerning its scheduled flights in three ways. First, at its systems operations center and at each airport dispatch center, the carrier would have to designate an employee who monitors the effects of flight delays, flight cancellations, and lengthy tarmac delays on passengers and has input into decisions on which flights to cancel and which to delay the longest. We anticipate that these responsibilities would be borne by current employees in addition to their other responsibilities; we do not intend for any carrier to have to hire new employees to comply with this regulation. Second, on its Web site, on all e-ticket confirmations, and, upon request, at each ticket counter and gate, the carrier would have to inform consumers how to file a complaint by providing the name, address, telephone number, and e-mail or Web-form address of the appropriate person or office. Carriers would be given 180 days to modify their Web sites and reformat their e-tickets before this requirement would take effect. Third, for each complaint filed, the carrier would have to acknowledge receipt to the consumer within 30 days and provide a substantive response within 60 days of receiving it. By ''substantive response,'' we mean a response that addresses the specific problems about which the consumer has complained. We are not proposing that this provision cover public charter operations. Complaints about public charter flights are filed not with the carrier but with the Public Charter Operator; also, the carriers operating these flights may not have employees at each airport that they serve.

In adopting this approach, we are tentatively rejecting as unrealistic CAPBOR's contention that we should require acknowledgement of a complaint's receipt within 24 hours and a resolution of the complaint within 30 days. The deadlines that we are proposing represent standard practice in the industry and should allow carriers adequate time to investigate and respond appropriately. We are addressing carriers' opposition to hiring new employees to do work that is redundant by clarifying that this is not our intent. We are tentatively rejecting carriers' arguments that we should not make any particular complaint channel mandatory, because we recognize that not all consumers have access to the Internet. Some consumers traveling on e-tickets purchased by a third party or by telephone may not have access to the Internet themselves. We are tentatively rejecting ATA's contention that requiring carriers to provide information on e-tickets regarding how to complain is redundant and burdensome, because ATA has not supported this contention. Under the proposed rule, an electronic e-ticket confirmation or itinerary may include a link to the complaint information in lieu of displaying the entire text. We invite ATA to provide evidence on the costs to carriers of changing the format for e-tickets to accommodate the new information in its comments on this proposal. We are tentatively rejecting RAA's contention that its members should not be required to tell consumers how to file complaints. The rule by its terms would not require those regional carriers that do not have Web sites or ticket counters or issue e-tickets to provide information on filing complaints via these channels. Passengers of these carriers who wish to complain should be able to find out at the gate how to do so. RAA provides no basis for its assertion that flights operated with aircraft seating fewer than 30 passengers should be exempt from this requirement.

*3. Chronically Delayed Flights as Violations of 49 U.S.C. 41712*

The ANPRM: This proposal would codify the Department's 2007 enforcement policy on chronically delayed flights. The proposed new text would define a chronically delayed flight as a flight by a covered carrier that is operated at least 45 times in a calendar quarter and arrives more than 15 minutes late more than 70 percent of the time. It would define a covered carrier as one that reports on-time performance data to the Department under 14 CFR part 234—*i.e.*, a certificated U.S. carrier that accounts for at least one percent of domestic scheduled passenger revenue. The text would state that the Department considers a chronically delayed flight to be an unfair and deceptive practice and an unfair method of competition within the meaning of 49 U.S.C. 41712 if it is not corrected before the end of the second calendar quarter following the one in which it is first chronically delayed.

The Comments: CAPBOR supports this proposal but believes that carriers should not be allowed a full six months to correct chronically delayed flights and that the Department should automatically impose civil penalties whenever a flight becomes chronically delayed in any given quarter. CAPBOR also favors stricter standards than the ones that we proposed: Specifically, that the rule should apply to flights operated at least 24 times in a calendar quarter and that flights should be deemed chronically late if they arrive at least 15 minutes late more than 50 percent of the time. Ms. Hanni goes further and calls for an even lower threshold of 40 percent. CAPBOR wants the Department to make certain that carriers cannot evade the rule by changing the number of a flight or changing its departure time by a few minutes. Ms. Hanni adds that the Department should also address the problem of chronically cancelled flights by regulation.

None of the individual commenters addressed this proposal. Of the other consumer associations, ACAP concurs with CAPBOR, as do U.S. PIRG, Public Citizen, and the National Consumers League. NBTA alone supports the proposal as drafted.

Delta, the only carrier that commented individually on this issue, takes the position that the Department should use the standard proposed as a rebuttable presumption that a flight violates 49 U.S.C. 41712 rather than as a rule. In Delta's view, the Department must also consider in each case whether the carrier has intended to deceive the public or compete unfairly, because flights may fail to operate on time for an extended period for many reasons that are beyond the carrier's control. For example, if a flight performs erratically due to unpredictable delays attributable to problems in the national air traffic control system, the carrier cannot solve the problem by extending the block time to make the flight operate on time more consistently: This would make the flight arrive early when the system functions properly, which in turn could cause disruptions and tarmac delays at the destination airport. Another example would be a period of harsh and unexpected weather arriving just when a carrier thought that it had solved the problems that had made a flight late. Delta warns that adopting a rigid standard for enforcement could result in carriers' cancelling flights or arbitrarily retiming them significantly, thus creating ''new'' flights, solely to avoid enforcement action and even though they might otherwise have eventually solved the scheduling problems. Delta warns that this approach is in turn likely to cause passengers more inconvenience than would continuing to try to address the real issues affecting a flight's performance. In cases where the actual individual delays of a given flight are relatively small—say 16 minutes, for example—passengers fare better if the flight is maintained than if it is cancelled altogether.

Delta opposes expanding the definition of a chronically delayed flight to include international flights to and from the United States. It claims that any carrier's ability to adjust the timing of such flights is limited by time zone issues and consumers' preference to arrive at foreign destinations at particular times. Additionally, foreign laws and airport authorities may limit a carrier's ability to adjust schedules or address other operational factors that affect on-time performance.

In Delta's opinion, adopting the proposal as a rule would not result in improvement of on-time performance, because carriers already deem customer satisfaction to be critical to their success and are therefore already doing whatever they can to meet their schedules. Rather, Delta suggests, the government should use its resources to improve the air traffic control system. The carrier concludes that in any enforcement action, if a carrier can show that it has done all it reasonably can to resolve the problem but that the underlying primary cause is outside of its control, no sanction should be imposed.

Of the carrier associations that commented, ATA, with IATA's endorsement, agrees with Delta that the proposed standard should only be a rebuttable presumption and not a rule, because in some circumstances a carrier may have legitimate reasons for not being able to comply. ATA supports the proposed definition of a chronically delayed flight and prefers it to the standard proposed by the Department's Inspector General (IG), *i.e.*, flights arriving 30 minutes late 40 percent of the time. ATA opposes expanding the definition to include international flights.

RAA does not oppose defining chronically delayed flights, but it does oppose treating them as an unfair and deceptive practice subject to enforcement action. RAA believes that the market will punish carriers that fail to satisfy consumers and that the Department should rely on market forces rather than enforcement. If the Department persists nevertheless, RAA takes the position that the rule should apply only to the carrier that sets the schedules and enters into contracts of carriage with passengers when that carrier is not the carrier operating the flights. In a similar vein, ACAA contends that any rule on chronically delayed flights should apply only to the largest carriers.

ACI–NA states that chronically delayed flights can harm both airports and their local communities economically by causing passengers to lose confidence in an airport's operations. A smaller airport can sustain greater harm, according to ACI–NA, because even though larger airports may have more delayed flights, delayed flights at a smaller airport may constitute a larger percentage of that airport's flights. Also, delays at small airports whose flights feed a large carrier's hub are more disruptive to passengers, because they cause more missed connections. Regarding the proposal, ACI–NA maintains that a threshold of 45 flight operations per calendar quarter, or approximately four flights per week, will improperly exclude operations at many small airports and thus fail to protect their passengers. Instead, ACI–NA proposes a threshold of 12 flight operations per calendar quarter, or one flight per week. ACI–NA also maintains that a late-arrival threshold of more than 70 percent is too lenient to carriers and unfair to consumers, and it proposes a threshold of 50 percent. Finally, ACI–NA maintains that any rule should apply not only to the major and national carriers that account for at least one percent of domestic scheduled passenger revenue but also to the operations of regional or feeder carriers that are affiliated with the larger carriers. ACI–NA reasons that delays harm passengers just as much regardless of which certificate holder operates the aircraft. Furthermore, with regional carriers now transporting one of every four domestic passengers, operating half of daily domestic flights, and providing the only scheduled service to about 70 percent of U.S. airports, ACI–NA deems it critical that their operations be covered by the rule.

Of the travel agency associations, ASTA supports defining chronically delayed flights as an unfair and deceptive practice but suggests that the proposal can be improved in a number of ways. First, the threshold should be set at 50 percent rather than 70 percent, which will be a stronger incentive for airlines to adjust their schedules or operations. Second, rather than permitting a carrier two calendar quarters to correct a chronically delayed flight, correction should be required within the first calendar quarter following the one in which the flight became chronically delayed: ASTA maintains that three months should usually suffice, and in cases where a carrier can show why it should be granted additional time, the Department would have the discretion to accommodate it. Third, ASTA supports applying this rule to international scheduled passenger service by both U.S. and foreign carriers. ITSA did not address this issue.

Proposed Rule: With some modification to the details, we have decided to propose a rule along the lines set forth in the ANPRM, and we invite comments from all interested persons. Specifically, we propose to amend 14 CFR 399.81 to define chronically delayed flights and to specify that the Department considers flights that continue to be chronically delayed for three consecutive calendar quarters to be an unfair and deceptive practice and an unfair method of competition within the meaning of 49 U.S.C. 41712 and subject to enforcement action. This proposal defines a flight as chronically delayed if it is operated at least 30 times in a calendar quarter and arrives more than 15 minutes late more than 70 percent of the time. As far as substitute flights are concerned, all flights in a given city-pair market whose scheduled departure times are within 30 minutes of the most frequently occurring scheduled departure time would be considered to be one single flight for purposes of assessing chronic delays. The revised proposal reflects the Department's 2008 enforcement policy, and we tentatively believe that it strikes the appropriate balance between consumers' need to have reliable information about the real arrival time of a flight and the carriers' inability to control or predict the weather and certain other factors that can contribute to delays. In addition, for the reasons set forth below in support of our decision not to propose a rule requiring on-time reporting of international flights, we have also decided against proposing to include foreign air transportation—*i.e.*, international flights—in the definition of a chronically delayed flight.

We further invite interested persons to comment on an alternate definition of a chronically late flight as one that is operated at least 30 times in a calendar quarter and that arrives at least 30 minutes late at least 60 percent of the time. While this latter approach could theoretically yield more benefits for consumers, we are concerned that adopting this more stringent standard could lead to a large number of flight cancellations and possibly even the elimination of service to some communities. Also, we invite comment on whether we should adopt an even stricter definition favored by the Department's Inspector General: A flight that is cancelled or delayed 30 minutes or more at least 40 percent of the time. The Inspector General calculated in 2006 that using this definition would yield 5,369 chronically delayed flights, a very high number (*Follow-Up Review:*

*Performance of U.S. Airlines in Implementing Selected Provisions of the Airline Customer Service Commitment*, Report Number AV–2007–012, Issued November 21, 2006, at page 5, footnote 8, and Attachment, page 17). Because we are concerned that any consequential increase in enforcement responsibilities might require the diversion of resources from other aviation compliance activities, commenters should assess both the benefits that this definition would engender and the costs that it would entail. Of course, regardless of which definition we adopt, we always have the authority to take enforcement action against flights that do not meet the definition but that appear to involve unrealistic scheduling and thus to constitute unfair and deceptive practices and unfair methods of competition within the meaning of 49 U.S.C. 41712.

For enforcement purposes, we are considering the option of not treating a flight that remains chronically delayed for three consecutive quarters as an unfair and deceptive practice and an unfair method of competition if every prospective passenger using any available channel of purchase is informed before buying a seat on that flight that the flight is chronically delayed. There is no deception or unfairness if a consumer who knows that a flight is chronically delayed chooses it for travel nonetheless. We invite comment on this approach.

We are tentatively rejecting as too draconian the consumers' contentions that we should not allow a full six months for the correction of a chronically delayed flight, that we should automatically impose civil penalties in the calendar quarter when a flight becomes chronically delayed, and that we should define chronically delayed flights more broadly. As we have stated above, our aim in proposing rules is to strike a balance between a passenger's need to have the best possible information about the real arrival time of a flight and the carriers' inability to control—or foresee—the weather and various other factors that can cause delays. As for chronically cancelled flights, the proposed rule would treat each flight that is cancelled within seven days of departure as a delayed flight for purposes of our analysis, but we decline at this time to consider regulating chronically cancelled flights in other respects. We are addressing consumers' concerns that carriers could evade the rule by changing a flight's number or departure time by providing for the treatment of substitute flights as the same flight.

We are also tentatively rejecting the carriers' contention that we should use the standard we adopt as a rebuttable presumption and not a rule. Chronic delays are a serious problem that must be addressed, and we consider the standard we are proposing here to be a reasonable and feasible approach. We invite carriers to provide evidence to the contrary in their comments on this proposal. Furthermore, as the carriers know, the Department's enforcement procedures afford a potential respondent ample opportunity to show extenuating or mitigating circumstances and thus perhaps avoid penalty. For example, our enforcement procedures are sufficiently flexible for us to take account of the contract terms between a major carrier and its regional code-share partner in any investigation of the latter's delayed flights. As for ACAA's contention that any rule should apply only to the largest carriers, while ACI–NA's comments attest to the importance of addressing unrealistic scheduling by small and regional carriers, by its terms the proposed rule would not apply to any carrier that does not account for at least one percent of domestic scheduled passenger revenue. These carriers already collect and report on-time performance data. Their operations account for nearly 90 percent of all domestic passenger enplanements. In our view, the substantial cost burden that compliance with this proposal would impose on the smaller carriers, which are not required to collect or report on-time performance data, would outweigh any corresponding public benefits.

*4. Delay Data on Carriers' and Other Sellers' Web Sites*

The ANPRM: This proposal would require both carriers that report on-time performance data to the Department and online travel agencies to include on their Web sites, at a point before the passenger selects a flight for purchase, the following information on each listed flight's performance during the previous month: The percentage of arrivals that were on time, the percentage of arrivals that were more than 30 minutes late, special highlighting of any flight that was late more than 50 percent of the time, and the percentage of cancellations.

The Comments: CAPBOR and its members support requiring carriers to publish delay data on their Web sites for all flights but they assert that flights should be defined as ''late'' if they arrive more than 15 minutes late, not 30 minutes as proposed. CAPBOR believes that passengers will use this information to make better choices and that as a consequence, carriers with more delayed flights will have a greater incentive to correct their problems. CAPBOR takes the position that carriers should be required to provide the information not only on their Web sites before booking but also upon request to consumers who book by telephone. CAPBOR also takes the position that third-party reservations services should be required to provide this information as well and that carriers ''should be required to provide open interfaces for internet applications to access [these] data from their servers so as not to impose undue costs [on] third parties.'' CAPBOR favors applying this rule to the international flights of U.S. carriers and to all domestic scheduled passenger service using aircraft with more than 30 passenger seats. Ms. Hanni adds that special highlighting should be required for any flight that is late more than 40 percent of the time. In her view, however, it would not be enough to require disclosure of the performance information by telephone only upon request. Rather, she maintains, we should require disclosure of information about both chronically delayed and chronically cancelled flights whenever a consumer is booking flights, be it on line, by telephone, or even in person.

Those individual commenters who addressed this issue agree that disclosure of this information should be required for telephone sales as well as internet sales. They also agree that the disclosure requirement should apply to third-party reservations services.

Of the other consumer associations, ACAP agrees with CAPBOR, as does U.S. PIRG. Public Citizen concurs with U.S. PIRG and CAPBOR; the National Consumers League concurs with U.S. PIRG. NBTA supports requiring carriers to provide on-time performance information to consumers ''so long as these requirements are aligned with performance reports that carriers must file with DOT.''

Senators Boxer and Snowe support this proposal.

As for members of the industry, Delta, again the only carrier that commented individually on this issue, agrees that giving interested consumers information on historical on-time performance is good customer service, but the carrier strongly objects to detailed regulation of how this information is provided. In Delta's view, carriers should be free to decide what to tell consumers and how. On its Web site, Delta currently makes available the percentage of operations that were on time for any flight for which it is required to file on-time performance data with the Department. Once a consumer has selected dates and

routes, the screen for flight availability and pricing provides access to the following information via a click on the flight number: equipment type, flight duration and distance, and on-time performance for the previous month. In Delta's view, its practice meets consumers' reasonable wishes for information on a flight's historical performance, and the other categories of information that the Department proposes to require are unnecessary. Delta also contends that requiring carriers to change their Web sites to provide this additional information would impose substantial costs without yielding offsetting benefits for consumers. Unlike on-time performance data, Delta maintains, the data needed to deliver the additional information are not already collected, and Delta's existing software would not support collecting them or displaying and highlighting the results.

Delta also contends that the additional information that the proposal would require is of little relevance to consumers when purchasing air transportation. First, it reasons, a flight's performance over a month does not predict its performance today, tomorrow, or in three months, because reasons for delays can vary with seasons and from week to week or day to day according to weather, special events, or infrastructure problems (*e.g.*, ATC system failures, runway or taxiway closures). Delta states that it is constantly identifying and analyzing flights that perform poorly and taking measures to improve their performance by adjusting schedules and block times, crew rotations, maintenance schedules, and other operational factors. As a result, Delta states, a flight that performs poorly in one month rarely performs poorly the next month, and it is even less likely to perform poorly several months in the future. Second, Delta states that it has monitored customer calls at the rate of about 5,000 per month and that between March and September of 2007 it did not observe even one request for information on on-time performance.

Delta maintains that the percentages of its arrivals that are more than 30 minutes late and the percentage of its cancellations would be ''statistically insignificant'' (Delta estimates that just over ten percent of its flights system wide arrive more than 30 minutes late and states that in November of 2007 its completion rate was 99.3 percent), but it claims that collecting the underlying data to comply with the proposal would ''require substantial infrastructure modifications.'' Delta also maintains that about 40 percent of all cancellations result from mechanical problems, which are not specific to flight, route, or schedule, and therefore, providing this information during the booking process would not alert consumers to problematic flights.

Delta objects to requiring reservations agents to disclose on-time performance at the time of booking without being asked. It states that this would increase call times and call wait times and the costs associated with each. The delays, it states, would irritate callers who do not seek this information—*i.e.*, in Delta's experience, most callers. Consumers would not benefit, Delta contends, because historic performance is a poor predictor of performance when the passenger plans to fly.

Of the carrier associations that commented on this proposal, ATA, with IATA's support, favors the disclosure of delay information on carriers' Web sites or via a link to a third-party Web site only when consumers request this information. Stating that carriers already have commercial incentives to provide information that is of interest to consumers and that many already post on-time data on their Web sites, ATA contends that requiring the disclosure of data that consumers demand only occasionally would waste resources by increasing programming costs and consuming valuable screen space. Such a requirement would also waste the time of those consumers who do not find the information useful.

Like Delta, ATA strongly opposes requiring carriers' reservations agents to disclose on-time information without being asked, because the high cost of compliance would outweigh its speculative benefit. Furthermore, ATA maintains, requiring carriers' reservations agents to provide this information but not requiring the same of travel agents would prejudice competition between the two channels by imposing the added costs only on the carriers. ATA estimates the cost of compliance at $0.50 per call, which would translate into an additional $25 million per year for a carrier that receives over 50 million calls at its reservations center just for agents' time and not including training and programming costs. ATA also maintains that Computer Reservations Systems' (CRSs') displays currently have no space to show the extra on-time information covered by the proposal. The costs of modifying the displays would be high but the benefits few, ATA argues, because carriers' reservation centers account for only about 20 percent of all bookings. This requirement would also waste the time of those passengers who do not want the additional information. At the FAA's valuation of passenger time at about $30 per hour, the waste could run to tens of millions of dollars each year.

ATA also maintains that requiring ''special highlighting'' of flights would entail high costs for extensive reprogramming of internal carrier software and extensive changes to carriers' Web sites but would yield benefits that are dubious at best. ATA does not believe that the proposed disclosures would give consumers better information or help them make better choices, because historic performance data do not predict future performance.

RAA believes that this proposal would burden the reservation process and Web sites by giving passengers information that they may not want and by cluttering display screens so that they could not accommodate as many flights as they do now. RAA agrees with Delta and ATA that historic performance information may well have no predictive value for a consumer's flight, given variations in weather, for example. RAA argues that ''subjecting passengers to information overload could only further confuse them, lengthen the time required for booking a flight, substantially increase the workloads of reservation agents and webmasters and lengthen customer wait times, all to the detriment of the passenger.'' RAA maintains that passengers who want information on their flights' past performance can find it in the Department's reports and can also use this source to compare the performance of flights in the same city-pair offered by competing carriers. It states that most carriers' Web sites already offer performance information on the previous and current day's flights, and it opines that this is the information that consumers find most useful as their travel days draw near. In addition, some historic performance information is already available from reservations agents on request. RAA suggests that carriers could offer those passengers who want additional information a link to the Department's Web site, a solution it deems superior to ''imposing unwanted information on travelers who would rather expedite their bookings.'' Finally, RAA observes that regional airlines that operate services for major carrier code-share partners and that do not offer their own reservations and ticketing services would not be covered by this proposal.

ACI–NA supports the proposal but did not specifically address it.

Of the travel agency associations, ASTA opposes this proposal as unworkable and unhelpful to consumers. Noting that current

technology could not deliver on-time data for display by online travel agencies until the first week of the month following the deadline for reporting the data to the Department, which itself is 15 days after the applicable reporting month, ASTA maintains that ''[w]hat happened on a flight two months ago (on average) is not particularly instructive for what flights will do today, especially if the seasonality factor is considered.'' ASTA agrees with Delta and ATA that the costs of reprogramming to comply with the proposal would be significant and that the reprogramming could complicate the web displays of all online sellers of air transportation. If the Department does adopt a rule requiring disclosure of flights that are late more than a certain percentage of time, ASTA believes that the percentage should be the same as the percentage the Department uses to define flights that are chronically delayed. In addition, ASTA believes that if the Department uses enforcement aggressively against chronically late flights, carriers may be expected to take steps to avoid enforcement, which in turn would lower the incidence of late flights and make the proposed rule superfluous.

ITSA opposes this proposal, taking the position that the publication of flight-specific on-time performance data should be left to the marketplace. In ITSA's view, vendors should be allowed to exercise their business judgment to determine the extent to which consumers demand this information and whether and how to present it. ITSA contends that consumers who use its members' services would not hesitate to let these vendors know if they wanted to have the historic performance data covered by the proposal when they book flights, and it asserts that so far they have not done so, not even in surveys and focus groups conducted by vendors. ITSA agrees with the other industry parties who contend that historic flight data have little if any predictive value. ITSA points out that the proposal's requirements would affect not only online reservations services, including those of the carriers, but also the CRSs on which all vendors rely. If, over ITSA's objections, the Department does propose a rule requiring disclosure of historic on-time performance, ITSA seeks clarification of whether all, some, or none of the rule's provisions would apply to third-party vendors as well as to the carriers. ITSA also raises the issue of liability for performance data's accuracy and asks the Department to specify that online vendors and CRSs rely entirely on carriers for these data.

Proposed Rule: We have decided to propose a rule mostly along the lines set forth in the ANPRM, and we invite comment from all interested persons. Specifically, we propose to amend 14 CFR 234.11 to require air carriers that report on-time performance to publish the following information on their web sites for each listed flight regarding its performance during the latest reported month: the percentage of arrivals that were on time (*i.e.*, within 15 minutes of scheduled arrival time), the percentage of arrivals that were more than 30 minutes late, with special highlighting if the flight was late more than 50 percent of the time, and the percentage of cancellations. Carriers will be able to comply with the rule in one of the following ways: by showing the percentage of on-time arrivals on the initial listing of flights and disclosing the remaining information on a later page at some stage before the consumer buys a ticket, or by showing all of the required information via a hyperlink on the page with the initial listing of flights. To ensure that all carriers are posting information covering the same month, we are proposing to require that they load the information for the previous month into their internal reservations systems between the 20th and the 23rd days of the current month. (This latter requirement would also apply to § 234.11(a), the existing requirement that carriers disclose on-time performance information during reservation calls, ticketing discussions or transactions, or flight inquiries.) We invite comment from carriers on whether they would find it more convenient to load the information overnight on the third Saturday of the month than between the 20th and 23rd days as proposed.

In adopting this approach, we are tentatively rejecting consumers' request for disclosure of the percentage of arrivals that were more than 15 minutes late and special highlighting of flights that are late more than 40 percent of the time as excessive and unnecessary. We also tentatively reject the contention that the same disclosures should be required during telephone bookings. Section 234.11 already requires disclosure of on-time performance when requested during live discussions, transactions, or inquiries. We tentatively agree with the carriers that the costs of providing this and other information to all callers whether requested or not would be unduly burdensome and of dubious benefit, especially given that the rule will give consumers access to this information on the carriers' web sites. We are tentatively rejecting the arguments that flight performance data are irrelevant to consumers: the consumers' comments show otherwise. We invite those who file comments in opposition to this proposal to support their arguments with data on the costs of modifying their web sites to comply with the proposed disclosure requirements.

We have tentatively decided not to propose requiring on-line travel agencies to post the same information. For one thing, the costs of doing so would probably far outweigh the benefits for at least several years. Our preliminary economic analysis indicates that the costs to on-line travel agencies of complying with this proposed rule would run to $53.4 million in the first year and that benefits to passengers in this first year would amount to only $3.4 million. (Initial Regulatory Impact Analysis of Proposed Rulemaking on Enhanced Airline Passenger Protections at 56.) Applying the requirement only to carriers would cost the carriers $1.9 million in the first year while conferring benefits of $2.8 million on passengers. (*Id.* at 53.)

We would also like commenters to address one additional question: should we require covered carriers to provide the required information for domestic code-share flights, and if so, should this requirement apply to all domestic code-share flights or only to those operated by carriers that report on-time performance?

*5. Complaint Data on Carriers' Web Sites*

The ANPRM: This proposal would require certificated and commuter carriers that operate domestic scheduled passenger service using any aircraft with more than 30 passenger seats to publish complaint data on their Web sites. Each carrier would have to disclose the number of consumer complaints it has received within a defined time frame concerning subjects such as tarmac delays, missed connections, and the failure to provide amenities to passengers affected by a flight that is delayed or canceled.

The Comments: CAPBOR and its members support the proposal and favor requiring carriers to publish complaint data on the following categories: involuntary bumping, baggage issues, frequent flyer miles, unaccompanied minors, delays, tarmac strandings, and disabilities. In Ms. Hanni's opinion, the complaints submitted only to the Department give an incomplete picture of the state of the industry.

Of the individual commenters, one does not think that consumers would use this information to make booking

decisions, because they base their decisions on price, availability, and schedule. This commenter also does not think that the proposal would lessen flight delays. Another individual agrees in general with the proposal but is concerned that the same information should be available to consumers who do not use the Internet.

Of the other consumer associations, ACAP concurs with CAPBOR, as do US PIRG, Public Citizen, and the National Consumers League. NBTA does not support this proposal. It argues that despite the desirability of transparency in general, the benefits to consumers of carriers' highlighting their complaints would be dubious. NBTA also cautions that many complaints are not sufficiently clear-cut to fall into simple categories and that the proposal makes no distinction between problems under carriers' control and problems resulting from uncontrollable factors such as the weather.

As for members of the industry, Delta, again the sole carrier to comment individually, strongly opposes this proposal. First, it maintains that carriers' communications on their Web sites are protected by the First Amendment and that there are constitutional restrictions on the government's ability to force carriers to communicate content on their Web sites with which they disagree and which does not show themselves in a positive light. Second, it asserts that consumers who would like to know other consumers' views of any carrier's customer service record can consult other sources, such as the Department's complaint data and a variety of third-party Web sites. Third, it contends, the proposal would be impossible to enforce, because carriers would inevitably adopt disparate standards. Fourth, it claims that the information would not be useful to consumers, because the carriers would not be able to indicate whether complaints were reasonable, how serious they were, or how they were handled.

Of the carrier associations that commented on this proposal, NACA, with ACAA's endorsement, opposes it. Like Delta, NACA believes that the subjective coding of complaint letters would render the cumulative numbers that would be published meaningless and devoid of context. Also like Delta, NACA contends that the proposal represents overreaching by the government. NACA states that the government does not force private businesses in any other industry to disclose their customer service results. NACA predicts, moreover, that the costs of collecting and disseminating the complaint data would be particularly onerous for the smaller carriers that do not file delay and baggage data with the Department and are not included in the Department's Air Travel Consumer Report.

ATA, with IATA's support, also opposes this proposal, because complaint data are already available from the Department and other online sources, because the information would not be useful to consumers, and because the Department provides no support for its implicit assumption that complaint data reflect a carrier's actual performance. ATA also maintains that compliance with the proposal would be costly, and, like NACA, it asserts that in no other industry are firms required to publish complaint data. In addition, ATA agrees with Delta that the proposal may well run afoul of the First Amendment.

RAA opposes this proposal as well, suggesting as an alternative that the Department encourage carriers to inform consumers on their Web sites of, and perhaps provide links to, the Department's Aviation Consumer Protection Division's Web site. This approach, it states, would give consumers standardized information that would be more helpful to them and would avoid burdening consumers with additional screen clutter and carriers with data storage and retrieval requirements.

ACI–NA supports this proposal but did not specifically address it.

Of the travel agency associations, ASTA opposes this proposal for the same reasons that it opposes requiring delay data on sellers' Web sites, and it questions the value of complaint data to consumers. ITSA opposes requiring online vendors to publish complaint data.

No Proposal: We have decided not to propose a rule requiring the publication of complaint data. Both the comments and our own further consideration have persuaded us that these data would be of little or no value to consumers. Specifically, consumers have access to a tabulation of complaints filed with the Department in the Air Travel Consumer Report, available on our Aviation Consumer Protection Division's Web site (*http://airconsumer.ost.dot.gov/*). In our experience with disability and discrimination complaints, consumers' complaints to the Department provide a reliable indication both of the types of complaints that individual carriers receive and, in relative terms, of which carriers receive the most complaints. Also, although carriers may receive 20 or 30 times as many complaints as the Department does, the Department's consumer complaint data are not subject to the disparate and subjective counting and coding that would inevitably occur under the original proposal.

*6. International Flights' On-Time Performance*

The ANPRM: This proposal would require U.S. carriers that report on-time performance to the Department and the largest foreign carriers to report on-time performance for international flights to and from the United States.

The Comments: CAPBOR and its members support a requirement that on-time performance be reported for all domestic and international scheduled passenger service using aircraft with more than 30 passenger seats. ACAP, U.S. PIRG, Public Citizen, and the National Consumers League concur. NBTA supports requiring U.S. and foreign carriers to report on-time performance for international flights as ''a reasonable mechanism to bring greater transparency to a growing market of [increasing] significance to NBTA and its international partners.'' It believes that the requirement should be comparable to that for domestic flights and that its implementation should be cost effective.

As for the industry commenters, of the carriers, Jet Airways generally supports initiatives to protect passengers without imposing unreasonable or unbalanced burdens on carriers, and it deems this proposal to be reasonable. Jet Airways suggests that to determine ''the largest foreign carriers'' the Department should consider the number of weekly flights a foreign carrier operates to U.S. airports and the concentration of international flights a single foreign carrier operates at each international gateway: for example, any foreign carrier that operates at least 70 flights a week to and from the United States could be included, as could any foreign carrier that accounts for at least 10 percent of scheduled international departures at a U.S. gateway.

Delta opposes the proposal. It believes on-time performance information to be of little use to consumers as a predictor of any given flight's performance on any given day, and it reports that consumers almost never request it. Delta doubts that on-time performance information for international flights will be useful to the Department for enforcement purposes, particularly flights to the United States, because factors that affect performance are often beyond a carrier's control, and because carriers often have little leeway to adjust schedules due to local airport restrictions, time zones, and other features of international aviation. In addition, Delta contends

that it would be unfair to impose the proposed requirement on U.S. carriers without holding foreign carriers to the same standards, which in turn would pose a risk that foreign authorities would retaliate by imposing burdensome requirements on U.S. carriers operating abroad, thus raising the costs of international flights.

China Eastern also opposes the proposal. It maintains that any benefits to consumers would be far outweighed by the costs to foreign carriers of devising the means to comply, especially those carriers that do not operate multiple daily flights to the United States. China Eastern also states that the information at issue is already available to consumers on Web sites such as *http://www.flightstats.com.* China Eastern cautions that if the Department adopts this proposal, other countries could impose similar requirements, resulting in ''a global patchwork of reporting requirements, imposing significant costs on foreign carriers and their customers.'' If the Department does adopt the proposal, China Eastern endorses Jet Airways' approach to defining ''the largest foreign carriers.'' China Eastern adds that if data are collected, the reasons for delays, such as the holding of flights for connecting passengers, weather, and airport congestion and traffic, should be clearly stated in conjunction with the delay statistics.

Virgin Atlantic opposes the proposal, stating that it is not required to supply on-time performance data to the UK or the EU and that producing such data and providing them to the Department would be a significant regulatory burden with questionable benefits for consumers. Virgin Atlantic contends that many factors affecting on-time performance are beyond any carrier's control. Virgin Atlantic also expresses concern over how to determine which foreign carriers are ''large,'' given that Virgin itself, like most foreign carriers, serves most of its international destinations only once or twice per day.

AAPA, a trade association of 17 major international carriers, states that it needs clarification from the Department on how it would use the on-time performance data, the level of detail the rule would require, and who would have access to the data before it can assess the costs involved with complying with this proposal. As for how to define ''large foreign airline,'' AAPA proposes that the definition be based on flight frequency to and from the U.S. rather than on carrier revenues.

IATA opposes the proposal. It states that sufficient on-time performance data are available through Web sites such as *http://www.flightstats.com* to give consumers all the information they might want or need. It maintains that any benefits the proposal might yield would be outweighed by its costs. In IATA's experience, consumers of international air transportation are swayed more by price and route convenience than by on-time performance. IATA's foreign-carrier members have not been required to report on-time performance data and would therefore incur significant costs in setting up the infrastructure to comply with the proposal. IATA contends that these costs would be especially onerous for the many foreign carriers that serve the United States infrequently. Like other industry commenters, IATA expresses concern that the proposal could prompt other governments to establish their own multifarious on-time performance reporting requirements, with each such requirement imposing another new set of costs, and with all of them together causing additional confusion for consumers. IATA notes that carriers sometimes delay long-haul international flights to accommodate delayed connecting passengers and cautions that the proposal could discourage this practice if carriers had to consider the consequences of poorer on-time performance results. This in turn would harm consumers, because frequently a carrier will only operate one such flight per day, so those passengers who missed it would have to stay overnight at their departure gateway.

ATA opposes the proposal for some of the same reasons as IATA. First, carriers frequently hold international flights for passengers who are delayed on inbound connecting flights, because an international flight may be a carrier's only operation to the foreign destination for that day or even for the week. These delays avoid stranding passengers, and ATA contends that carriers should not be penalized by having to report them. Second, ATA states that wind speeds tend to be stronger over the oceans, causing significant delays when carriers have to fly against prevailing winds. Third, ATA maintains that while equity and fairness would require the Department to impose the same requirements on foreign carriers as on U.S. carriers, the proposal would nonetheless place U.S. carriers at a competitive disadvantage, since they report all of their domestic flights as well as international flights, while most foreign airlines would report only a few flights per day, and ''[t]his severe disparity in the data would result in skewed and misleading information to consumers.'' Fourth, the proposal could subject U.S. carriers to new foreign regulations country by country. Fifth, the burden the proposal would impose on many foreign carriers would outweigh any theoretical benefit to consumers. ATA asserts that if the Department adopts the proposal over its objections, it should take care to ensure that domestic on-time performance data and international on-time performance data are kept separate in any source seen by consumers.

RAA opposes the proposal, fearing new reporting requirements on the part of foreign governments and the associated cost burdens. If the Department does adopt the proposal, however, RAA favors requiring reports only of the largest airlines in the largest markets.

ACI–NA supports the proposal but did not specifically address it.

Of the travel agency associations, ITSA takes the position that any reporting requirement for international flights ''should be carefully harmonized with the home nations of any such carriers, or through any appropriate multinational body, in advance, in order to avoid [responsive] additional and potentially inconsistent requirements on U.S. carriers'' which ''could lead to additional and possibly inconsistent publishing requirements for [online vendors, CRSs,] and others from multiple nations.'' ASTA did not address this issue.

No proposal: We have decided for several reasons not to propose a rule requiring the reporting of on-time performance for international flights. First, as some carriers report, this information is already available on the internet. Second, many international flights involve slot-controlled airports, which means that the carriers operating them already have an incentive to meet their schedules. Third, we do not have sufficient evidence of a problem to justify the costs of reporting on-time performance of international flights, and on the many international routes that are only served by one carrier, access to on-time performance data would not affect consumers' choices. Fourth, as some carriers contend, a reporting requirement could make carriers less inclined to hold flights for incoming connections, which would create hardships for passengers in city-pairs served once a day or less. Fifth, the operating environment for international flights is much less homogeneous than that for domestic flights: For example, a variety of transoceanic weather patterns and long stage lengths can affect operating times. Finally, a reporting requirement, particularly one based on

carrier size, could raise issues regarding carriers' ''fair and equal opportunity to compete'' if the requirement differentiated between U.S. and foreign carriers or among foreign carriers.

*7. Carriers' Adherence to Customer Service Plans*

The ANPRM: This proposal would require certificated and commuter carriers that operate domestic scheduled passenger service using any aircraft with more than 30 passenger seats to audit their own adherence to their customer service plans. We stated that in conjunction with this proposal we are considering requiring any covered carrier that does not already have a customer service plan in place to adopt one and, and we called for comments on what provisions should be mandatory in such plans.

The Comments: CAPBOR and its members support the proposal and take the position that carriers should be required to audit their customer service plans every three years and submit the results of the audits to the Department for approval.

Of the two individuals who commented on this issue, one supports the proposal and believes that carriers should all be required to have customer service plans and that audits should be standardized. The other also supports the proposal but believes that the Department should review a percentage of the audits every year.

Of the other consumer associations, ACAP endorses CAPBOR's comments but adds its view that customer service plans are at present ''largely illusory exercises in public relations rather than genuine, enforceable, and measurable standards for customer service'' and concludes that therefore self-auditing of these plans would be meaningless. ACAP maintains that any auditors should be independent, that they should use the standards required for financial audits, and that the audits themselves should be ''reviewed and audited by [the Department] on a statistically significant sample basis to determine their effectiveness and validity.'' US PIRG concurs with CAPBOR; Public Citizen concurs with US PIRG and CAPBOR, and the National Consumers League concurs with US PIRG.

NBTA doubts that self-audits of customer service plans would make these plans credible, so it favors giving the Department's IG the resources to conduct audits of carriers' customer service, whether or not they have adopted specific plans, and to make the results public. NBTA suggests that these audits be conducted every three years or more and ''at similar times in the year to provide accurate comparative information.''

As for members of the industry, Delta, again the only carrier to comment individually, opposes the proposal as unnecessary. It contends that compliance with public customer service plans represents good business, particularly given the highly competitive state of the aviation marketplace at present. It contends that conducting a single, unified audit of compliance may not make sense, and it states that it has audit processes and controls in place within each of the business units involved in meeting its own service commitments. Rather than performing one comprehensive audit of all twelve points of its plan, Delta runs continuous quality assurance and performance management programs and has done so for many years. The carrier adapts these programs as appropriate to achieve its customer service goals. Delta therefore believes that a unified audit would be redundant and unnecessary. Delta also contends that aside from compliance with customer service plans being good business, a carrier's failure to comply with its plan is subject to enforcement by the Department. Audits are thus not necessary to give carriers a strong incentive to comply.

Of the carrier associations that addressed this issue, NACA, with ACAA's endorsement, opposes independent auditing as an unnecessary added cost. ATA, with IATA's support, objects to external auditing but not to self-auditing. Also, ATA believes that the Department should require all carriers to adopt customer service plans, but it opposes a requirement that these plans be incorporated in carriers' contracts of carriage on the same grounds as those on which it opposes requiring incorporation in the contracts of carriage of contingency plans for lengthy tarmac delays.

RAA is opposed to requiring all carriers operating any aircraft with more than 30 seats to adopt customer service plans reviewed by the Department and to audit their own compliance with these plans. The audits, it maintains, would impose significant expenses on the smaller carriers that are least able to afford them. RAA contends that many of the commitments in existing customer service plans would be inappropriate if applied to carriers that neither market nor sell air transportation directly to passengers and that do not enter into contracts of carriage with them. Moreover, it states that the major carriers that belong to ATA have already undertaken in their ''Customers First 12-Point Customer Service Commitment'' to ensure good customer service by their code share partners.

ACI–NA supports the proposal but did not specifically address it.

Of the travel agency associations, ASTA asserts that carriers have a history of not living up to their customer service commitments and that therefore some form of auditing should be mandatory. It maintains, however, that auditing assumes specific standards by which performance can be empirically measured and tested, and ASTA does not see clearly how this could work in the context of customer service commitments. ASTA does not think that rulemaking is the appropriate means for devising auditing standards. ITSA did not address this issue.

Proposed Rule: We have decided to propose a rule along the lines set forth in the ANPRM but with one significant addition, and again we invite comment from all interested persons. Specifically, our proposed new rule, 14 CFR part 259, would require every U.S. air carrier that accounts for at least one percent of domestic scheduled passenger revenue to adopt a customer service plan for its scheduled service and any public charter flights that it sells directly to the public and to adhere to this plan's terms, but unlike the proposal in the ANPRM, this proposed rule would require carriers to incorporate their customer service plans in their contracts of carriage. This incorporation would enable passengers to sue for breach of contract in the event that a carrier failed to adhere to its plan. We are proposing that this rule include public charter flights because the operating carrier is the party responsible for ensuring that charter passengers receive necessary and promised services. The rule would require each carrier to audit its own adherence to its plan annually and to make the results of its audits available for the Department's review for two years. At a minimum, each plan would have to address the same subjects as ATA's Customers First Customer Service Commitment (*http://www.airlines.org/customerservice/passengers/Customers_First.htm*): Offering the lowest fare available, notifying consumers of known delays, cancellations, and diversions, delivering baggage on time, allowing reservations to be held or cancelled, providing prompt ticket refunds, properly accommodating disabled and special-needs passengers, meeting customers' essential needs during long on-aircraft delays, handling ''bumped'' passengers in cases of oversales with fairness and consistency, disclosing travel itinerary, cancellation policies, frequent flyer rules, and aircraft configuration,

ensuring good customer service from code-share partners, and improving response to customer complaints. The provision on meeting customers' essential needs during long on-aircraft delays would be required at least to refer to the carrier's contingency plan for lengthy tarmac delays. Failure to do any of the above would be considered an unfair and deceptive practice within the meaning of 49 U.S.C. 41712 and subject to enforcement action.

In adopting this approach, we are tentatively rejecting consumers' arguments that the Department should set standards for the audits, review all audits, or even have them done by our IG. The comments do not persuade us that we are more qualified than the carriers to carry out audits. We are also tentatively rejecting carriers' arguments against requiring audits. We are concerned that some carriers may not be living up to their customer service commitments. By requiring the relevant carriers to adopt plans, incorporate them in their contracts of carriage, audit their own compliance, and make the results of their audits available for us to review, we intend to afford consumers better protection than they have experienced up to now. The plans would be enforceable not only by the Department under 49 U.S.C. 41712 but also by individual consumers or classes of consumers under state contract law. The auditing requirement should bring further pressure to bear on carriers to live up to their commitments. As in the case of the contingency plans for lengthy tarmac delays, we invite interested persons to comment on the implications of our creating a private right of action here, particularly potential benefits to passengers, potential negative consequences, and the costs to carriers. Would requiring incorporation lead to carriers' weakening their existing plans? We also invite those carriers that oppose self-auditing as unduly burdensome to provide evidence of the costs that they anticipate. We further invite comment on whether we should also require carriers to describe in their customer service plans the services they provide to mitigate passengers' inconvenience resulting from flight cancellations and missed connections and to specify whether they provide these services in all circumstances or only when the cancellations and missed connections have been within their control.

*8. Retroactive Applicability of Amendments to Contracts of Carriage*

Although we are not proposing specific regulatory language on amendments to contracts of carriage here, we are considering adopting a rule to prohibit carriers from retroactively applying any material amendment to their contracts of carriage with significant negative implications for consumers to people who have already bought tickets. We would like commenters to address the implications of a carrier's being held to different contract terms *vis-à-vis* different passengers on the same flight if some bought their tickets before the contract of carriage was amended and some afterwards.

*9. Effective Date*

We propose that any final rules that we adopt take effect 180 days after its publication in the **Federal Register**. We intend to afford carriers sufficient time to adopt their plans, modify their computer programs, and take other necessary steps to be able to comply with the new requirements before we begin enforcing them. We invite comments on whether 180 days is the appropriate interval for completing these changes.

**Regulatory Notices**

*A. Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures*

This action has been determined to be significant under Executive Order 12866 and the Department of Transportation's Regulatory Policies and Procedures. It has been reviewed by the Office of Management and Budget under that Order. A preliminary discussion of the proposed solutions to enhance airline passenger protections without creating undue burdens for the carriers is presented above and in the accompanying Regulatory Evaluation. On the cost side, we recognize that many of the measures suggested in this NPRM would impose costs for both implementation and operation on the entities that its proposed requirements would cover. The benefits we seek to achieve entail relieving consumers of the burdens they now face due to lengthy ground delays, chronically delayed flights, and other problems discussed in the NPRM. The benefits would be achieved by affording consumers significantly more information than they have now about delayed and cancelled flights and about how carriers will respond to their needs in the event of lengthy ground delays. Making this information accessible should not only alleviate consumers' difficulties during long delays but also enable them to make better-informed choices when booking flights. The Regulatory Evaluation has concluded that the benefits of the proposal appear to exceed its costs. A copy of the Regulatory Evaluation has been placed in the docket.

*B. Executive Order 13132 (Federalism)*

This Notice of Proposed Rulemaking has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (''Federalism''). This notice does not propose any regulation that has substantial direct effects on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. It does not propose any regulation that imposes substantial direct compliance costs on State and local governments. It does not propose any regulation that preempts state law, because states are already preempted from regulating in this area under the Airline Deregulation Act, 49 U.S.C. 41713. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

*C. Executive Order 13084*

This notice has been analyzed in accordance with the principles and criteria contained in Executive Order 13084 (''Consultation and Coordination with Indian Tribal Governments''). Because none of the options on which we are seeking comment would significantly or uniquely affect the communities of the Indian tribal governments or impose substantial direct compliance costs on them, the funding and consultation requirements of Executive Order 13084 do not apply.

*D. Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires an agency to review regulations to assess their impact on small entities unless the agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities. The regulatory initiatives discussed in this NPRM would have some impact on some small entities, as is discussed in the Regulatory Evaluation, but I certify that it would not have a significant economic impact on a substantial number of small entities. We invite comment to facilitate our assessment of the potential impact of these initiatives on small entities.

*E. Paperwork Reduction Act*

This NPRM proposes three new collections of information that would require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 49 U.S.C. 3501 *et seq.*)

Under the Paperwork Reduction Act, before an agency submits a proposed collection of information to OMB for approval, it must publish a document in the **Federal Register** providing notice of and a 60-day comment period on, and otherwise consult with members of the public and affected agencies concerning, each proposed collection of information.

This NPRM proposes three new collections of information. The first is a requirement that certificated and commuter air carriers that operate domestic scheduled passenger service using any aircraft with more than 30 passenger seats retain for two years the following information about any ground delay that either triggers their contingency plans for lengthy tarmac delays or lasts at least four hours: the length of the delay, the cause of the delay, and the actions taken to minimize hardships for passengers. The Department plans to use the information to investigate instances of long delays on the ground and to identify any trends and patterns that may develop. The second is a requirement that each air carrier that accounts for at least one percent of scheduled domestic passenger revenue audit its own adherence to its Customer Service Plan annually and retain the results for two years. The Department plans to review the audits to monitor carriers' compliance with their plans and take enforcement action when appropriate. The third is a requirement that each air carrier that accounts for at least one percent of scheduled domestic passenger revenue and maintains a web site display information on each listed flight's on-time performance for the previous month. This information will help consumers to select their flights.

For each of these information collections, the title, a description of the respondents, and an estimate of the annual recordkeeping and periodic reporting burden are set forth below:

1. *Requirement to retain for two years information about any ground delay that triggers the respondent's contingency plan for lengthy tarmac delays or lasts at least four hours.*

*Respondents:* Certificated and commuter air carriers that operate domestic scheduled passenger service using any aircraft with more than 30 passenger seats.

*Estimated Annual Burden on Respondents:* 0 to 9 hours and 50 minutes (570 minutes) per year for each respondent. The estimate was calculated by multiplying the estimated time to retain information about one ground delay (15 minutes) by the total number of ground delay incidents lasting at least four hours per respondent (0 to 38 incidents).

*Estimated Total Annual Burden:* A maximum of 73 hours and 35 minutes (4,401 minutes) for all respondents. The estimate was calculated by multiplying the estimated time to retain information about one ground delay (15 minutes) by the total number of ground delay incidents lasting at least four hours in calendar year 2007 for the reporting carriers (276) and adding the product of the estimated time to retain information about one ground delay (15 minutes) multiplied by 6.3 percent of the total number of ground delay incidents lasting at least four hours in calendar year 2007 for the reporting carriers (17.4). (The reporting carriers accounted for 93.7 percent of domestic scheduled passenger service, so we have assumed that nearly all of the remaining 6.3 percent was provided by other certificated and commuter carriers using aircraft with more than 30 passenger seats.)

*Frequency:* 0 to 38 ground delay information sets to retain per year for each respondent. (*N.b.* Some air carriers may not experience any ground delay incident of at least four hours in a given year, while some larger air carriers could experience as many as 38 in a given year according to data on ground delays in calendar year 2007.)

2. *Requirement that each covered carrier retain for two years the results of its annual self-audit of its compliance with its Customer Service Plan.*

*Respondents:* Every U.S. air carrier that accounts for at least one percent of scheduled domestic passenger revenue (18 carriers).

*Estimated Annual Burden on Respondents:* 15 minutes per year for each respondent. The estimate was calculated by multiplying the estimated time to retain a copy of the carrier's self-audit of its compliance with its Customer Service Plan by the number of audits per carrier in a given year (1).

*Estimated Total Annual Burden:* A maximum of 4 hours and 30 minutes (270 minutes) for all respondents. The estimate was calculated by multiplying the time in a given year for each carrier to retain a copy of its self-audit of its compliance with its Customer Service Plan (15 minutes) by the total number of covered carriers (18).

*Frequency:* One information set to retain per year for each respondent.

3. *Requirement that each covered carrier display on its Web site, at a point before the consumer selects a flight for purchase, the following information for each listed flight regarding its on-time performance during the last reported month: the percentage of arrivals that were on time (with special highlighting if the flight was late more than 50 percent of the time), the percentage of arrivals that were more than 30 minutes late, and the percentage of flight cancellations.*

*Respondents:* Every U.S. carrier that accounts for at least one percent of scheduled passenger revenue, maintains a Web site, and is not already displaying the required information (15 carriers).

*Estimated Annual Burden on Respondents:* 623 hours (37,380 minutes) in the first year and no more than 12 hours (720 minutes) in subsequent years for each respondent. The estimate for the first year was calculated by adding the estimated number of hours per respondent for developing its Web site for data posting (611 hours [36,660 minutes], the quotient of a one-time programming cost of $20,000 divided by $32.73, the median hourly wage for computer programmers) to the estimated number of hours for management of data links (12 hours [720 minutes], estimated at one hour per month).

*Estimated total annual burden:* 9,345 hours (560,700 minutes) in the first year and no more than 180 hours (10,800 minutes) in subsequent years for all respondents. The estimate for the first year was calculated by multiplying the number of hours per respondent for developing its Web site for data posting (611 hours) by the number of covered carriers (15) and adding the product of the number of hours per year for management of data links (12) and the number of covered carriers (15). The estimate for subsequent years was calculated by multiplying the number of hours per year for management of data links (12) by the number of covered carriers (12).

*Frequency:* Development of Web site for data posting: 1 time for each respondent. Updating information for each flight listed on Web site: 12 times per year (1 time per month) for each respondent.

The Department invites interested persons to submit comments on any aspect of each of these two information collections, including the following: (1) The necessity and utility of the information collection, (2) the accuracy of the estimate of the burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) ways to minimize the burden of collection without reducing the quality of the collected information. Comments submitted in response to this notice will be summarized or included, or both, in the request for OMB approval of these information collections.

*F. Unfunded Mandates Reform Act*

The Department has determined that the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply to this notice.

**List of Subjects:**

*14 CFR Parts 234 and 259*

Air carriers, Consumer protection, Reporting and recordkeeping requirements.

*14 CFR Part 399*

Administrative practice and procedure, Air carriers, Air rates and fares, Air taxis, Consumer protection, Small business.

For the reasons set forth in the preamble, the Department proposes to amend title 14, chapter II, subchapters A and F as follows:

## PART 234—[AMENDED]

1. The authority citation for part 234 continues to read as follows:

**Authority:** 49 U.S.C. 329 and chapters 401 and 417.

2. Section 234.11 is revised to read as follows:

### § 234.11 Disclosure to consumers.

(a) During the course of reservations or ticketing discussions or transactions, or inquiries about flights, between a carrier's employees and the public, the carrier shall disclose upon reasonable request the on-time performance code for any flight that has been assigned a code pursuant to this part.

(b) For each flight for which schedule information is available on its Web site, a reporting carrier shall display the following information regarding the flight's performance during the most recent calendar month for which the carrier has reported on-time performance data to the Department: the percentage of arrivals that were on time—*i.e.*, within 15 minutes of scheduled arrival time (including special highlighting if the flight was late more than 50 percent of the time), the percentage of arrivals that were more than 30 minutes late, and the percentage of flight cancellations. The information may be provided in either of the following ways:

(1) By showing the percentage of on-time arrivals on the initial listing of flights and disclosing the remaining information on a later page at some stage before the consumer buys a ticket, or

(2) By showing all of the required information via a hyperlink on the page with the initial listing of flights.

(c) Each carrier shall load the information whose disclosure is required under paragraphs (a) and (b) of this section into its internal reservation system between the 20th and 23rd days of the month after the month for which the information is being provided.

3. A new part 259 is added to read as follows:

## PART 259—ENHANCED PROTECTIONS FOR AIRLINE PASSENGERS

Sec.
259.1 Purpose.
259.2 Applicability.
259.3 Definitions.
259.4 Contingency plan for lengthy tarmac delays.
259.5 Customer service plan.
295.6 Contract of carriage.
259.7 Response to consumer problems.

**Authority:** 49 U.S.C. 40101(a)(4), 40101(a)(9), 40113(a), 41702, and 41712.

### § 259.1 Purpose.

The purpose of this part is to mitigate hardships for airline passengers during lengthy tarmac delays and otherwise to bolster air carriers' accountability to consumers.

### § 259.2 Applicability.

This rule applies to all certificated and commuter air carriers that operate domestic scheduled passenger service or public charter service using any aircraft with a design capacity of more than 30 passenger seats, with the following exceptions:

(a) Section 259.5 only applies to U.S. air carriers that account for at least one percent of domestic scheduled passenger revenue, and

(b) Section 295.7 does not apply to charter service.

### § 259.3. Definitions.

(a) *Certificated air carrier* means a U.S. direct air carrier that holds a certificate issued under 49 U.S.C. 41102 to operate passenger service and/or cargo and mail service or an exemption from 49 U.S.C. 41102.

(b) *Commuter air carrier* means an air carrier as established by 14 CFR 298.3(b) that carries passengers on at least five round trips per week on at least one route between two or more points according to published flight schedules and uses small aircraft.

(c) *Large hub airport* means an airport that accounts for at least 1.00 percent of the total enplanements in the United States.

(d) *Medium hub airport* means an airport accounting for at least 0.25 percent but less than 1.00 percent of the total enplanements in the United States.

(e) *Small aircraft* means any aircraft originally designed to have a maximum passenger capacity of up to 60 seats.

(f) *Tarmac delay* means the holding of an aircraft on the ground either before taking off or after landing with no opportunity for its passengers to deplane.

### § 259.4 Contingency plan for lengthy tarmac delays.

(a) *Adoption of plan.* Each certificated air carrier and each commuter air carrier that operates scheduled domestic passenger service using any aircraft with a design capacity of more than 30 seats shall adopt a contingency plan for lengthy tarmac delays for its scheduled and public charter flights and shall adhere to this plan's terms.

(b) *Contents of plan.* Each contingency plan for lengthy tarmac delays shall include, at a minimum, the following:

(1) Assurance of the maximum amount of time that the air carrier will permit the aircraft to remain on the tarmac before proceeding to a gate and allowing passengers to deplane,

(2) Assurance of adequate food, water, and lavatory facilities, as well as medical attention if needed, while the aircraft remains on the tarmac,

(3) The amount of time on the tarmac that triggers the provision of the services enumerated in paragraph (b)(2) of this section,

(4) Assurance of sufficient resources to implement the plan, and

(5) Assurance that the plan has been coordinated with airport authorities at all medium and large hub airports that the carrier serves.

(c) *Amendment of plan.* At any time, an air carrier may amend its contingency plan for lengthy tarmac delays to decrease the time intervals covered in paragraphs (b)(1) and (b)(3) of this section. An air carrier may also amend its plan to increase these intervals, in which case the amended plan shall apply only to those flights that are first offered for sale after the plan's amendment.

(d) *Retention of records.* Each air carrier that is required to adopt a contingency plan for lengthy tarmac delays shall retain for two years the following information about any on-ground delay that either triggers its contingency plan or lasts at least four hours:

(1) The length of the delay,

(2) The cause of the delay, and

(3) The actions taken to minimize hardships for passengers, including the provision of food and water, the maintenance and servicing of lavatories, and medical assistance.

**§ 259.5 Customer service plan.**

(a) *Adoption of plan.* Each U.S. air carrier that accounts for at least one percent of scheduled domestic passenger revenue shall adopt a customer service plan for its scheduled flights and any public charter flights that it sells directly to the public and shall adhere to this plan's terms.

(b) *Contents of plan.* Each customer service plan shall, at a minimum, address the following subjects:

(1) Offering the lowest fare available,

(2) Notifying consumers of known delays, cancellations, and diversions,

(3) Delivering baggage on time,

(4) Allowing reservations to be held or cancelled without penalty for a defined amount of time,

(5) Providing prompt ticket refunds,

(6) Properly accommodating disabled and special-needs passengers (At a minimum, this provision must refer to the air carrier's contingency plan for lengthy tarmac delays.),

(7) Meeting customers' essential needs during long on-aircraft delays,

(8) In the case of oversales, handling ''bumped'' passengers with fairness and consistency,

(9) Disclosing travel itinerary, cancellation policies, frequent flyer rules, and aircraft configuration,

(10) Ensuring good customer service from code-share partners, and

(11) Improving response to customer complaints.

(c) *Self-auditing of plan and retention of records.* Each air carrier that is required to adopt a customer service plan shall audit its own adherence to its plan annually and shall make the results of its audits available for the Department's review upon request for two years.

**§ 259.6 Contract of Carriage.**

(a) Each air carrier that is required to adopt a contingency plan for lengthy tarmac delays shall incorporate this plan into its contract of carriage.

(b) Each air carrier that is required to adopt a customer service plan shall incorporate this plan in its contract of carriage.

(c) Each air carrier that has a Web site shall post its entire contract of carriage on this site.

**§ 259.7 Response to consumer problems.**

(a) *Designated advocates for passengers' interests.* Each certificated air carrier and each commuter air carrier that operates scheduled domestic passenger service using any aircraft with a design capacity of more than 30 passenger seats shall designate an employee at its system operations center and at each airport dispatch center who shall be responsible for monitoring the effects of flight delays, flight cancellations, and lengthy tarmac delays on passengers. This employee shall have input into decisions on which flights to cancel and which to delay the longest.

(b) *Informing consumers how to complain.* Each certificated air carrier and each commuter air carrier that operates scheduled domestic passenger service using any aircraft with more than 30 passenger seats shall provide the name, address, telephone number, and e-mail or web-mail address of the person with whom or the office with which to file a complaint on its Web site, on all e-ticket confirmations, and, upon request, at each ticket counter and gate.

(c) *Response to complaints.* Each certificated air carrier and each commuter carrier that operates scheduled domestic passenger service using any aircraft with a design capacity of more than 30 passenger seats shall acknowledge receipt of each complaint to the complainant within 30 days of receiving it and shall send a substantive response within 60 days of receiving it.

## PART 399—[AMENDED]

4. The authority citation for part 399 continues to read as follows:

**Authority:** 49 U.S.C. 40101 *et seq.*

5. Section 399.81 is revised to read as follows:

**§ 399.81 Unrealistic or deceptive scheduling.**

(a) It is the policy of the Department to consider unrealistic scheduling of flights by any air carrier providing scheduled passenger air transportation to be an unfair or deceptive practice and an unfair method of competition within the meaning of 49 U.S.C. 41712.

(b) With respect to the advertising of schedule performance, it is the policy of the Department to regard as an unfair or deceptive practice or an unfair method of competition the use of any figures purporting to reflect schedule or on-time performance without indicating the basis of the calculation, the time period involved, and the pairs of points or the percentage of systemwide operations thereby represented and whether the figures include all scheduled flights or only scheduled flights actually performed.

(c) *Chronically delayed flights.*

(1) This paragraph applies to each U.S. direct air carrier that holds a certificate issued under 49 U.S.C. 41102 to operate passenger service and/or cargo and mail service and that accounts for at least one percent of domestic scheduled passenger revenue.

(2) It is the policy of the Department to consider any domestic flight that is operated at least 30 times in a calendar quarter and arrives more than 15 minutes late or is cancelled more than 70 percent of the time during that quarter to be chronically delayed.

(3) For purposes of this paragraph, the Department considers all flights in a given city-pair market whose scheduled departure times are within 30 minutes of the most frequently occurring scheduled departure time to be one single flight.

(4) It is the policy of the Department to consider any flight that is chronically delayed for three consecutive calendar quarters to be unrealistic or deceptive scheduling within the meaning of paragraph (a) of this section.

Issued this 17th, day of November 2008, at Washington, DC.

**Michael W. Reynolds,**

*Acting Assistant Secretary for Aviation and International Affairs.*

[FR Doc. E8–28527 Filed 12–5–08; 8:45 am]

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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.*

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**H.R. 2040/P.L. 110–451**

Civil Rights Act of 1964 Commemorative Coin Act (Dec. 2, 2008; 122 Stat. 5021)

**S. 602/P.L. 110–452**

Child Safe Viewing Act of 2007 (Dec. 2, 2008; 122 Stat. 5025)

**S. 1193/P.L. 110–453**

To direct the Secretary of the Interior to take into trust 2 parcels of Federal land for the benefit of certain Indian Pueblos in the State of New Mexico, and for other purposes. (Dec. 2, 2008; 122 Stat. 5027)

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| 200–699 | (869–064–00115–3) | 53.00 | July 1, 2008 |
| 700–End | (869–064–00116–1) | 61.00 | July 1, 2008 |
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| **33 Parts:** | | | |
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| 200–End | (869–064–00128–5) | 60.00 | July 1, 2008 |
| **34 Parts:** | | | |
| 1–299 | (869–064–00129–3) | 53.00 | July 1, 2008 |
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| 400–End & 35 | (869–064–00131–5) | 64.00 | July 1, 2008 |
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| 300–End | (869–064–00134–0) | 64.00 | July 1, 2008 |
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| 50–51 | (869–064–00140–4) | 48.00 | July 1, 2008 |
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| 63 (63.600–63.1199) | (869–064–00148–0) | 50.00 | [8] July 1, 2008 |
| 63 (63.1200–63.1439) | (869–064–00149–8) | 53.00 | July 1, 2008 |
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| 63 (63.8980–End) | (869–064–00152–8) | 38.00 | July 1, 2008 |
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| 1, 1–11 to Appendix, 2 (2 Reserved) | | 13.00 | [3] July 1, 1984 |
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| 8 | | 4.50 | [3] July 1, 1984 |
| 9 | | 13.00 | [3] July 1, 1984 |
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| 18, Vol. I, Parts 1–5 | | 13.00 | [3] July 1, 1984 |
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| **47 Parts:** | | | |
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[1] Because Title 3 is an annual compilation, this volume and all previous volumes should be retained as a permanent reference source.

[2] The July 1, 1985 edition of 32 CFR Parts 1–189 contains a note only for Parts 1–39 inclusive. For the full text of the Defense Acquisition Regulations in Parts 1–39, consult the three CFR volumes issued as of July 1, 1984, containing those parts.

[3] The July 1, 1985 edition of 41 CFR Chapters 1–100 contains a note only for Chapters 1 to 49 inclusive. For the full text of procurement regulations in Chapters 1 to 49, consult the eleven CFR volumes issued as of July 1, 1984 containing those chapters.

[4] No amendments to this volume were promulgated during the period January 1, 2005, through January 1, 2006. The CFR volume issued as of January 1, 2005 should be retained.

[5] No amendments to this volume were promulgated during the period April 1, 2000, through April 1, 2007. The CFR volume issued as of April 1, 2000 should be retained.

[6] No amendments to this volume were promulgated during the period April 1, 2006 through April 1, 2007. The CFR volume issued as of April 1, 2006 should be retained.

[7] No amendments to this volume were promulgated during the period July 1, 2006, through July 1, 2007. The CFR volume issued as of July 1, 2006 should be retained.

[8] No amendments to this volume were promulgated during the period July 1, 2007, through July 1, 2008. The CFR volume issued as of July 1, 2007 should be retained.

[9] No amendments to this volume were promulgated during the period October 1, 2005, through October 1, 2007. The CFR volume issued as of October 1, 2005 should be retained.

[10] No amendments to this volume were promulgated during the period October 1, 2006, through October 1, 2007. The CFR volume issued as of October 1, 2006 should be retained.