12–19–08 Friday
Vol. 73 No. 245 Dec. 19, 2008

Pages 77473–78148

# Federal Register

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WHEN: Tuesday, January 27, 2009
9:00 a.m.–12:30 p.m.

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

RESERVATIONS: (202) 741–6008

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## DEPARTMENT OF HOMELAND SECURITY

### 8 CFR Parts 215 and 235

**[DHS–2005–0037]**

**RIN 1601–AA35; RIN 1600–AA00**

## United States Visitor and Immigrant Status Indicator Technology Program (''US–VISIT''); Enrollment of Additional Aliens in US–VISIT; Authority To Collect Biometric Data From Additional Travelers and Expansion to the 50 Most Highly Trafficked Land Border Ports of Entry

**AGENCY:** National Protection and Programs Directorate, DHS.

**ACTION:** Final rule.

**SUMMARY:** The Department of Homeland Security (DHS) established the United States Visitor and Immigrant Status Indicator Technology Program (US–VISIT) in 2003 to verify the identities and travel documents of aliens. Aliens subject to US–VISIT may be required to provide fingerscans, photographs, or other biometric identifiers upon arrival at the United States. Currently, aliens arriving at a United States port of entry with a nonimmigrant visa, or those traveling without a visa as part of the Visa Waiver Program, are subject to US–VISIT requirements with certain limited exceptions. This final rule expands the population of aliens who will be subject to US–VISIT requirements to nearly all aliens, including lawful permanent residents. Exceptions include Canadian citizens seeking short-term admission for business or pleasure under B visas and individuals traveling on A and G visas, among others.

On August 31, 2004, the Department promulgated an interim final rule that expanded the US–VISIT program to include aliens seeking admission under the Visa Waiver Program and travelers arriving at designated land border ports of entry. This rule also finalizes that interim final rule and addresses public comments received during that rulemaking action.

**DATES:** This final rule is effective January 18, 2009.

**FOR FURTHER INFORMATION, CONTACT:** Helen deThomas, Senior Policy Analyst, US–VISIT, Department of Homeland Security, 1616 Fort Myer Drive, 18th Floor, Arlington, Virginia 22209, (202) 298–5200.

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## I. Background

### *A. Program Development*

The Department of Homeland Security (DHS) established the United States Visitor and Immigrant Status Indicator Technology Program (US–VISIT) in accordance with several statutory mandates that collectively require DHS to create an integrated, automated biometric entry and exit system that records the arrival and departure of aliens; biometrically compares the identities of aliens; and authenticates travel documents presented by such aliens through the comparison of biometric identifiers. Aliens subject to US–VISIT may be required to provide fingerscans, photographs, or other biometric identifiers upon arrival in, or departure from, the United States. DHS views US–VISIT as a biometrically-driven program designed to enhance the security of United States citizens and visitors, while expediting legitimate travel and trade, ensuring the integrity of the immigration system, and protecting the privacy of our visitors' personal information.

The statutes that authorize DHS to establish US–VISIT include, but are not limited to:

- Section 2(a) of the Immigration and Naturalization Service Data Management Improvement Act of 2000 (DMIA), Public Law 106–215, 114 Stat. 337 (June 15, 2000);
- Section 205 of the Visa Waiver Permanent Program Act of 2000, Public Law 106–396, 114 Stat. 1637, 1641 (Oct. 30, 2000);
- Section 414 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Public Law 107–56, 115 Stat. 271, 353 (Oct. 26, 2001);
- Section 302 of the Enhanced Border Security and Visa Entry Reform Act of

2002 (Border Security Act) Public Law 107–173, 116 Stat. 543, 552 (May 14, 2002);

• Section 7208 of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Public Law 108–458, 118 Stat. 3638, 3817 (December 17, 2004); and

• Section 711 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Public Law 110–52, 121 Stat. 266 (Aug. 3, 2007).

DHS provided detailed abstracts of the particular sections of the statutes that established and authorized the US–VISIT program in prior rulemakings and the proposed rule. *See* 69 FR 468 (Jan. 5, 2004); 69 FR 53318 (Aug. 31, 2004); 71 FR 42605 (July 27, 2006); 73 FR 22065 (Apr. 24, 2008).

On January 5, 2004, DHS implemented the first phase of the US–VISIT biometric component by publishing an interim final rule in the **Federal Register** providing that aliens seeking admission into the United States through nonimmigrant visas must provide fingerprints, photographs, or other biometric identifiers upon arrival in, or departure from, the United States at air and sea ports of entry. 69 FR 468 (Jan. 5, 2004). Effective September 30, 2004, nonimmigrants seeking to enter the United States without visas under the Visa Waiver Program (VWP) [1] also are required to provide biometric information to US–VISIT. 69 FR 53318 (Aug. 31, 2004). US–VISIT is now operational for entry at 115 airports, 15 seaports, and 154 land border ports of entry. The following categories of aliens currently are expressly exempt from US–VISIT requirements by DHS regulations:

• Aliens admitted on an A–1, A–2, C–3 (except for attendants, servants, or personal employees of accredited officials), G–1, G–2, G–3, G–4, NATO–1, NATO–2, NATO–3, NATO–4, NATO–5, or NATO–6 visa;

• Children under the age of 14;

• Persons over the age of 79;

• Taiwan officials admitted on an E–1 visa and members of their immediate families admitted on E–1 visas.

[1] Pursuant to section 217 of the Immigration and Nationality Act (INA), 8 U.S.C. 1187, the Secretary of Homeland Security (the Secretary), in consultation with the Secretary of State, may designate certain countries as Visa Waiver Program (VWP) countries if certain requirements are met. Citizens and eligible nationals of VWP countries may apply for admission to the United States at a U.S. port of entry as nonimmigrant aliens for a period of ninety (90) days or less for business or pleasure without first obtaining a nonimmigrant visa, provided that they are otherwise eligible for admission under applicable statutory and regulatory requirements. The list of countries which currently are eligible to participate in VWP is set forth in 8 CFR 217.2(a).

8 CFR 235.1(f)(1)(iv).[2] In addition, the Secretary of State and Secretary of Homeland Security may jointly exempt classes of aliens from US–VISIT. The Secretaries of State and Homeland Security, as well as the Director of the Central Intelligence Agency, also may exempt any individual from US–VISIT. 8 CFR 235.1(f)(1)(iv)(B).

*B. Program Operation*

The US–VISIT program, through U.S. Customs and Border Protection (CBP) officers, collects biometrics (digital fingerprints and photographs) from aliens seeking admission to the United States. 73 FR 22066. The US–VISIT program also receives biometric data collected by Department of State (DOS) consular offices in the visa application process. DHS checks biometric data on those applying for admission to the United States against government databases to identify suspected terrorists, known criminals, or individuals who have previously violated U.S. immigration laws. These procedures assist DHS in determining whether an alien seeking to enter the United States is, in fact, admissible to the United States under existing law. Biometric data collected by US–VISIT assists DOS consular officers in the verification of the identity of a visa applicant and the determination of the applicant's eligibility for a visa. DHS's ability to establish and verify the identity of an alien and to determine whether that alien is admissible to the United States is critical to the security of the United States and the enforcement of the laws of the United States. By linking the alien's biometric information with the alien's travel documents, DHS reduces the likelihood that another individual could assume the identity of an alien already recorded in US–VISIT or use an existing recorded identity to gain admission to the United States.

From its inception on January 5, 2004 to the present, US–VISIT has biometrically screened more than 130 million aliens at the time they applied for admission to the United States. DHS has taken adverse action against more than 3,800 aliens based on information obtained through the US–VISIT biometric screening process. By ''adverse action,'' DHS means that the alien was:

• Arrested pursuant to a criminal arrest warrant;

[2] Effective January 23, 2007, 8 CFR 235(d)(1)(iv) was redesignated as 8 CFR 235.1(f)(1)(iv). 71 FR 68412 (Nov. 24, 2006).

• Denied admission, placed in expedited removal, or returned to the country of last departure; or

• Otherwise detained and denied admission to the United States.

In addition, by quickly verifying identity and validity of documents, US–VISIT has expedited the travel of millions of legitimate entrants. Expanding the population of aliens required subject to US–VISIT requirements will allow DHS to identify additional aliens who are inadmissible or who otherwise may present security and criminal threats, including those who may be traveling improperly on previously established identities.

*C. Notice of Proposed Rulemaking*

On July 27, 2006, DHS published a notice of proposed rulemaking (NPRM or proposed rule) proposing to expand the population of aliens subject to US–VISIT requirements. The NPRM proposed to require enrollment of any alien in US–VISIT, with the exception of those Canadian citizens applying for admission as B–1/B–2 visitors for business or pleasure, and those specifically exempted under DHS regulations. Under the proposed rule, the following classes of aliens, among others, would become subject to US–VISIT requirements:

• Lawful Permanent Residents (LPRs). [3]

• Aliens seeking admission on immigrant visas.

• Refugees and asylees.

• Certain Canadian citizens who receive a Form I–94 at inspection or who require a waiver of inadmissibility.

• Aliens paroled into the United States.

• Aliens applying for admission under the Guam Visa Waiver Program.

DHS received 69 comments on the 2004 interim final rule during the 30-day notice and comment period. DHS has considered the comments received in the development of this final rule. This final rule adopts the proposed rule without change.

This rule also addresses comments received on the August 31, 2004, interim final rule and finalizes that rule. For ease of reference, DHS responds separately to the comments submitted on the interim rule and the proposed rule.

[3] The authorizing statutes, which all refer to ''aliens'' without differentiation, support the inclusion of lawful permanent residents (LPRs) into the US–VISIT program. See section 101(a)(3) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. 1101(a)(3) (''The term 'alien' means any person not a citizen or national of the United States'').

**II. Comments on the Notice of Proposed Rulemaking**

DHS received 71 comments on the July 27, 2006, notice of proposed rulemaking. Some comments were positive, while other comments were negative or asked that the regulation be withdrawn. The comments raised a number of issues, including the relationship with other DHS initiatives, suggesting that US–VISIT should not proceed until other initiatives have been completed. One commenter noted that there have been several GAO reports that have been critical of US–VISIT and DHS has addressed those concerns as discussed in the published reports. DHS continues to address all of these concerns and recommendations as US–VISIT is developed. The most common issue raised by the comments was the inclusion of lawful permanent residents (LPRs) in US–VISIT enrollment and verification.

Some comments were very general, such as those suggesting that DHS concentrate on removing illegal aliens present in the United States. DHS believes that US–VISIT plays an important role in preventing illegal immigration in the first place by requiring biometric information from travelers seeking to enter the United States. DHS continues to concentrate on intercepting aliens who are in the United States without authorization. These priorities do not conflict.

Similarly, a commenter asked how DHS is benchmarking or measuring the success of US–VISIT. DHS provides performance measures to the Executive Office of the President and to the Office of Management and Budget (OMB) using OMB's Program Assessment Rating Tool (PART). Some of the factors included in the Fiscal Year (FY) 2006 PART assessment were: Cumulative and annual percentage baseline cost and schedule overrun on US–VISIT Increment Development and Deployment, Reduction in Review Time for Privacy Redress, Ratio of Adverse Actions to Total Biometric Watch List Hits at Ports of Entry, Percentage of Exit Records Matched to Entry Records, and other factors. OMB rated US–VISIT as ''moderately effective.'' DHS accepts OMB's view on these performance measures and is taking steps to achieve better results. The comment, however, does not raise issues relating to the proposed rule.

*A. Status of LPRs in US–VISIT*

1. Past Security Checks

Thirty-two commenters urged that LPRs be exempt from US–VISIT, based on their status as LPRs, because they have previously been subject to significant security checks in order to obtain LPR status. Similarly, some commenters stated that there is no evidence that LPRs pose a threat to the level that they ''should be grouped with'' nonimmigrants who are subject to US–VISIT. One commenter stated that DHS has a flawed process in that it is willing to trust in an LPR's first use of US–VISIT for initial capture of fingerprints, rather than compare against the records captured during the initial adjustment of status process.

DHS agrees that LPRs receive an extensive background check to become LPRs, including a criminal background check using the applicant's fingerprints. United States Citizenship and Immigration Services (USCIS) conducts an extensive investigation prior to granting adjustment of status to that of an LPR, and the DOS undertakes significant investigation of an alien applying for an immigrant visa. Also, DHS agrees that there is not necessarily evidence to support the notion that LPRs—as a class—pose risks not posed by nonimmigrants—as a class.

DHS does not, however, believe that this point is entirely relevant for the purposes of this rule for several significant reasons. DHS and DOJ continue to uncover significant immigration document fraud, particularly in relation to permanent resident cards (Form I–551). Common examples include giving or selling a permanent resident card to someone else, altering a lost permanent resident card, and using a fraudulently created permanent resident card. DHS has substantially increased the security features on permanent resident cards in recent years, but security features are not foolproof.

The Immigration and Naturalization Service (INS), predecessor to a number of DHS functions, issued resident alien cards without expiration dates until 1989. Permanent resident cards issued after 1989 are valid only for ten years. Additionally, INS upgraded the Form I–551 significantly, including more secure features, in September 1997. 62 FR 44146 (Aug. 19, 1997). Many LPRs possess permanent resident cards that have limited security features and no expiration date. Trafficking in these cards is inhibited by the fact that the card must appear to be aged to the date of its issue, but otherwise these cards provide limited security from assumed identity. DHS is taking steps to recall all such cards. 72 FR 46922 (Aug. 22, 2007).

Including LPRs within the scope of US–VISIT processing will enable DHS to detect, deter, and act against those who attempt fraud through the biometric match of the person presenting the Form I–551 against the record of the person to whom that card was issued. Accordingly, the inclusion of LPRs within US–VISIT is consistent with other security programs initiated by DHS.

LPRs are still subject to entry, documentation, and removability requirements to the United States. LPRs are aliens. *See* sections 101, 212, 237 of the INA (8 U.S.C. 1101, 1182, 1227) and 8 CFR 235.1(b), (f)(1)(i). Although LPRs are not technically regarded as seeking admission to the United States if they are returning from a stay of less than 180 days under section 101(a)(13)(C)(ii) of the INA (8 U.S.C. 1101(a)(13)(C)(ii)), they remain subject to the admissibility requirements of section 212 of the INA (8 U.S.C. 1182) because of their status as an alien and not a United States citizen. Accordingly, DHS must determine whether an LPR is admissible to the United States whenever the LPR arrives at a port of entry, as well as determine whether an LPR is removable from the United States based on intervening facts since the time LPR status was granted, and initial background checks conducted, which may have been many years ago. US–VISIT enables DHS to determine if an LPR seeking entry has been convicted of any crime that would render him or her subject to removal from the United States. In addition, DHS is concerned about attempts by terrorist and transnational criminal organizations to recruit LPRs, who are perceived to be subject to less scrutiny in travel. *See* section 101(a)(13)(C)(v) of the INA (8 U.S.C. 1101(a)(13)(C)(v). Accordingly, the processing of LPRs through US–VISIT serves an important purpose: Identifying aliens who pose a security risk, have a disqualifying criminal or immigration violation, or are otherwise inadmissible at the time that they present themselves for entry into the United States as LPRs.

DHS compares the fingerprints collected as part of the adjustment of status or immigrant visa process with the fingerscans of the LPR seeking entry, when those fingerprints are available in DHS's Automated Biometric Identification System (IDENT). The addition of data from adjustment of status and immigrant visa applications to the IDENT system will substantially reduce the initial enrollment of LPRs, but LPRs, as aliens, should be enrolled in US–VISIT.

Finally, the statutes underlying the development of US–VISIT have never distinguished between immigrants and nonimmigrants. For the purpose of data collection and biometric comparison,

the law requires the collection of data from all aliens.

2. Relationship to United States Citizens

Five commenters suggested that LPRs should not be subject to US–VISIT because they are so similar to United States citizens, and United States citizens are not subject to US–VISIT by the terms of this rule. DHS does not agree that the difference between an LPR and a United States citizen is minor. The INA defines the term ''alien'' as ''any person not a citizen or national of the United States.'' See section 101(a)(3) of the INA (8 U.S.C. 1101(a)(3)).

Similarly, some commenters suggested that the distinction between LPRs and United States citizens in terms of US–VISIT processing should be ''all or nothing.'' In other words, these commenters stated that either both LPRs and United States citizens should be subject to US–VISIT, or neither should. Generally, these comments tend to suggest that passports are just as likely to be used fraudulently as permanent resident cards and that there are no significant legal differences between LPRs and United States citizens. A corollary argument was made by other commenters: DHS should increase significantly the security features of the Form I–551 in order to make them equivalent to passports in terms of security.

As a legal matter, LPRs, although allowed to stay and work in the United States permanently, are still ''aliens'' and subject to immigration law. Unlike United States citizens,

- The status of LPRs can be rescinded under section 246 of the INA (8 U.S.C. 1256) and LPRs can be removed from the United States under section 237 of the INA (8 U.S.C. 1227); [4]
- LPRs are required to acquire and carry evidence of their status (Form I–551) and replace it when it is lost or expires under section 264 of the INA (8 U.S.C. 1304) and 8 CFR 264.5(b);
- LPRs must present specific documentation as a condition for admission and re-admission to the United States under section 211 of the INA (8 U.S.C. 1181) and 8 CFR 211.1(a);
- LPRs must notify DHS of each change of address and new address within ten days of the date of the change of address under section 265(a) of the INA (8 U.S.C. 1305(a)) and 8 CFR 265.1;
- LPRs may be deemed to have abandoned their status when outside of the United States for more than one year, unless they obtain a re-entry permit, in line with the documentary requirements at 8 CFR 211.1(a) and (b)(3); and
- LPRs must apply for naturalization to obtain citizenship, demonstrating good moral character and at least five years of continuous residence under section 316 of the INA (8 U.S.C. 1427), as well as an understanding of the English language and a knowledge and understanding of the fundamentals of the history and of the principles and form of government of the United States under section 312 of the INA (8 U.S.C. 1423).

These requirements, and others, clearly differentiate LPRs from United States citizens. Moreover, LPR status does not grant an alien a variety of benefits accorded to a citizen of the United States, including the most fundamental right to vote for federally elected officials. *See* 18 U.S.C. 611 (criminal penalties for alien voting). Aliens, whether immigrants or nonimmigrants, may not serve on a federal jury. *See* 28 U.S.C. 1861 (declaration of policy that citizens sit on juries), 1862 (discrimination against citizens on account of race, color, religion, sex, national origin, or economic status prohibited for jury service), 1865(b)(1) (requirement of citizenship for jury service); 18 U.S.C. 243 (discrimination on basis of race or color against citizens prohibited in jury selection). Accordingly, obtaining LPR status is not equivalent to citizenship and DHS is not constrained to treat aliens in LPR status and citizens alike.

Finally, DHS has a specific and unique responsibility with respect to ensuring that LPRs comply with the requirements of their status. DHS does not accept the argument that LPR status is so equivalent to United States citizenship that US–VISIT processing must be the same or similar for both. DHS recognizes that most LPRs do not pose a threat to the United States and do not commit crimes that would subject them to removal, and has accommodated the free flow of travel by LPRs by instructing them to seek inspection at airports by joining the ''United States Citizen'' inspection line. This accommodation does not mean that LPRs are, or will otherwise be treated as, United States citizens.

DHS is taking steps to improve the security of permanent resident cards, but that does not necessarily mean that they should remain exempt from contemporaneous biometric identification under US–VISIT. As noted above, DHS has proposed to invalidate all permanent resident cards without an expiration date; this action will facilitate upgrading card security and evidence of LPR status legitimacy and security. 72 FR 46922 (Aug. 22, 2007). US–VISIT is only one step in the ongoing efforts by DHS to improve the security of the United States and enforce the immigration laws of the United States.

DHS believes that US–VISIT creates better protections against the fraudulent use of immigration documentation than does mere document examination, and does so in a way that is cost-effective. Using US–VISIT, a CBP officer can match an LPR's biometric features against a database where those features are stored based on the processing done to obtain the benefit of LPR status (either an immigrant visa or an adjustment of status application). This greatly diminishes the possibility that a Form I–551 can be used fraudulently to obtain entry to the United States because there is an automated comparison to the biometric characteristics and an examination of the card itself. Thus, the security features on the Form I–551 itself are extremely helpful, but it is the biometric checks that provide the best security against immigration fraud, as this also prevents legitimate cards from being used by those to whom a card was not issued. DHS believes that because it has the biometric data collected for LPRs and the capability to technically, quickly, and easily compare those data to a person seeking to enter a port of entry, DHS has a responsibility to use those data to ensure that the person seeking admission is using his or her documentation legitimately.

3. Relationship to Canadian Citizens

Twelve commenters suggested that it was unfair to exempt Canadian tourists from US–VISIT, but require LPRs to be enrolled and processed by US–VISIT. Another commenter opposed LPR enrollment in US–VISIT, but supported the enrollment of all Canadian citizens regardless of the purpose of their trip to the United States.

DHS understands that the ''staged'' implementation of US–VISIT can carry the perception of unfairness. However, the distinction between LPRs and Canadian temporary visitors is not based on the notion that one is inherently more of a ''threat'' than the other. Logistical difficulties in implementation of biometric checks at primary inspection in the land border environment and foreign policy issues govern the continued exemption of

[4] Even after an LPR is naturalized as a United States citizen, such naturalization can be revoked under section 340 of the INA (8 U.S.C. 1451). [Suggest adding language to make clear there are very limited bases for revocation. Otherwise, this may be misleading.]

Canadians visitors for business or pleasure for the time being.

All LPRs and Canadians arriving at land border ports of entry are treated the same—those who are sent to secondary inspection are processed through US–VISIT; those who are inspected at primary inspection are not. Aliens requiring a Form I–94 (select Canadians, in this case) will actually be referred to secondary inspection more often than LPRs, because they must secure a new Form I–94, in most cases, every six to eight months in addition to those instances where such referrals may be made for any other reason. In some instances, such as classifications with extended duration of status, a single Form I–94 may be valid for an extended period, those aliens must renew their Form I–94 at least every six to eight months. This result is simply a function of the need for additional technological advancements in order to build an operational system that can function as a biometric entry system without significantly impairing the efficiency of inspections.

4. Travel Concerns in United States Air and Sea Ports

Seven commenters mentioned the current structure of most United States airports and seaports, where ''United States Citizens/LPRs'' are directed into one inspection line and ''Visitors'' are directed to a different inspection line. They suggested that placing LPRs in the ''Visitors'' line merely for the sake of US–VISIT processing would cause significant delays for them and could separate families traveling together. DHS has deployed US–VISIT equipment in virtually all lanes at United States airports and seaports where US–VISIT is functional. This deployment allows CBP the flexibility to quickly change ''Citizen/LPR'' lanes to ''Visitors'' lanes and vice versa, as there is a need to balance and rebalance the time spent in the queue and process all arrivals efficiently and effectively. Because of almost universal lane availability, DHS will be able to process LPRs and others in the existing lane determinations. LPRs will remain within the ''United States Citizen/LPR'' lanes and will not be shifted into the ''Visitors'' lane unless such action could expedite processing. Additionally, LPRs are processed in the same lanes as United States citizen lanes, in many instances, to process entire families more expeditiously; DHS continues to recognize and attempt to accommodate families traveling together.

One commenter stated that this would cause delays for United States citizens, as the lanes dedicated to LPRs and United States citizens will slow down. DHS will monitor delays in processing carefully, but does not believe that US–VISIT will add to such delays. The United States averages roughly 33 million air/sea port arriving United States citizen travelers per year and approximately 4.4 million air/sea port arriving LPR travelers per year. Further, many ports of entry use dedicated ''United States Passport only'' lanes even within the ''United States Citizen/LPR'' lanes. DHS believes that the application of US–VISIT to LPRs will not impact United States citizens' travel to a significant degree.

One commenter questioned whether, given that DHS does not currently possess electronically searchable fingerprints on all LPRs, LPRs would be required to provide a full set of ten fingerprints (or ''10 prints'') through US–VISIT at the point in which US–VISIT transfers to 10-print enrollment. DHS began transitioning to 10-print devices and capture at primary inspection in December 2007.

The process for LPR enrollment and verification will be the same as for other aliens. If entering the United States at a port with available 10-print devices, LPRs will be enrolled though the 10-print enrollment process. Thus, an alien will need to submit 10 fingerprints only one time (whether at a port of entry or at a USCIS Application Support Center), and all subsequent times, in whatever environment, the alien will provide less than 10 fingerprints for verification. DHS will possess a higher percentage of 10 prints in its biometric database for LPRs, because LPRs generally must renew their permanent resident card every 10 years and are required to submit 10 fingerprints as part of the renewal process.

5. Travel Concerns at Land Border Inspections

One commenter implied that the treatment of LPRs is unfair due to lack of radio frequency identification (RFID) chips in the Form I–551. This comment refers to a DHS proof of concept program in which five land border ports of entry have used RFID technology to track exits and pre-position information on entry for nonimmigrants. *See* 70 FR 44934 (Aug. 4, 2005). This proof of concept has now been concluded. While Form I–551 does not provide, at this time, an RFID chip, treatment of non-immigrants, immigrants, and citizens does not, and has never, required parity.

DHS agrees that documentation issued to different aliens should be consistent to the extent practical and to the extent that consistency serves security and efficiency goals. DHS is examining integration of data processes to provide both better security and better efficiency. Accordingly, DHS will consider additional opportunities to include LPRs in these initiatives in addition to United States citizens and Canadian travelers.

LPRs at the land border, however, are less likely than nonimmigrant aliens to be referred to secondary inspection as discussed above. LPRs will be referred to secondary inspection only when a CBP officer in primary inspection determines that further investigation is required before admission, as is the current practice. There is no reason to believe that LPRs, as a result of the promulgation of this rule, will be referred to secondary inspection more frequently or will spend significantly more time while in secondary inspection. Nonimmigrant aliens, on the other hand, are referred to secondary inspection routinely at least every six to eight months to renew their Form I–94.

6. Privacy Concerns of LPRs

Five commenters suggested that promulgation of the rule as proposed would violate, in a very generic way, the privacy rights of LPRs. One commenter objected to the retention of travel information on LPRs.

DHS complies with the Privacy Act, 5 U.S.C. 552a. In addition, the Homeland Security Act of 2002, in creating DHS, established a Privacy Officer who is tasked with assuring full compliance with the Privacy Act, advising the Secretary and DHS on the privacy of personal information, and conducting privacy impact assessments on DHS regulations. *See* Homeland Security Act of 2002, Public Law 107–296, tit. II, § 222, 116 Stat. 2135, 2155 (Nov. 25, 2002) (as amended, found at 6 U.S.C. 142). DHS has published the privacy impact analysis for this rule. *See* 71 FR 42653. DHS continues to be concerned about the privacy of all persons in the United States and compliance with the laws affecting privacy.

However, the US–VISIT programmatic statutes all refer to ''aliens'' without differentiation. DHS believes the intent of these statutes is clear: LPRs are to be included within US–VISIT as much as practical and consistent with other legal obligations relating to travel documents issued by the United States, including those issued by DHS and DOS. Most LPRs travel internationally on DHS-issued documents; therefore, LPRs are directly impacted by these requirements. Additionally, DHS has a legitimate need for maintaining some information on LPR travel. DHS has collected travel information on LPRs for many years, originally as part of the

Treasury Enforcement Communications System (TECS) that was transferred to DHS in 2003. *See* 66 FR 52984, at 53029 (Notice of Privacy Act systems of record). Per DHS regulations, an LPR can be deemed to have abandoned his or her status if he or she stays outside of the United States for longer than one year. *See* 8 CFR 211.1(a), (b)(3) (imposing certain documentary requirements or waiver applications on LPRs only if returning from a temporary absence of less than a year).

7. Ten-Print Enrollment

One commenter inquired whether LPRs for whom DHS has no electronic biometric record will have ten-print or two-print fingerscan enrollment upon being processed in US–VISIT in the primary lane. DHS began transitioning to a ten-print enrollment process in December 2007. These processes will not be limited to LPRs, however, and DHS is confident that it can use technology to minimize the potential for delay as a result of the change.

*B. Canadian Citizens*

1. Western Hemisphere Travel Initiative

The Western Hemisphere Travel Initiative (WHTI) requires that the Secretary of Homeland Security, in consultation with the Secretary of State, develop and implement a plan to require travelers entering the United States to present a passport, other document, or combination of documents which is ''deemed by the Secretary of Homeland Security to be sufficient to denote identity and citizenship'' by June 1, 2009. *See* section 7209 of IRTPA, Public Law 108–458, 118 Stat. at 3823, as amended by the Department of Homeland Security Appropriations Act, 2007, Public Law 109–295, sec. 546, 120 Stat. 1355, 1386 (Oct. 4, 2006), found at 8 U.S.C. 1185 note. DHS and DOS have implemented this requirement effective January 23, 2007, for air ports of entry. 70 FR 52037 (Sept. 1, 2005) (Western Hemisphere Travel Initiative, ANPRM); 71 FR 46155 (Aug. 11, 2006) (same, NPRM); 71 FR 68412 (Nov. 24, 2006) (same; air ports of entry; Final Rule).

One commenter to this rule asked whether the Canadian border issues that have been addressed through WHTI were being taken into account in the promulgation of this rule. DHS has been working very closely with Canadian authorities in order to secure better the border between the United States and Canada without sacrificing the close ties between the two countries. In March 2005, the Administration launched the Security and Prosperity Partnership (SPP) as a trilateral effort with Canada and Mexico premised on the mutual reinforcement of our security and economic prosperity. *See http://www.spp.gov/Security_Fact_Sheet.pdf.* Through this effort and others, the United States and Canada are engaged in greater cooperation and information sharing, while being mindful of the privacy laws of each country. Together, the United States and Canada are exploring ways to facilitate legitimate travel and trade while assuring the security of our border. All of these efforts were considered in the promulgation of this rule.

Another commenter suggested that the NPRM fails to consider the impact of WHTI and this US–VISIT expansion at the same time. This rule is being implemented on January 18, 2009, and the first phase of WHTI (requiring a passport or other document to demonstrate identity and citizenship at air ports of entry) began on January 23, 2007. The second phase of WHTI (land borders and sea ports) was published as a final rule on April 3, 2008, and will be effective June 1, 2009. 73 FR 18384.

This expansion of US–VISIT procedures deals with the type of immigration processing certain aliens will require at all ports of entry, with the differences described elsewhere based on the type of port of entry. One of the main reasons for exempting Canadians who do not require a separate admissibility determination through Form I–94 in this rulemaking is to coordinate the timing of the WHTI land border port of entry procedures, before DHS can determine what, if any, additional steps should be taken for US–VISIT processing of these aliens at land border ports of entry. DHS and DOS are carefully coordinating the implementation of multiple initiatives to improve the security of the United States and ensure efficient border management.

2. Preclearance Sites in Canada

Three commenters expressed concern that the preclearance sites in Canada would see a dramatic increase in the numbers of aliens subject to US–VISIT and be unable to handle the increase in time and traffic. One commenter also noted that unlike the traditional environment of immigration processing where the flights have already landed, in the preclearance environment, persons are trying to board a flight before it is too late, and that, therefore, the delays would be much more costly.

DHS acknowledges the concerns with preclearance flight locations in Canada. However, DHS notes that Canadians not requiring visas—which include those transiting the United States or applying for admission to the United States as visitors for business or pleasure—are not required to be processed in US–VISIT. Accordingly, the increased volume of preclearance travelers in US–VISIT may not be as high as the commenters suggest. Nonetheless, DHS has existing mitigation strategies in effect to respond to overcrowded inspection facilities. DHS will pay close attention to these preclearance locations to determine whether implementing these strategies is appropriate, especially during the first few weeks after this final rule becomes effective.

3. Canadians Requiring a Waiver of Inadmissibility

One commenter expressed concern about Canadian B–1/B–2 travelers who frequently travel over the land border and require a waiver of inadmissibility under section 212 of the INA (8 U.S.C. 1182) to be admitted to the United States. DHS is currently considering alternative administrative processes for simplified handling of waivers and their application to US–VISIT, but until DHS implements these processes, DHS will maintain the same procedures for Canadian B–1/B–2 travelers requiring a waiver of inadmissibility as it has with all Canadians requiring a waiver of inadmissibility and given a multiple entry Form I–94: US–VISIT secondary processing every six months or when sent to secondary by a CBP officer. Canadian B–1/B–2 applicants for admission requiring a waiver of admissibility will not be required to be processed in US–VISIT every time they cross a United States land border.

4. Canadians in Transit Through the United States

Three commenters raised concerns about Canadians in transit through the United States, two in the land context and one in the air context. In the air context, one commenter suggested that Canadian B–1/B–2 travelers will be exempt from US–VISIT processing if flying to the United States, but not if they are flying through the United States. DHS agrees with the commenter that this would be an illogical result if this were in fact what had been proposed. The proposed rule provided that Canadians are subject to US–VISIT procedures only if they are required to obtain a visa or be issued a Form I–94. Typically, Canadians may transit through the United States by air without a visa and are not required to obtain a Form I–94. *See* 8 CFR 212.1(a)(1) (no visa required); 8 CFR 235.1(h)(1)(i) (no Form I–94 required). Canadians needing a waiver of inadmissibility are required to obtain a visa even if transiting the

United States. Thus, only these Canadians transiting the United States but needing such a waiver and visa are subject to US–VISIT as a result of publication of this final rule. Accordingly, the number of Canadians transiting the United States by air who will be subject to US–VISIT is small.

In the land context, another commenter suggested essentially the same point, explaining a scenario in which a Canadian truck driver entering the United States as a visitor for business (and who is thus visa-exempt) would not be subject to US–VISIT processing, but where the same person transiting through the United States to Mexico would be subject to US–VISIT processing. The commenter conceded that this was not currently a concern due to restrictions in hauling cargo between the three countries, but that it could be a concern in the future. DHS does not believe this scenario requires US–VISIT processing for the same reason as in the air environment. The driver in the scenario posed above—a truck driver taking cargo from Canada to Mexico—would not require a visa to enter the United States, nor would he be issued a Form I–94, regardless of whether he is ultimately driving to Mexico. Thus, transiting aliens who do not otherwise require US–VISIT processing would not be subject to US–VISIT processing as a result of this final rule.

5. Crew Members

Two commenters suggested that Canadian airline crew members be exempt from US–VISIT requirements. These commenters stated that crew members are subject to significant levels of scrutiny to begin with, including checks made by Transport Canada and placement on the Master Crew lists provided to CBP 48 hours prior to departure. They also stated that the same reasoning applied to the continuing exemption for Canadian B1/B2 travelers appears to apply here, as each group is staying for a limited period of time. Finally, they said that any security benefits from these checks are insignificant compared to the costs that Canadian airlines would incur as a result of the inclusion of crew members in US–VISIT.

In promulgating this final rule, DHS is attempting to treat all aliens as equally as operationally possible in US–VISIT processing. In other words, crew from all other foreign carriers (D visa holders) currently are required to be processed in US–VISIT, and in nearly all airports there is a special crew lane designated especially for air crew members' use. Based on observations from the four years that US–VISIT has been operational, DHS does not believe that any delay for crew travel has been so significant as to justify continuing to not process airline crews through US–VISIT based on country of origin or nationality. Second, DHS does not believe that the connection to Canadian B1/B2 travelers is equivalent, as the exemption for those travelers is meant to account for the unique operational concerns of the land border environment. In addition, the extra checks that are mentioned by the commenter are biographic checks, and not the biometric checks that US–VISIT processing would provide.

However, the commenter also identifies an inequity faced by Canadian crew with respect to biometric exit procedures. Because of the large number of United States preclearance sites in Canada, Canadian airlines often fly into United States domestic airport terminals. The commenter states that if one of these airlines were to fly into a United States airport where biometric exit processing were operational, the Canadian crewmember would be required to leave the domestic terminal, go to the international terminal, record his exit biometrically, and then return to the domestic terminal for the next flight.

DHS agrees with the commenter that under these specific circumstances it may be unreasonable for Canadian airline crew members to biometrically register their departure. The exit pilot program has been terminated and, therefore, no pilots are being required to provide to register their departure.

*C. Mexican Citizens*

Two commenters stated there should be no continued exemption for Mexican citizens, as the BCC and Form I–551 are the same. Currently, Mexican citizens who use a BCC to meet the documentary requirements of 8 CFR 212.1, if staying in the United States for 72 hours or less within a specified distance from the United States/Mexico border, are not required to obtain Form I–94 and, therefore, are not subject to US–VISIT. See 8 CFR 235.1(h)(1)(iii), (v). The commenter is correct that, from a security standpoint, BCCs are equivalent to Forms I–551 carried by LPRs. DHS anticipates that procedures for interacting with these two populations will be very similar. At air or sea ports of entry, both populations will be biometrically checked on every encounter. At land borders, under this final rule, LPRs and BCC holders will be checked as appropriate by CBP officers. This final rule adds LPRs to the list of travelers who, upon being referred to secondary inspection at land border ports of entry, will be processed in US–VISIT. Thus, this rule places LPRs and BCC holders in equivalent circumstances.

*D. Operational Issues*

1. Clarification of Procedures for Returning Nonimmigrants

One commenter professed confusion with the proposed regulation's treatment of nonimmigrants returning through a land border port of entry, suggesting that DHS should clearly state whether it plans to conduct US–VISIT processing of all returning nonimmigrants arriving at a land port who, during primary inspection, present a valid visa and a current, multiple-entry Form I–94.

Nonimmigrant visa holders have been subject to US–VISIT processing in secondary inspection at the 50 most trafficked land border ports of entry since December 2004, and at all land border ports of entry since December 2005. These procedures have been in place for three years, and the additional alien classifications added by this final rule do not change any existing land border procedures. Nonimmigrant aliens requiring completion of a Form I–94 may be referred to secondary inspection at any time at the discretion of the CBP officer at primary inspection, but at least every six to eight months for renewal of the Form I–94, regardless of the time remaining on the validity of the document or whether it is issued for duration of status (D/S). Forms I–94 issued following US–VISIT processing are marked with the date on which the alien's period of admission expires (or duration of status, if applicable) and the date on which the person was processed in US–VISIT. At primary inspection, the alien is referred to secondary inspection for US–VISIT processing if six to eight months have passed since the last time the alien was processed in US–VISIT (depending on the level of activity at the port of entry at that moment, the capacity to efficiently process the alien, and other factors). If no adverse information is found relating to that alien, the alien is admitted under the existing terms of the original Form I–94.

The commenter characterizes this procedure as ''recurrent readjudication of previously approved nonimmigrant status.'' DHS does not agree with this characterization. Under the INA, each nonimmigrant alien applies for admission to the United States by approaching a port of entry and presenting identification for inspection, and DHS determines whether that nonimmigrant alien is admissible to the United States. See sections 101(a)(13),

212(a), 214, and 235(a)(3) of the INA (8 U.S.C. 1101(a)(13), 1182(a), 1184, and 1225(a)(3). DHS is not persuaded that requiring some nonimmigrant aliens to undergo an abbreviated review every six to eight months at the land border ports of entry is somehow illegitimate or unfair to the nonimmigrant alien who is being inspected and admitted, or denied admission. The DHS policy of requiring the alien to be processed every six to eight months responds to the precise problem raised by the commenter—a CBP officer has a two-month ''gap'' in which to refer multiple entry aliens to secondary inspection for US–VISIT processing in order to best select a time that would be the least burdensome on the alien. DHS feels strongly that the balancing test here—the need for additional security and an additional tool to combat immigration fraud against what is, at worst, a minor inconvenience to the alien—favors the proposed policy.

The commenter suggested also that the proposed regulation would inject uncertainty and inefficiency into the process, as a Canadian would need to carry the entire documentation for their visa classification, as well as payroll records and employment records to prove whatever the examining officer might decide is required to establish maintenance of status. DHS policy does not currently require such complex presentations on existing Forms I–94, nor does DHS anticipate changing this policy as a result of this final rule. Experience has established that the program is not being executed in the way the commenter fears. Under the INA, an alien may be required to present all of the appropriate evidence necessary to establish admissibility at any inspection or at any time. See e.g. section 264(e) of the INA, 8 U.S.C. 1304(e).

2. Real ID Act of 2005

One commenter suggested that the expansion of alien categories in US–VISIT, in conjunction with the REAL ID Act of 2005, would have an impact on the states' relationship with the federal government under Executive Order 13132 because the REAL ID Act will require states to issue driver's licenses with effective dates that do not exceed the time permitted on the alien's admission period on the Form I–94. DHS disagrees.

The REAL ID Act of 2005 prohibits federal agencies from accepting a state driver's license or personal identification card for any ''official purpose'' unless it has been issued by a state that has certified to, and been determined by DHS to meet, the minimum document requirements, minimum issuance standards, and other requirements of the REAL ID Act. *See* REAL ID Act of 2005, Public Law 109–13, Div. B, tit. II, section 202, 119 Stat. 231, 302, 312 (May 11, 2005) (49 U.S.C. 30301 note). Nothing in the REAL ID Act or final rule pertains to the expansion of the population of persons subject to US–VISIT requirements under this final rule. The commenter's concern that under the REAL ID Act and implementing regulations, states will issue REAL–ID compliance licenses to aliens that track with period of the aliens lawful status in the United States is outside the scope of this rulemaking action. The present regulatory action to expand US–VISIT makes no regulatory change that has a direct impact on the states. See 72 FR 10819.

3. Advance Passenger Information System

One commenter suggested that the proposed expansion of US–VISIT was inconsistent with previous DHS regulatory statements regarding the possible elimination of the Form I–94. DHS understands this concern and believes that it is pursuing a consistent long-term goal that may result in elimination of the Form I–94.

DHS currently requires the electronic transmission of manifest information for passengers (passenger name record or ''PNR'') and crew members to CBP in advance of those flights. *Electronic Transmission of Passenger and Crew Manifests for Vessels and Aircraft,* 70 FR 17820 (Apr. 7, 2005) (Advance Passenger Information System or ''APIS'' final rule); *Advance Electronic Transmission of Passenger and Crew Member Manifests for Commercial Aircraft and Vessels,* 72 FR 48320 (Aug. 23, 2007) (''APIS Quick Query or ''AQQ'' final rule''). As noted in the APIS final rule, DHS continues to study whether, and the extent to which, the transmission of APIS data can replace the submission of paper forms. At that time, DHS indicated that preliminary analysis suggested that Forms I–94 and I–418 could be significantly reduced, if not eliminated. That evaluation is ongoing as DHS pursues a consolidated data analysis approach—beginning with applications for visas to the DOS and machine-readable passports, through advance passenger information, to inspection admission verification, and to exit verification. As technological capacity further develops, DHS believes that a unified system is possible and preferable. This expansion of US–VISIT is one step toward that unified and streamlined goal. As further steps become possible and are taken, appropriate regulatory changes will be adopted and obsolete forms eliminated.

4. Connection to IDENT/IAFIS Interoperability

One commenter questioned the interconnections between US–VISIT under the changes in the regulations as proposed and IDENT, and the Federal Bureau of Investigation's (FBI's) Integrated Automated Fingerprint Identification System (IAFIS). The commenter expressed concern that IDENT database entries might be made available in the IAFIS database and opposed any plan to place civil immigration violations in a criminal database. Finally, the commenter requested an update on the ability of the systems to timely reflect changes and extensions of status. The commenter suggested that the proposal to expand US–VISIT to additional alien populations should wait for full IDENT/IAFIS integration.

IDENT is a DHS-wide electronic record system for the collection and processing of biometric and limited biographic information in connection with the national security, law enforcement, immigration, intelligence, and other mission-related functions of DHS, as well as for any associated testing, training, management reporting, planning and analysis, or other administrative uses. *See* 71 FR 42651 (July 27, 2006) (systems of records notice for IDENT).

IAFIS is a national fingerprint and criminal history system maintained by the Criminal Justice Information Services (CJIS) Division of the FBI. IAFIS provides automated fingerprint search capabilities, latent searching capability, electronic image storage, and electronic exchange of fingerprints and responses. As a result of submitting fingerprints electronically, agencies receive electronic responses to criminal ten-print fingerprint submissions within two hours and within 24 hours for civil fingerprint submissions.

DHS, DOJ, and DOS are collaborating to achieve interoperability between IAFIS and IDENT. *See* 71 FR 67884, 67885 (Nov. 24, 2006) (Interim Data Sharing Model). Interoperability is defined as the sharing of alien immigration history, criminal history, and terrorist information based on positive identification and the interoperable capabilities of IDENT and IAFIS. Interoperability between the two systems is expected by late 2009. DHS and FBI already share information for the most egregious offense data sets held by the FBI, including known or suspected terrorists, wanted persons,

and sex offenders, as well as serious immigration violators.

It is unclear from the comments why the proposal to expand the classifications of aliens subject to US–VISIT should wait for full IDENT/IAFIS interoperability. DHS currently receives substantial benefits from screening without interoperability because US–VISIT identifies existing aliens requiring further review (e.g. criminal warrants, prior deportations, etc.).

Whether immigration violations are made available to law enforcement officers through IAFIS is not germane to this final rule. As IDENT/IAFIS interoperability moves forward, any such determination will be discussed in the appropriate PIAs by the appropriate Department if and when contemplated.

Finally, although not germane to the rulemaking, DHS notes that biographic data from USCIS are transmitted to the Arrival Departure Information System (ADIS) so that changes to immigration status are reflected in US–VISIT in near-real time. Accordingly, US–VISIT has the capability to ensure that aliens who are in lawful status are not determined to have stayed past their original periods of admission if that period has been extended by USCIS.

5. Biometric Identifiers

One commenter inquired about the language in the proposed rule that reserves the ability for DHS to collect ''other biometric identifiers'' in addition to photograph and fingerprints. This language is prophylactic. At this time, DHS has no plans to collect biometric identifiers in addition to photographs and fingerprints. However, DHS also recognizes that historically, other biometric identifiers such as height, weight, color of hair, color of eyes, etc., have been recorded, and this language continues to reflect that historic fact. Moreover, technological development may provide the capacity for use of other biometric identifiers in the future. DHS will make, as appropriate, changes in Privacy Impact Assessments and Systems of Records Notices for these systems.

Another commenter suggested that visual comparison of photographs is sufficient for identification. DHS disagrees. Document fraud, in some instances, has been effective in creating a false identity that defeats simple visual inspection of photographs with the face of the bearer. In addition, the commenter's suggestion overlooks the purpose of positive freezing of an identity with fingerscans to determine whether the individual is admissible to the United States or has committed criminal or terrorist acts that bar admission.

6. Age Restrictions

One commenter stated that the age limitations on the requirement to be processed in US–VISIT were too narrow, saying the program should be applicable to no one over the age of 60 years old, as opposed to over the age of 79. Another commenter suggested the opposite, saying that the age range should be expanded to cover those between the ages of 10 and 85.

US–VISIT processing is currently required of aliens who are between the ages of 14 and 79 and otherwise required to enroll and be verified in US–VISIT. Technically, it is possible to include more individuals who are younger and older than these age limitations. However, this age range is consistent with longstanding DHS and legacy INS policy concerning the fingerprinting of those seeking immigration benefits, including adjustment of status to permanent resident and naturalization. DHS uses exemptions consistent with these limitations. DHS may reconsider these age ranges in the future, but does not do so as part of this regulation. The current exemptions will continue to apply equally to all of the aliens enrolled in US–VISIT.

7. Exemption of Individual Aliens

One commenter objected to language in the proposed 8 CFR 215.8(a)(2)(iv) and 8 CFR 235.1(f)(1)(iv)(D) that allows the Secretary of Homeland Security, the Secretary of State, or the Director of Central Intelligence to exempt any individual alien from the biometric entry or exit processes. Each of these three departments has specific reasons why a particular person should be exempt from the biometric collection process that is integral for their core mission. The individualized decision to exempt an alien is based on the interests of the United States in managing its foreign and military affairs and poses no risk to the security of the United States.

*E. Privacy and Information Retention*

Several commenters raised concerns relating to privacy, particularly the privacy of particular groups of aliens and DHS compliance with the Privacy Act, 5 U.S.C. 552a.

One commenter stated that DHS has not met its responsibilities under the Privacy Act by failing to publish a Privacy Impact Assessment (PIA). DHS has published a PIA. 71 FR 42653 (July 27, 2006). Though not legally required to do so because nonimmigrants are not covered by the Privacy Act, DHS, as a matter of policy, has considered all aliens subject to US–VISIT as warranting Privacy Act analysis. DHS has published numerous PIAs and System of Record Notices (SORNs) for the systems making up US–VISIT. The PIAs published by US–VISIT list the principal users for, and uses of, the data contained within US–VISIT/DHS systems. The PIAs also identify the extent that the information may be shared with other law enforcement agencies of the United States, State, local, foreign or tribal governments, who, in accordance with their responsibilities, are lawfully engaged in collecting law enforcement intelligence information and/or investigating, prosecuting, enforcing or implementing civil and/or criminal laws, related rules, regulations, or orders. DHS has published the PIAs (www.dhs.gov/privacy) and provided links to the system of records notices for the US–VISIT program. *See*, *e.g.*, 68 FR 69412 (Dec. 12, 2003); 68 FR 69414 (Dec. 12, 2003); 69 FR 482 (Jan. 5, 2004); 69 FR 57036 (Sept. 23, 2004); 70 FR 35110 (Jun. 16, 2005); 70 FR 38699 (July 5, 2005); 70 FR 39300 (July 7, 2005); 71 FR 3873 (Jan. 24, 2006); 71 FR 13987 (Mar. 20, 2006); 71 FR 42653 (July 27, 2006); 71 FR 42651 (July 27, 2006).

One commenter objected to the data retention policies of the US–VISIT system, stating that DHS does not have adequate justification for taking new photographs and fingerprints of aliens at each encounter. Another commenter questioned whether DHS should retain identification information perpetually, even if the alien later became a United States citizen. DHS is currently reviewing the retention policy for the Arrival Departure Information System (ADIS) and plans to adjust that policy to be consistent with the retention policy for IDENT, which is part of US–VISIT. IDENT is an encounter-based system compiling a complete travel history to permit DHS to prevent fraud and provide evidence of each particular encounter. DHS disagrees with the commenters' conclusion that insufficient justification exists for this system.

In addition, DHS uses the historical fingerscans to ensure that the best quality prints are matched against watchlists. This ''best print forward'' process involves evaluating the quality of the prints each time DHS encounters an alien and using the best quality print from that point on. DHS is less and less likely to receive a ''false positive,'' as the quality of prints will improve over a lifetime of encounters—both because of this quality selection process and because of improvements in the

hardware and software used in the process.

Another commenter questioned how many adverse actions were based on ''false positives.'' None of the adverse actions were based on false positives. DHS is aware of the potential of false positive ''hits'' against immigration and criminal databases and has taken documented steps to address this potential. Currently, US–VISIT uses a series of matching algorithms and thresholds developed in consultation and testing with the United States National Institute of Standards and Technology (NIST). An automated fingerprint comparison establishes mathematical scores of matching and non-matching, and a non-conclusive score is checked manually by a fingerprint examiner located at the DHS Biometric Support Center. The Biometric Support Center manually determines whether any ''close'' match is a ''false positive'' on a 24-hour, seven-day-per-week basis.

Three commenters stated that what they perceived to be low numbers of ''adverse actions'' against those being matched against biometric databases provided evidence that the program should be scaled back instead of expanded. DHS does not agree and does not measure the success of the program solely by the specific number of adverse actions. Further, the number of adverse actions pertains to those in which the person was identified solely by biometric information. It also excludes those who were identified but ultimately admitted. Finally, it obviously does not include those who were deterred by the system in the first place. Overall, measuring a program's success by the detection of the things it is designed to prevent does not necessarily lead to significant conclusions.

*F. International Conventions*

One commenter argued that the proposed rule would violate the obligations of the United States under Articles 10, 12, and 21 of the International Covenant on Civil and Political Rights (ICCPR) of 1966 relating to detention, freedom to leave a country, and assembly. The commenter suggests that these provisions apply in the border management process when a person requests admission at a port of entry. [I sent question to Nina and Elizabeth]DHS disagrees. The ICCPR is not self-executing and was ratified with limitations and understandings. *See International Covenant on Civil and Political Rights,* Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368, *as signed and submitted see Four Treaties Pertaining to Human Rights,* Feb. 23, 1978, S. Exec. Docs. C, D, E, and F, 95th Cong., 2d Sess. (1978); *as reported* S. Exec. Rep. No. 23, 102d Cong., 2d Sess. 2 (1992); *as considered and ratified in the Senate* 138 Cong. Rec. 8070—8071 (1992); *see* Multilateral Treaties Deposited with the Secretary-General: Status as of 31 Dec. 1995, at 122, 130, U.N. Doc. ST/LEG/SER.E/14 (1996); *Sosa* v. *Alvarez-Machain,* 542 U.S. 692, 734–35 (2004) (stating that the ICCPR is not self-executing). The United States takes its international obligations seriously, and this rule violates no provision of the ICCPR.

Article 10 of the ICPPR is not applicable to the border management process by definition—Article 10 applies to the detention of persons for violation of the criminal laws of a signatory country. Although the ICCPR does not apply to this rule, DHS also does not believe there is anything inherently degrading or inhuman about the current US–VISIT process. Moreover, individuals often provide pictures for the purpose of obtaining a benefit—most notably in the context of obtaining a driver's license, a passport, or some other form of identification and associated benefit. Photographs and fingerscans are common commercial identifying events.

Article 12 permits freedom to depart a country and limits any restrictions to those that are provided by law; are necessary to protect national security, public order, public health or morals, or the rights and freedoms of others; and are consistent with the other rights recognized by the present ICCPR. US–VISIT does not unduly restrict departure from the United States—it merely records departure. Many signatory countries to the ICCPR use some exit registration, and exit registration is generally considered to be consistent with the ICCPR.

Article 21 provides for the right of peaceful assembly, except that restrictions may be placed on the exercise of this right which are necessary in a democratic society in the interests of national security, public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others. However, nearly all governments can, and do, inspect people traveling across their international borders, and they do so in every country every day. Accordingly, DHS does not believe this rule violates or impacts any of the obligations of the United States under the ICCPR.

*G. United States Citizen Voluntary Enrollment*

Three commenters stated that US–VISIT should be applied to all travelers, regardless of citizenship, for security reasons. Three commenters stated explicitly that they were opposed to this in the context that application of US–VISIT to LPRs would mean the eventual application to United States citizens. One commenter stated that there should be provisions through which United States citizens could voluntarily be biometrically identified through US–VISIT as a means of getting through security faster at airports. On the first point, DHS is limited by statute and regulation to apply US–VISIT to aliens. On the second point, DHS is exploring several types of ''registered traveler'' programs which may accomplish the same goal. Overall, this objective could be accomplished in the future, and DHS is exploring it, just not through US–VISIT.

*H. Economic Impact*

One commenter stated that DHS incorrectly certified that it was not required to conduct a Regulatory Flexibility Analysis, as required by 5 U.S.C. 603. In the NPRM, DHS did certify that such an analysis was not required, pursuant to the provisions of 5 U.S.C. 605(b), which provides that the requirement for an analysis does not apply if the head of the agency certifies that the rule will not have a substantial affect on small entities as that term is defined at 5 U.S.C. 601(6). *See* 71 FR at 42608.

The definitions for the Regulatory Flexibility Act provide that the term ''small entity'' is the composite of the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' 5 U.S.C. 601(6). Normally a ''small business'' has the same meaning as the term ''small business concern'' under section 3 of the Small Business Act, 15 U.S.C. 632. A ''small organization'' generally means any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. And, finally, a ''small governmental jurisdiction'' generally means governments of cities, counties, towns, townships, villages, school districts, or special districts with a population of less than fifty thousand. Although the statute permits deviation from these terms by following an established statutory procedure, DHS does not apply any different definition for this purpose. 5 U.S.C. 601 (3), (4), (5).

The Regulatory Flexibility Act applies to individuals only to the extent that

they are sole proprietors of businesses that are small entities; for example, an independent trucker. The Regulatory Flexibility Act does not apply to individuals, but to small businesses (for profit or not for profit), whether a sole proprietorship, a partnership, or a corporation, and small governmental entities, not the individuals who may own or belong to those organizations.

One commenter stated that DHS was incorrect to include in its Executive Order 12866 benefit/cost statements of the proposed rule that there are no potential costs or consequences associated with this rule that would impede the free flow of commerce and trade. The commenter suggests that Executive Order 12866 requires DHS to publish a thorough explanation as to how US–VISIT will benefit the efficient functioning of the economy and private markets and a full assessment of the costs of US–VISIT.

DHS believes that the commenter relies heavily on the notion that DHS plans to enact user fees to finance the US–VISIT program. As noted above, US–VISIT is funded by appropriations. DHS has no plans to charge a user fee to those seeking admission to the United States to finance US–VISIT.

DHS is required to weigh the benefits and costs of the changes of this particular rule. US–VISIT has, by design, been implemented in stages—for technology, operational, and cost reasons. This expansion of the classifications is another step for the program, and one in which DHS has weighed the benefits and costs. First, as stated previously, no additional individuals will be processed as part of US–VISIT at a land border without being sent to secondary inspection. The only aliens being added to land border secondary inspection under this rule are Canadian visa holders with a multiple entry Form I–94, and only once every six to eight months. In these instances, a Canadian being processed in secondary inspection may experience a fifteen second US–VISIT processing time, but this would be part of a several minute processing time in secondary inspection for reissuance of a Form I–94. Further, there is ample evidence, discussed in the proposed rule, that US–VISIT has actually reduced waiting times in the secondary environment at the land borders. DHS does not have any empirical evidence that the economies of land border communities will be adversely affected by expansion of US–VISIT. Moreover the commenters have not cited any empirical evidence supporting such an adverse effect.

Additionally, commenters raised questions relating to staffing, space, security, and technology costs. As discussed above, in the proposed rule, and in previous rulemakings and notices, DHS has already deployed US–VISIT technological capability into virtually all primary lanes at air and sea ports of entry and in all secondary inspection environments in land border ports of entry. Therefore, the deployment costs, space, and technology issues are virtually nonexistent. Similarly, all CBP officers in air and sea primary inspection, and in secondary land inspection, are trained on the existing US–VISIT equipment and are already familiar with its use. Finally, DHS believes that expanding a biometric entry-exit system is more likely to increase security for the United States. Security, as the foundation for the US–VISIT program, is a point made numerous times by the 9/11 Commission Report and Congress.

*I. Attorney Representation*

One commenter suggests that attorneys should be permitted to represent applicants for admission to the United States in the inspection area. As an initial matter, this suggestion is not germane to the issues presented by the proposed rule. Any affirmative response to the comment would require substantial changes in regulations and procedures not addressed by the proposed rule to expand the implementation of US–VISIT. DHS, however, wishes to be responsive to the comment.

DHS has considered this proposal in the past and will not implement this proposal because it is neither required by law nor good policy. Congress has specifically provided for the expedited removal of aliens seeking admission who are inadmissible to the United States because of misrepresentation or on deficient or non-existent documentation. Section 235(b) of the Act, 8 U.S.C. 1225(b)(3). An applicant for admission to the United States may be permitted to withdraw his or her application for admission to the United States and depart immediately from the United States. Section 235(a)(4) of the Act, 8 U.S.C. 1225(a)(4). Removal proceedings for other aliens seeking admission to the United States are conducted before an immigration judge and the alien has the privilege of counsel during those proceedings. Sections 292, 240(b)(4)(A) of the Act, 8 U.S.C. 1362, 1229a(b)(4)(A).

The introduction of the concept of legal counsel into a secured international inspection area would severely disrupt the efficient processing of the vast majority of international travelers for little, if any, benefit. Inspection of aliens and accompanying luggage is conducted very rapidly in a secured inspection environment for a number of different purposes. Facilities for detailed questioning in secondary inspection are limited. No evidence has been presented to DHS that suggests that any benefit accrues from permitting counsel to consult with clients in this environment when they are free to consult prior to seeking admission to the United States or if they are placed in removal proceedings.

Accordingly, DHS' regulations provide that:

> [n]othing in this paragraph shall be construed to provide any applicant for admission in either primary or secondary inspection the right to representation, unless the applicant for admission has become the focus of a criminal investigation and has been taken into custody.

8 CFR 292.5(b).

Additionally, DHS does not believe that the expansion of US–VISIT requires a change to the existing regulation because US–VISIT does not significantly alter the inspection or admission process for aliens. Accordingly, DHS declines to expand the privilege of counsel into the secure inspection environment.

*J. Pacific Rim Issues*

A commenter expressed concern that the inclusion of those applying for admission under the Guam Visa Waiver Program could impair overall processing times at the Guam port of entry, noting that this specific inclusion affected a large number of individuals applying for admission in a port of entry that has limited capacity. The commenter suggested that DHS should be sure to adequately staff that port of entry and have a robust outreach strategy for those entering Guam.

The Guam Visa Waiver Program was established by section 14 of the Omnibus Territories Act, Public Law 99–396, sec. 14(a), 100 Stat. 837, 842 (Aug. 27, 1986) (adding section 212(l) to the INA, 8 U.S.C. 1182(l)), and is reflected in the regulations at 8 CFR 212.1(e). Citizens of many Pacific nations are exempt from the requirement of a visa if they are entering Guam as a visitor for business or pleasure, are staying for 15 days or less, and waive the right to contest any removal decision. To date, those entering under the Guam Visa Waiver Program have not been required to be processed in US–VISIT.

DHS shares the commenter's concern and understands that inclusion of those seeking admission to Guam under the Guam Visa Waiver Program will impact

that particular port disproportionately. DHS will make significant efforts to ensure that the outreach plan to nations in the Pacific is equivalent to the outreach when US–VISIT began and that the Guam port of entry has the resources it needs to process aliens in a timely manner. In addition, DHS has existing mitigation strategies in place for instances of excessively long wait times at immigration inspection and will monitor carefully the Guam port of entry to determine whether to invoke those procedures.

Another commenter suggested that aliens from the Federated States of Micronesia need to be added to the US–VISIT program. DHS agrees; Micronesia nationals would be covered under the definition in 8 CFR 235.1 in the proposed rule and in this final rule.

**III. Comments on the August 31, 2004 Interim Rule**

*A. General*

DHS received a number of general comments on the US–VISIT program as a whole. These comments were mixed, and many expressed strong feelings about the program. Some commenters raised general immigration issues, such as whether the United States admitted the appropriate number of immigrants, whether treatment of Mexicans and Canadians was inequitable, and whether the program amounted to a stigma against the presumption of innocence. These comments are beyond the scope of the regulation and raise questions of whether Congress should alter the immigration laws of the United States.

These comments, however, indicate a misunderstanding of some of the basic laws that underlie the regulations. Every person arriving at the border of the United States must be inspected and every alien's admissibility to the United States must be determined. Under the immigration laws of the United States, the person seeking admission to the United States must establish that they are a United States citizen or a foreign national eligible for admission. See sections 212, 235 of the Immigration and Nationality Act (INA) (8 U.S.C. 1182, 1225). Inspection and admissibility upon arrival to the United States involves verification of the identity of the alien and a determination that the alien is admissible to the United States, i.e., that the alien has established that the alien has permission to be admitted and is not ineligible for admission by reason of any of the disqualifying provisions in the Immigration and Nationality Act, as enacted and amended by Congress.

The scope of the US–VISIT program, under the authorizing statutes discussed above, is, however, properly within the scope of the rulemaking. The 9/11 Commission pointed out that ''targeting travel is at least as powerful a weapon against terrorists as targeting their money'' and recommended a biometric entry-exit screening system as a result. T. Kean, et al., *Final Report of the National Commission on Terrorist Attacks Upon the United States* (9/11 Commission Report) (Government Printing Office, 2004) at 389. In successive enactments before and after the 9/11 Commission Report, Congress has insisted that DHS establish a comprehensive entry-exit data entry system. Accordingly, DHS has established the US–VISIT program and will, as practicable and subject to certain limited exceptions, expand the program to record the entry of all aliens. DHS recognizes that many individuals perceive distinctions within the universe of non-U.S. citizens as unfair, but most of these distinctions are made by Congress as a matter of law and cannot be changed by DHS. Distinctions within the universe of non-United States citizens made by DHS in the US–VISIT program reflect assessments of risk and threat, practicality of implementation based on international relations, capacity to implement universal alien data capture, and technological and other limitations.

*B. Outreach to the Affected Public*

Six commenters raised concerns about US–VISIT in terms of sharing information, most notably the concerns of the border communities. Three commenters raised the concerns of small businesses generally—that US–VISIT would result in fewer travelers and tourism and hurt the economy (and small businesses) as a whole. These commenters encouraged outreach to the affected communities and suggested that substantial notice be given to the public before changes to the program take place.

DHS disagrees with the notion that US–VISIT will result in fewer travelers and tourism. DHS is aware of no empirical evidence, and the comments have provided no empirical evidence, that the recordation of fingerscans in US–VISIT and verification of identities has an adverse impact on the number of travelers or tourists seeking admission to the United States, or that the development of US–VISIT will harm small businesses or the economy.

DHS, though US–VISIT, is committed to ensuring effective outreach to all persons affected by the program. Since 2004, US–VISIT has implemented an ongoing strategy to facilitate dialogue with land border communities in the United States, Mexico, and Canada, engaging stakeholders in two-way discussions that allowed US–VISIT to learn and understand the specific issues and concerns related to border management in those communities. At the same time, this dialogue has created opportunities to educate stakeholders about the US–VISIT program, informing them of developments in program implementation, and gaining their assistance in reaching out to inform their own constituents about the program.

Since February 2004, DHS has hosted or participated in over 100 meetings with land border stakeholders in communities along the borders of, and in the interiors of, the United States, Mexico, and Canada. These meetings occurred in Texas, Arizona, New Mexico, California, Washington, Minnesota, Michigan, New York, Vermont, and Maine. In Canada, outreach was coordinated in Toronto, Vancouver, Montreal, Windsor, Sarnia, Ottawa, and Winnipeg. In Mexico, outreach activities were held in Mexico City, Reynosa, Tijuana, Ciudad Jaurez, Monterrey, Nuevo Laredo, and Matamoros. DHS has placed numerous advertisements in publications serving border communities in the United States and Mexico to advise the public directly of the US–VISIT process.

DHS and US–VISIT have coordinated extensively with Canada on issues relating to the approximately 5,500-mile mutual border, through forums such as the Bi-National Technical Working Group, the Security and Prosperity Partnership (SPP), and participation in the Shared Border Accord meetings. The SPP is a trilateral effort to increase security and enhance prosperity among the United States, Canada, and Mexico through greater cooperation and information sharing. Through SPP, the United States and Canada have explored options for lower-cost, secure proof of status and nationality documents to facilitate cross-border travel, and have tested technology and made recommendations to enhance the use of biometrics in screening travelers.

DHS and US–VISIT have coordinated extensively with Mexico on issues relating to the 1,951-mile mutual border, including the Bi-National Technical Working Group. Mexico's National Institute of Immigration (INM) has helped to ensure that US–VISIT's education efforts are culturally appropriate so they can successfully reach, educate, and inform key population groups or communities in Mexico.

The effort to educate and engage the diverse border communities contributed significantly to US–VISIT's ability to implement the program at the 50 most trafficked land border ports of entry in 2004 and to deploy US–VISIT at the remaining 104 land border ports of entry where aliens are processed in 2005. The outreach efforts were critical to the smooth pilot testing and deployment of US–VISIT entry procedures at land border ports of entry.

DHS and US–VISIT recognize that outreach benefits not just the public, but the government as well. The success of the US–VISIT program is contingent on effective outreach. DHS and US–VISIT are committed to continue this outreach effort for future steps in the program.

*C. Use of Interim Rules*

Three commenters suggested that the use of interim rules by DHS in the previous two US–VISIT rules was inappropriate.

DHS has used interim rules twice in the development of US–VISIT. In a January 5, 2004, interim rule, DHS implemented the first phase of US–VISIT and provided that aliens seeking admission into the United States through nonimmigrant visas must provide fingerprints, photographs, or other biometric identifiers upon arrival in, or departure from, the United States at air and sea ports of entry. The rule exempted several groups of aliens:

- Those with diplomatic recognition (A–1, A–2, C–3 (except for attendants, servants or personal employees of accredited officials), G–1, G–2, G–3, G–4, NATO–1, NATO–2, NATO–3, NATO–4, NATO–5, or NATO–6 visas, unless the Secretary of State and the Secretary of Homeland Security jointly determine that a class of such aliens should be subject to the rule);
- Children under the age of 14;
- Persons over the age of 79;
- Classes of aliens the Secretary of Homeland Security and the Secretary of State jointly determine shall be exempt;
- And an individual alien whom the Secretary of Homeland Security, the Secretary of State, or the Director of Central Intelligence determines shall be exempt.

69 FR 468 (Jan. 5, 2004). At the same time, DHS published a notice in the **Federal Register** setting forth the classes of aliens subject to US–VISIT and the air and sea ports where US–VISIT would be applicable. 69 FR 482 (Jan. 5, 2004). DHS received 21 comments on that interim rule and responded to those comments in the August 31, 2004, interim rule. 69 FR at 53323–53329.

On August 31, 2004, DHS implemented the second phase of US–VISIT through an interim rule that expanded the US–VISIT program to land border ports of entry in the United States. That interim rule also further refined the population of aliens who are required to enroll in US–VISIT to include VWP travelers and ship crewmembers, and it exempted Mexican nationals who present a Border Crossing Card (Form DSP–150, or BCC), aliens who are not required to be issued a Form I–94 Arrival/Departure Record, and certain officials of the Taipei Economic and Cultural Representative Office. This interim rule is being finalized in this final rule. Subsequently, DHS has published notices applying US–VISIT to all land border ports of entry, implemented at secondary inspection.

DHS appreciates and understands the concern expressed by the commenters on the use of interim rules to implement the US–VISIT program. Consistent with the Administrative Procedure Act, DHS publishes proposed rules for public notice and comment whenever possible. 5 U.S.C. 553. Where DHS determines that expedited promulgation of a rule is required and has good cause to publish and make effective an interim final rule before receiving and considering public comments because delay would be impractical, unnecessary, or contrary to the public interest, DHS provides a clear statement to that effect. 5 U.S.C. 553(b)(B). DHS is committed to providing the public with an opportunity to comment on its rules and to considering public comments in making final decisions in promulgating rules.

One commenter questioned whether the August 31, 2004, interim rule contained sufficient information to permit the public comment on the second phase of US–VISIT. The scope and content of the comments received indicate that DHS provided ample information to support the interim rule, and DHS is responding to those comments in this final rule.

That interim rule included a sixty-day comment period. Additionally, the comment period was extended to 90 days (expiring on December 1, 2004) to provide an opportunity for commenters to observe and comment on the land border implementation (which began November 15, 2004). 69 FR 64477 (Nov. 5, 2004).

DHS is committed to ensuring that the public is able to comment on all aspects of the US–VISIT program. DHS is also committed to providing as much information as possible to permit public comment on the implementation of rulemaking.

*D. Facilities*

Five commenters suggested that existing inspection facilities could not handle, without significant delays, any broad changes to the existing inspection procedures. One commenter suggested the need to create expedited lanes for frequent travelers, believing that the existing infrastructure was inadequate to make these types of changes.

To date, US–VISIT implementation at the land borders has not caused any significant delays and has actually decreased processing time at many ports due to the implementation of an automated Form I–94 issuance process at secondary inspection. As indicated in the proposed rule, US–VISIT has significantly decreased entry timing at certain monitored land border ports of entry. 71 FR at 42609.

While land border infrastructure is constrained, DHS has taken steps to alleviate congestion, such as implementing frequent traveler programs and dedicated lanes for their travel, where possible.

One commenter specifically suggested that including a broad number of Canadians in US–VISIT would have a detrimental effect on northern border facilities. This final rule and the July 27, 2006, proposed rule describe how DHS will include some Canadians in US–VISIT processing at land border inspection. DHS agrees that there are significant technological difficulties associated with implementing US–VISIT at land borders for all aliens' entry and exit through primary inspection. Whether expansion of US–VISIT will include installation at all primary inspection booths is, at this point, unclear. This rule establishes that only a small number, and not all, Canadians will be processed in US–VISIT at secondary inspection. DHS, thus, believes that the impact on northern border facilities will be minimal.

*E. Interaction With Existing Programs*

Ten comments discussed US–VISIT interoperability with other existing programs that collect biometric or biographic information, most often those that impact the land borders, such as the Secure Electronic Network for Travelers Rapid Inspection (SENTRI), Free and Secure Trade (FAST), and NEXUS. Some commenters were concerned that multiple checks were repetitive and would not contribute to security, although they would slow down processing at the borders and airports. Other commenters noted that other programs have already vetted specific travelers and that further

security checks through US–VISIT are redundant.

DHS is committed to ensuring that international travel is both secure and efficient, and, therefore, is exploring ways to appropriately integrate US–VISIT, SENTRI, FAST, NEXUS, and other border screening and credentialing programs. DHS acknowledges the validity of the commenters' concern that multiple systems can create unnecessary redundancy. DHS is committed to ensuring that any unnecessary redundancy and inefficiencies are not perpetuated and that all border crossing programs are appropriately integrated over time.

*F. Staffing and Training*

Five commenters suggested that US–VISIT could have a negative impact if other areas of DHS did not support the program. For example, a few commenters stated that too few CBP officers were knowledgeable about issues surrounding US–VISIT and how it could affect admissibility.

Following the initial rollout of US–VISIT, DHS has taken additional steps to address this issue. For example, DHS sent training teams to all 50 land border ports of entry to instruct officers about the process changes as a result of US–VISIT implementation. In addition, DHS set up a telephone call center through the rollout of the 50 busiest ports of entry in November and December of 2004. In the Summer and Fall of 2005, other training steps were taken in conjunction with the rollout of the additional 104 land border ports of entry, including sending field trainers to each additional port implementing US–VISIT and providing on-line refresher courses on US–VISIT policies and procedures. US–VISIT procedures are implemented through the CBP management, training of officers, policy memoranda, and operational direction.

*G. Travel and Delays*

Six commenters expressed concern over the waiting periods in the inspection process that they claimed were caused by US–VISIT. These comments covered both past events in the air and sea context and concerns over future land border processes, and attributed delays to too few inspection booths and the inability of scanners to read fingerprints on the first try. Other commenters acknowledged shortened processing times due to the increase in the number of CBP officers available, but noted delays attributed to fingerprints not always being effectively scanned on the first try.

DHS is committed to ensuring that US–VISIT will be as least burdensome as possible while accomplishing its mission and understands that facilitating legitimate travel and trade is one of the program's core goals. DHS attempts to ensure that there are adequate numbers of CBP officers to clear flights as expeditiously as possible. While DHS believes that it largely succeeds in this mission, it acknowledges that there are times when international passengers are not inspected as quickly as they or DHS would like. DHS is responsible for ensuring that all international travelers seeking admission to the United States are who they claim to be and are eligible for admission. The balancing of these responsibilities can occasionally cause delays.

DHS takes steps to increase CBP officer presence during peak hours. In addition, DHS has taken steps at various ports to attempt to improve the ability to read fingerprints quickly. For example, DHS has been experimenting with attaching a silicon film to the fingerscan reader to get more accurate readings, and this process has yielded good results thus far. DHS will continue to ensure that the US–VISIT process does not unduly delay the inspection process.

At the land border ports of entry, the current process for land border inspection remains largely the same as it was prior to the implementation of US–VISIT. Aliens who must acquire Form I–94 as evidence of admission are referred to secondary inspection rather than being processed in the primary inspection lanes. This process will continue following the publication of this final rule.

Another commenter raised the issue of implementing US–VISIT at the 50 most highly trafficked land borders in November and December of 2004, stating that this was the busiest time of the year due to the holidays, and suggested waiting until January 2005. DHS understands this concern, but DHS was required to implement US–VISIT at the 50 busiest land borders by December 31, 2004. DHS sought to avoid this issue when expanding US–VISIT to all other land border ports of entry in 2005. *See* 70 FR 54398 (Sept. 14, 2005) (additional ports being added prior to December 31, 2005). In future expansions of US–VISIT, DHS plans to avoid implementing changes during the peak travel times of the year. However DHS must reserve the decision on timing of future implementation until decisions are made based on all requirements at that time.

Two commenters raised concerns involving third-party nationals crossing at land borders, specifically the southern border. One suggested that a strict interpretation of the existing regulations would require an alien who is not Mexican, but who has a multiple-entry Form I–94 and is a frequent border crosser (such as a person living on one side of the border and working on the other), to be processed in US–VISIT for every entry. DHS has not implemented such a policy. Those with multiple-entry Forms I–94 are required to undergo US–VISIT processing upon the expiration of their existing Form I–94, or every six to eight months.

*H. Health Risks*

Citing the United States Department of Health and Human Services' Bureau of Primary Health Care, two commenters suggested that southern border communities have a higher rate of communicable diseases, such as tuberculosis. The commenters suggested that biometric fingerprinting could exacerbate this incidence and create exposure to both the CBP officers working on the southern border and United States citizens living in the border communities. Another commenter raised similar health concerns regarding the US–VISIT process in the air and sea environment.

DHS is aware of these health concerns and believes that they are not influenced by US–VISIT. Tuberculosis is an airborne bacterial infection transmitted by air, and to become infected, an individual must usually be exposed to an infection source for an extended period in a closed environment. In 2005, 14,097 tuberculosis (TB) cases were reported to the Centers for Disease Control and Prevention (CDC) from the fifty states and the District of Columbia. CDC, *Reported Tuberculosis in the United States, 2005,* Sept. 2006, at 3, available at *http://www.cdc.gov/nchstp/tb/surv/surv2005/PDF/TBSurvFULLReport.pdf.* DHS believes that fingerprint scans do not impact the chances of transmitting tuberculosis, as the disease is spread through the air and transmission requires an extended period of contact with a person carrying it, not the short period of time required for enrollment. Similarly, there is no risk that US–VISIT contacts will cause contraction or transmission of viral haemorhagic fevers (such as Ebola, Lassa, Marburg, Congo-Crimean), bioterrorism diseases (plague, anthrax, tularemia), bloodborne diseases (HIV, hepatitis B and C virus), soil-transmitted diseases (worms, dermatophytes, sporeforming bacteria), or vectorborne diseases (malaria, dengue, leishamaniasis, trypansomiasis).

CBP officers clean the fingerscan machines periodically using lint-free wipes and rubbing alcohol to mitigate the public's legitimate health concerns. This periodic cleaning helps DHS capture better quality fingerscans on the first try and reduces inspection wait times.

Finally, the DHS Chief Medical Officer (CMO) oversees and coordinates all medical activities of DHS to ensure appropriate preparation for, and response to, incidents having medical significance. The DHS CMO also coordinates the biodefense activities of DHS, including its pandemic influenza portfolio, and ensures that DHS has a unified approach to medical preparedness. Accordingly, any medical direction from the DHS CMO will be implemented to prevent transmission of pathogens through US–VISIT.

*I. Program Exemptions*

DHS received many comments concerning the populations of aliens who were, or should be, included in US–VISIT. A few discussed issues that did not directly involve US–VISIT, such as extension of the time period per visit for holders of a B–1/B–2 visa or BCC, or more parity between Mexican and Canadian visitors. *See* 70 FR 52037 (Sept. 1, 2005) (Western Hemisphere Travel Initiative, ANPRM); 71 FR 46155 (Aug. 11, 2006) (same, NPRM); 71 FR 68412 (Nov. 24, 2006) (same; airports; Final Rule).

Four commenters expressed support for the Canadian exemption and requested it be made permanent, whereas one commenter suggested eliminating the exemption. Creating a permanent US–VISIT exemption for applicants for admission from Mexico and Canada, or for some other nationality, is inconsistent with the statutory obligations of DHS to create a complete biometric entry-exit system. Moreover, no regulatory provision dealing with security can be considered permanent—programmatic requirements and implementing regulatory requirements and limitations must be adjusted to respond as security requirements change. DOS security measures in the issuance of a BCC do not relieve DHS of its statutory obligations. However, DHS considers the impact of processing additional alien classifications in US–VISIT and attempts to minimize negative impacts prior to implementation. DHS understands the economic ramifications of transborder travel and commerce and will implement large-scale changes through technology and processes to minimize their overall impact.

Another commenter focused specifically on the northern border with Canada, stating that there is not, in writing, a permanent exemption for Canadians. The comment is correct. No nationality was ever planned to be permanently exempt from US–VISIT.

*J. Privacy*

Twelve commenters raised privacy concerns in the collection of US–VISIT information, although these comments were about varying specific points of the program. DHS is required to protect the privacy of the individuals from whom DHS collects information through the US–VISIT process in accordance with the Privacy Act, 5 U.S.C. 552a. As part of this responsibility, DHS has published a series of Privacy Impact Assessments (PIAs) to explain the program, changes to the program, risks that have been identified to privacy, and steps undertaken to mitigate that risk. The PIAs affecting US–VISIT list the principal users of the data within DHS and notes that the information may also be shared with other law enforcement agencies at the federal, state, local, foreign, or tribal level who, in accordance with their responsibilities, are lawfully engaged in collecting law enforcement intelligence information and/or investigating, prosecuting, enforcing, or implementing civil and/or criminal laws, related rules, regulations, or orders. DHS has made available several PIAs and revisions for the US–VISIT program and noted that availability on the public record. *See* 71 FR 42653 (July 27, 2006); 71 FR 3873 (Jan. 24, 2006); 70 FR 39300 (July 7, 2005); 70 FR 35110 (June 16, 2005); 70 FR 17857 (Apr. 7, 2005) (Advanced Passenger Information System); 69 FR 57036 (Sept. 23, 2004); 69 FR 2608 (Jan. 16, 2004). All of the assessments and revisions are available on the DHS Web site at *http://www.dhs.gov/us-visit.* DHS continually considers the impact of US–VISIT on privacy interests and updates its assessments as the program is developed.

Two comments raised the issue of ''scope creep'' or ''mission creep,'' stating fears that the information collected in US–VISIT will be used for purposes not connected to the program. DHS believes that the PIAs, which identify the specific purposes for which the information is being collected, the intended use of the information, with whom the information will be shared, and how the information will be secured, protect the public from ''mission creep.'' The PIA process is also a transparent one, with the public being able to access it and comment on it. As DHS further considers integrating its border security databases, DHS will reassess the privacy impact of such integration, and the public will be invited to provide further comment.

One commenter stated, however, that the statements in the PIA on the purposes of information collection and to whom the information must be shared conflicted with the language of the August 31, 2004 interim rule, quoting that language where the interim rule stated:

> the [collected] information may also be shared with other law enforcement agencies at the federal, state, local, foreign, or tribal level, who, in accordance with their responsibilities, are lawfully engaged in collecting law enforcement intelligence information and/or investigating, prosecuting, enforcing, or implementing civil and/or criminal laws, related rules, regulations, or orders.

69 FR at 53324. The relevant PIA, however, contains the same language (section 4, p. 7).

The commenter also suggested that the purposes for which the PIA states that the information is being collected conflicts with the sharing of the data with the FBI and other law enforcement agencies. One of the stated purposes of US–VISIT in the PIA is, however, to provide information on whether a person ''should be apprehended or detained for law enforcement action.'' DHS believes that this purpose is not inconsistent with sharing data with law enforcement entities. DHS also published a revised PIA prior to the interim rule becoming effective on September 30, 2004. 69 FR 57036 (Sept. 23, 2004). Further, DHS published additional PIAs as necessary for additional steps in the program.

Finally, the commenter stated that DHS should recognize a right of judicial review for individuals adversely affected by US–VISIT. DHS has interpreted ''adversely affected'' to refer to inaccurate or incorrect information maintained by US–VISIT or a determination of inadmissibility. These situations have been excluded from judicial review per DHS and Department of Justice (DOJ) policy for many years, and the implementation of US–VISIT does not warrant reopening this issue. Moreover, a determination that the alien is inadmissible is reviewable only pursuant to other statutory and regulatory provisions. See, e.g., section 240 of the INA (8 U.S.C. 1229a) (removal proceedings to deciding inadmissibility).

If an individual believes that there is an error in the information contained in DHS systems and collected through the US–VISIT process, US–VISIT has provided a three-step redress process to

have records reviewed and amended or corrected based on accuracy, relevancy, timeliness, or completeness. This process includes confirming that mismatches and other errors are not retained as part of an alien's record. The first opportunity for data correction occurs at the port of entry where the CBP officer has the ability to correct manually most biographic-related errors, such as name, date of birth, flight information, and document errors. All of this process occurs without any action required by the individual.

If the individual still has questions about the travel record, he or she may contact the US–VISIT Privacy Officer. As of March 2007, US–VISIT's Privacy Office has received 175 requests for redress from the more than 78.5 million encounters through the US–VISIT process. The US–VISIT Privacy Officer will review the travel record, amend or correct it as necessary, and send a response to the traveler describing the action taken within 20 business days of receipt of the inquiry. If the individual is not satisfied with the action taken, he or she can appeal to the DHS Chief Privacy Officer, who will review the appeal, conduct an investigation, and make a final decision on the action to be taken. This redress policy is published on the DHS Web site at *http://www.dhs.gov/us-visit.* The US–VISIT Privacy Officer can also be contacted by e-mail at *usvisitprivacy@dhs.gov.*

One commenter suggested that aliens sent to secondary inspection for purposes related to US–VISIT be included in a line separate and apart from those sent to secondary for any other purpose. Unfortunately, this comment cannot be adopted. At the time a traveler is sent to secondary, the CBP officer does not know definitively whether the reason is a mismatched fingerprint (false positive) or some other reason, such as a passport substitution. Initial studies have determined, however, that the incidence of a traveler being identified incorrectly as a ''watchlist hit'' by US–VISIT and being referred to secondary as a result is low, less than one-tenth of one percent.

Another commenter discussed the impact of ''false hits'' and the need to eliminate them. DHS is actively attempting to decrease the likelihood of a false match—where one alien is incorrectly matched to a watchlist hit—with frequent upgrades of our matching algorithms. Further, DHS is constantly seeking ways to reduce the incidence of false hits.

*K. Fees*

One commenter stated that it would be inappropriate for DHS to raise traveler fees to fund the US–VISIT program because the commenter believed that US–VISIT provides no direct benefit to the international traveler at the time of inspection. This comment misapprehends the source of funding for US–VISIT. US–VISIT is funded through appropriations. *See* Department of Homeland Security Appropriations Act, 2007, Public Law 109–295, tit. II, 120 Stat. 1355, 1357 (Oct. 4, 2006). The commenter is correct in citing one of the factors in determining whether a fee should be charged under the Chief Financial Officers Act, 31 U.S.C. 902(a)(8); the Independent Offices Appropriations Act, 1952, 31 U.S.C. 9701; and Office of Management and Budget Circular A–25, *User Charges* (Revised), section 6, 58 FR 38142 (July 15, 1993). DHS is not, however, considering establishing a fee to support funding of US–VISIT at this time, and the proposed rule did not suggest that such a fee was being considered.

## IV. Statutory and Regulatory Reviews

*A. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) (5 U.S.C. 605(b)), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996 (SBREFA), requires an agency to prepare, and make available to the public, a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). DHS has considered the impact of this rule on small entities and certifies that this rule will not have a significant economic impact on a substantial number of small entities. The individual aliens to whom this rule applies are not small entities as that term is defined in 5 U.S.C. 601(6). There is no change expected in any process as a result of this rule that would have a direct effect, either positive or negative, on a small entity. Accordingly, this rule will not have a significant economic impact on a substantial number of small entities, and DHS does not believe that US–VISIT processing will impede the free flow of travel and trade, especially travel and trade related to small entities.

*B. Executive Order 12866—Regulatory Planning and Review*

Under section 3(f) of Executive Order 12866, ''Regulatory Planning and Review'' (58 FR 51735 (Sept. 30, 1993) (as amended), DHS has determined that this final rule is a ''significant regulatory action'' because there is a significant public interest in issues pertaining to national security, immigration policy, and international travel and trade related to this final rule. Accordingly, this rule has been submitted to the Office of Management and Budget (OMB) for review and approval.

DHS currently processes through US–VISIT, using biometrics, all aliens entering the United States with a nonimmigrant visa or under the VWP at any air, sea, or land port of entry. US–VISIT biometric screening has resulted in the ability of DHS to take adverse action against more than 3800 aliens who posed a security threat to the United States or whose prior criminal actions rendered them ineligible for admission. This final rule will strengthen the ability of CBP officers to identify and take action against persons whose conduct renders them a security threat and therefore ineligible for admission. For example, DHS expects that, just as 3,382 nonimmigrants have been intercepted by DHS using the biometric screening of US–VISIT, additional individuals applying for admission with permanent resident cards or reentry permits will be found, through the comparison of biometric identifiers, to have violated the terms of their permanent resident status. Such violations may be the result of the commission of various crimes, tampering with the actual permanent resident card, or attempting to gain entry by assuming the identity of another LPR. Such violations could ultimately result in the loss of permanent resident status and possible removal from the United States or the exclusion or removal of an individual from the United States for fraud. Based on the number of permanent resident cards that are seized by CBP officers at ports of entry (approximately 15,000 in FY 2005) and the number of DHS Forensic Document Laboratory analyses each month (approximately 250), DHS estimates that US–VISIT biometric screening has the potential to identify a significant number of aliens each month in need of additional investigation prior to being admitted to the United States. In addition, based on the numbers of refugee travel documents (519) and immigrant visas (2,287) that CBP officers intercepted in attempts to use the documents fraudulently by aliens during FY 2005, US–VISIT estimates that interception of fraudulently used documents will increase with the introduction of biometric verification of identity.

DHS expects similar results—an increase in the number of aliens identified with possible admission-

related or immigration problems—by including the other groups of aliens highlighted in this final rule into the US–VISIT biometric screening protocol. For example, aliens holding immigrant visas have a six-month validity window from the date that the visa is issued to arrive in the United States. Events could occur during this time period that could result in the alien being found inadmissible to the United States, and such inadmissibility might only be discovered as the result of biometric comparisons. Over the last several years, over 365,000 aliens have entered the United States annually on immigrant visas.

Refugees and asylees—appearing before government officers in many instances without the benefit of even the most basic form of identity documentation—potentially pose a risk to public safety and security. In many instances, the United States Government is providing these individuals with a new identity. It is important to recognize that for refugees and asylees, US–VISIT will be verifying the identity of these aliens by comparing the biometrics collected at the time of an application for admission to the United States with the biometrics that were already collected during the initial refugee or asylee adjudication process.

Similarly, aliens paroled into the United States warrant the additional screening derived by using US–VISIT. While the majority of these aliens have been screened overseas in order to determine whether a parole should be granted, it is in the security interests of the United States to verify that the individuals who arrive at the border are the same individuals originally screened for parole. Approximately 150,000 aliens are granted parole into the United States each year.

The costs associated with implementation of this final rule for select travelers not otherwise exempt from US–VISIT requirements include an increase of approximately 15 seconds in initial inspection processing time (additional biometric collection) per applicant over the current average inspection time. No significant difference is anticipated in the processing of an alien traveling with a visa or under the VWP, as compared to any other alien who is exempted from the visa requirements. These ports of entry handle over 99% of all air and sea border traffic and over 95% of all land border traffic for these alien classifications. DHS, through CBP, has carefully monitored the impact of US–VISIT biometric data collection on the inspection of applicants for admission at air, sea, and land borders. At air and sea ports, internal studies have established that the biometric collection adds no more than 15 seconds on average to the inspection processing time at primary inspection. At land border ports, internal studies have shown positive results, and in some ports of entry the amount of time to process an alien for admission using the US–VISIT process was actually shorter than it had been previously due to the automation of data collection and implementation of a standard process. A close examination of the first three land ports of entry to begin US–VISIT biometric collection as part of admission found that the average processing time for applicants requiring a Form I–94 or Form I–94W actually decreased and sometimes resulted in significantly reduced processing times.

| Port of entry | Average form I–94 processing time before implementing US–VISIT | Average form I–94 processing time after implementing US–VISIT |
|---|---|---|
| Port Huron, MI | 11 minutes, 42 seconds | 9 minutes, 58 seconds. |
| Douglas, AZ | 4 minutes, 16 seconds | 3 minutes, 12 seconds. |
| Laredo, TX | 12 minutes, 10 seconds | 2 minutes, 18 seconds. |

Accordingly, DHS does not believe that US–VISIT processing impedes the free flow of travel and trade.

In addition, over time, the efficiency with which the process is employed will increase, and the process can be expected to further improve. DHS will not apply this rule to all aliens crossing land borders until technological advancements are identified, tested, and implemented to ensure that the land border commerce and traffic concerns are significantly mitigated. DHS may choose to implement this rule in the air and sea environment before the land border environment. As mentioned in the August 31, 2004, rule, DHS has developed a number of mitigation strategies, not unlike those already available to CBP under other conditions to mitigate delays. DHS, while not anticipating significant delays for travelers, will nevertheless develop procedures and strategies to deal with any significant delays that may occur through unanticipated and unusually heavy travel periods.

*C. Executive Order 13132—Federalism*

Executive Order 13132 requires DHS to develop a process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' Such policies are defined in the Executive Order to include rules 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.''

DHS has analyzed this final rule in accordance with the principles and criteria in the Executive Order and has determined that this rule would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, DHS has determined that this rule does not have federalism implications. This rule codifies procedures for the collection by the federal government of biometric identifiers from certain aliens seeking to enter or depart from the United States, for the purpose of improving the administration of federal immigration laws and for national security. States do not conduct activities with which the provisions of this specific rule would interfere.

*D. Unfunded Mandates Reform Act*

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, 109 Stat. 48 (March 22, 1995) (2 U.S.C. 1501 et seq.), requires federal agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a federal mandate likely to result in the expenditure by state, local, or tribal governments, in the aggregate, or by the private sector of more than $100 million in any one year (adjusted for inflation with 1995 base year). Before promulgating a rule for which a written statement is needed, section 205 of the UMRA requires DHS to identify and consider a reasonable number of regulatory alternatives and to adopt the least costly, most cost-

effective, or least burdensome option that achieves the objective of the rule. Section 205 allows DHS to adopt an alternative, other than the least costly, most cost-effective, or least burdensome option if DHS publishes an explanation with the final rule. This final rule will not result in the expenditure, by state, local or tribal governments, or by the private sector, of more than $100 million annually. Thus, DHS is not required to prepare a written assessment under the UMRA.

*E. Small Business Regulatory Enforcement Fairness Act*

This final rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804, as this rule will not result in an annual effect on the economy of $100 million or more.

*F. Trade Impact Assessment*

The Trade Agreement Act of 1979, Public Law 96–39, tit. IV, secs. 401–403, 93 Stat. 144, 242 (July 26, 1979), as amended (19 U.S.C. 2531–2533), prohibits federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for United States standards. DHS has determined that this final rule will not create unnecessary obstacles to the foreign commerce of the United States and that any minimal impact on trade that may occur is legitimate in light of this rule's benefits for the national security and public safety interests of the United States. In addition, DHS notes that this effort considers and utilizes international standards concerning biometrics, and DHS will continue to consider these standards when monitoring and modifying the program.

*G. National Environmental Policy Act*

DHS is required to analyze the proposed actions contained in this final rule for purposes of complying with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 et seq., and Council on Environmental Quality (CEQ) regulations, 40 CFR parts 1501–1508. An agency is not required to prepare either an environmental impact statement (EIS) or environmental assessment (EA) under NEPA if in fact the proposed action falls within a categorical exclusion, and no extraordinary circumstances preclude use of the categorical exclusion. 40 CFR 1508.4. DHS analyzed the interim final rule published on August 31, 2004, and concluded that there were no factors in the expansion of US–VISIT pursuant to this final rule that would limit the use of a categorical exclusion under 28 CFR part 61 App. C, as authorized under 6 U.S.C. 552(a). In the July 27, 2006 NPRM, DHS stated that it would analyze the environmental impacts to conduct the appropriate level of analysis in accordance with NEPA. DHS has done such an analysis and has concluded that there are no factors in the expansion of US–VISIT that would limit the use of a categorical exclusion, for similar reasons—that the impact to the land border ports of entry would be largely unnoticed since US–VISIT processing would take place in secondary inspection only. In addition, DHS will not implement US–VISIT processing at primary inspection locations at land border ports of entry without at least one additional round of notice and comment rulemaking. Since this final rule makes only minor changes to the existing regulations, and because DHS will not expand US–VISIT processing in the primary environment at land border ports of entry without additional notice and comment rulemaking, DHS finds that this final rule is also categorically excluded from further environmental documentation.

*H. Paperwork Reduction Act*

This final rule establishes the process by which DHS will require certain aliens who cross the borders of the United States to provide fingerprints, photograph(s), and potentially other biometric identifiers upon their arrival and departure at designated ports. These requirements constitute an information collection under the Paperwork Reduction Act (PRA), 44 U.S.C. 507 et seq. OMB, in accordance with the Paperwork Reduction Act, has previously approved this information collection for use. The OMB Control Number for this collection is 1600–0006.

Since this rule provides a mechanism for the addition of new aliens by Notice in the **Federal Register** who may be photographed and fingerprinted and who may be required to provide other biometric identifiers, DHS has submitted the required Paperwork Reduction Change Worksheet (OMB–83C) to OMB reflecting the increase in burden hours, and OMB has approved the changes.

*I. Public Privacy Interests*

As discussed in the January 5, 2004 (69 FR 468) and August 31, 2004 (69 FR 53318) interim final rules and the July 27, 2006 NPRM (71 FR 42605), US–VISIT records will be protected consistent with all applicable privacy laws and regulations. See also Parts II.K and III.E. Personal information will be kept secure and confidential and will not be discussed with, nor disclosed to, any person within or outside US–VISIT other than as authorized by law and as required for the performance of official duties. In addition, careful safeguards, including appropriate security controls, will ensure that the data are not used or accessed improperly. The DHS Chief Privacy Officer will review pertinent aspects of the program to ensure that these proper safeguards and security controls are in place. The information will also be protected in accordance with the DHS published privacy policy for US–VISIT. Affected persons will have a three-stage process for redress if there is concern about the accuracy of information. An individual may request a review or change, or a DHS officer may determine that an inaccuracy exists in a record. A DHS officer can modify the record. If the individual remains dissatisfied with this response, he or she can request assistance from the US–VISIT Privacy Officer and can ask that the DHS Privacy Officer review the record and address any remaining concerns.

The DHS Privacy Office will advise US–VISIT to further ensure that the information collected and stored in IDENT and other systems associated with US–VISIT is being properly protected under privacy laws and guidance. US–VISIT also has a program-dedicated Privacy Officer to handle specific inquiries and to provide additional advice concerning the program.

Finally, DHS will maintain secure computer systems that will ensure that the confidentiality of an individual's personal information is maintained. In doing so, DHS and its information technology personnel will comply with all laws and regulations applicable to government systems, such as the Federal Information Security Management Act of 2002, Title X, Public Law 107–296, 116 Stat. 2259–2273 (Nov. 25, 2002) (codified in scattered sections of titles 6, 10, 15, 40, and 44 U.S.C.); Information Management Technology Reform Act (Clinger-Cohen Act), 40 U.S.C. 11101 et seq.; Computer Security Act of 1987, 40 U.S.C. 1441 et seq. (as amended); Government Paperwork Elimination Act, 44 U.S.C. 101, 3504; and Electronic Freedom of Information Act of 1996, 5 U.S.C. 552.

**List of Subjects**

*8 CFR Part 215*

Administrative practice and procedure, Aliens, Travel restrictions.

*8 CFR Part 235*

Aliens, Immigration, Registration, Reporting and recordkeeping requirements.

■ Accordingly, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

## PART 215—CONTROL OF ALIENS DEPARTING FROM THE UNITED STATES

■ 1. The authority citation for part 215 continues to read as follows:

**Authority:** 8 U.S.C. 1104; 1184; 1185 (pursuant to E.O. 13323, published January 2, 2004), 1365a and note, 1379, 1731–32.

■ 2. Section 215.8 is amended by revising paragraph (a)(1) to read as follows:

**§ 215.8 Requirements for biometric identifiers from aliens on departure from the United States.**

(a)(1) The Secretary of Homeland Security, or his designee, may establish pilot programs at land border ports of entry, and at up to fifteen air or sea ports of entry, designated through notice in the **Federal Register**, through which the Secretary or his delegate may require an alien admitted to or paroled into the United States, other than aliens exempted under paragraph (a)(2) of this section or Canadian citizens under section 101(a)(15)(B) of the Act who were not otherwise required to present a visa or have been issued Form I–94 or Form I–95 upon arrival at the United States, who departs the United States from a designated port of entry, to provide fingerprints, photograph(s) or other specified biometric identifiers, documentation of his or her immigration status in the United States, and such other evidence as may be requested to determine the alien's identity and whether he or she has properly maintained his or her status while in the United States.

* * * * *

## PART 235—INSPECTION OF PERSONS APPLYING FOR ADMISSION

■ 3. The authority citation for part 235 continues to read as follows:

**Authority:** 8 U.S.C. 1101 and note, 1103, 1183, 1185 (pursuant to E.O. 13323 published on January 2, 2004), 1201, 1224, 1225, 1226, 1228, 1365a note, 1379, 1731–32.

■ 4. Section 235.1 is amended by revising paragraph (f)(1)(ii) to read as follows:

**§ 235.1 Scope of examination.**

* * * * *

(f) * * *

(1) * * *

(ii) The Secretary of Homeland Security or his designee may require any alien seeking admission to or parole into the United States, other than aliens exempted under paragraph (f)(1)(iv) of this section or Canadian citizens under section 101(a)(15)(B) of the Act who are not otherwise required to present a visa or be issued Form I–94 or Form I–95 for admission or parole into the United States, to provide fingerprints, photograph(s) or other specified biometric identifiers, documentation of his or her immigration status in the United States, and such other evidence as may be requested to determine the alien's identity and whether he or she has properly maintained his or her status while in the United States. The failure of an applicant for admission to comply with any requirement to provide biometric identifiers may result in a determination that the alien is inadmissible under section 212(a) of the Immigration and Nationality Act or any other law.

* * * * *

**Paul A. Schneider,**

*Deputy Secretary.*

[FR Doc. E8–30095 Filed 12–18–08; 8:45 am]

**BILLING CODE 9111–97–P**

## FEDERAL RESERVE SYSTEM

## 12 CFR Part 229

**[Regulation CC; Docket No. R–1344]**

## Availability of Funds and Collection of Checks

**AGENCY:** Board of Governors of the Federal Reserve System.

**ACTION:** Final rule; technical amendment.

**SUMMARY:** The Board of Governors (Board) is amending the routing number guide to next-day availability checks and local checks in Regulation CC to delete the reference to the head office of the Federal Reserve Bank of St. Louis and to reassign the Federal Reserve routing symbols currently listed under that office to the head office of the Federal Reserve Bank of Atlanta. These amendments reflect the restructuring of check-processing operations within the Federal Reserve System.

**DATES:** The final rule will become effective on February 21, 2009.

**FOR FURTHER INFORMATION CONTACT:** Jeffrey S. H. Yeganeh, Financial Services Manager (202/728–5801), or Joseph P. Baressi, Financial Services Project Leader (202/452–3959), Division of Reserve Bank Operations and Payment Systems; or Sophia H. Allison, Senior Counsel (202/452–3565), Legal Division. For users of Telecommunications Devices for the Deaf (TDD) only, contact 202/263–4869.

**SUPPLEMENTARY INFORMATION:** Regulation CC establishes the maximum period a depositary bank may wait between receiving a deposit and making the deposited funds available for withdrawal.[1] A depositary bank generally must provide faster availability for funds deposited by a ''local check'' than by a ''nonlocal check.'' A check is considered local if it is payable by or at or through a bank located in the same Federal Reserve check-processing region as the depositary bank.

Appendix A to Regulation CC contains a routing number guide that assists banks in identifying local and nonlocal banks and thereby determining the maximum permissible hold periods for most deposited checks. The appendix includes a list of each Federal Reserve check-processing office and the first four digits of the routing number, known as the Federal Reserve routing symbol, of each bank that is served by that office for check-processing purposes. Banks whose Federal Reserve routing symbols are grouped under the same office are in the same check-processing region and thus are local to one another.

On February 21, 2009, the Reserve Banks will transfer the check-processing operations of the head office of the Federal Reserve Bank of St. Louis to the head office of the Federal Reserve Bank of Atlanta. As a result of this change, some checks that are drawn on and deposited at banks located in the St. Louis and Atlanta check-processing regions and that currently are nonlocal checks will become local checks subject to faster availability schedules. To assist banks in identifying local and nonlocal checks and making funds availability decisions, the Board is amending the list of routing symbols in appendix A associated with the Federal Reserve Banks of St. Louis and Atlanta to reflect the transfer of check-processing operations from the head office of the

[1] For purposes of Regulation CC, the term ''bank'' refers to any depository institution, including commercial banks, savings institutions, and credit unions.

Federal Reserve Bank of St. Louis to the head office of the Federal Reserve Bank of Atlanta. To coincide with the effective date of the underlying check-processing changes, the amendments to appendix A are effective February 21, 2009. The Board is providing notice of the amendments at this time to give affected banks ample time to make any needed processing changes. Early notice also will enable affected banks to amend their availability schedules and related disclosures if necessary and provide their customers with notice of these changes.[2]

**Administrative Procedure Act**

The Board has not followed the provisions of 5 U.S.C. 553(b) relating to notice and public participation in connection with the adoption of the final rule. The revisions to appendix A are technical in nature and are required by the statutory and regulatory definitions of ''check-processing region.'' Because there is no substantive change on which to seek public input, the Board has determined that the § 553(b) notice and comment procedures are unnecessary. In addition, the underlying consolidation of Federal Reserve Bank check-processing offices involves a matter relating to agency management, which is exempt from notice and comment procedures.

**Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR 1320 Appendix A.1), the Board has reviewed the final rule under authority delegated to the Board by the Office of Management and Budget. The technical amendment to appendix A of Regulation CC will delete the reference to the head office of the Federal Reserve Bank of St. Louis and reassign the routing symbols listed under that office to the head office of the Federal Reserve Bank of Atlanta. The depository institutions that are located in the affected check-processing regions and that include the routing numbers in their disclosure statements would be required to notify customers of the resulting change in availability under § 229.18(e). However, all paperwork collection procedures associated with Regulation CC already are in place, and the Board accordingly anticipates that no additional burden will be imposed as a result of this rulemaking.

[2] Section 229.18(e) of Regulation CC requires that banks notify account holders who are consumers within 30 days after implementing a change that improves the availability of funds.

**List of Subjects in 12 CFR Part 229**

Banks, Banking, Reporting and recordkeeping requirements.

**Authority and Issuance**

■ For the reasons set forth in the preamble, the Board is amending 12 CFR part 229 to read as follows:

## PART 229—AVAILABILITY OF FUNDS AND COLLECTION OF CHECKS (REGULATION CC)

■ 1. The authority citation for part 229 continues to read as follows:

**Authority:** 12 U.S.C. 4001–4010, 12 U.S.C. 5001–5018.

■ 2. The Sixth and Eighth Federal Reserve District routing symbol lists in appendix A are amended by removing the headings and listings for the Eighth Federal Reserve District and revising the listings for the Sixth Federal Reserve District to read as follows:

**Appendix A to Part 229—Routing Number Guide to Next-Day Availability Checks and Local Checks**

* * * * *

Sixth Federal Reserve District

[Federal Reserve Bank of Atlanta]

| *Head office* | |
|---|---|
| 0610 | 2610 |
| 0611 | 2611 |
| 0612 | 2612 |
| 0613 | 2613 |
| 0620 | 2620 |
| 0621 | 2621 |
| 0622 | 2622 |
| 0630 | 2630 |
| 0631 | 2631 |
| 0632 | 2632 |
| 0640 | 2640 |
| 0641 | 2641 |
| 0642 | 2642 |
| 0650 | 2650 |
| 0651 | 2651 |
| 0652 | 2652 |
| 0653 | 2653 |
| 0654 | 2654 |
| 0655 | 2655 |
| 0660 | 2660 |
| 0670 | 2670 |
| 0810 | 2810 |
| 0812 | 2812 |
| 0815 | 2815 |
| 0819 | 2819 |
| 0820 | 2820 |
| 0829 | 2829 |
| 0840 | 2840 |
| 0841 | 2841 |
| 0842 | 2842 |
| 0843 | 2843 |
| 0865 | 2865 |

* * * * *

By order of the Board of Governors of the Federal Reserve System, December 15, 2008.

**Jennifer J. Johnson,**

*Secretary of the Board.*

[FR Doc. E8–30085 Filed 12–18–08; 8:45 am]

**BILLING CODE 6210–01–P**

## CONSUMER PRODUCT SAFETY COMMISSION

### 16 CFR Part 1303

### Ban of Lead-Containing Paint and Certain Consumer Products Bearing Lead-Containing Paint

**AGENCY:** Consumer Product Safety Commission.

**ACTION:** Final rule.

**SUMMARY:** The Consumer Product Safety Commission (CPSC or Commission) is amending its regulations concerning the ban of lead-containing paint and certain consumer products bearing lead-containing paint.

**DATES:** This rule is effective on August 14, 2009.

**FOR FURTHER INFORMATION CONTACT:** Hyun Sun Kim, Office of the General Counsel, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, Maryland 20814, email: *hkim@cpsc.gov.*

**SUPPLEMENTARY INFORMATION:** The Commission's regulations at 16 CFR 1303.1 currently define as ''banned hazardous products'' certain consumer products, including paint and similar surface-coating materials, toys and other articles intended for use by children, and certain furniture articles that are or bear lead-containing paint, that is paint in which the lead content is in excess of 0.06 percent of the weight of the total nonvolatile content of the paint or the weight of the dried paint film. On August 14, 2008, Congress enacted the Consumer Product Safety Improvement Act of 2008 (CPSIA), Public Law 110–314. Section 101(f)(1) of CPSIA mandates that 0.06 percent lead limit of 16 CFR 1303.1 be reduced to 0.009 percent, effective August 14, 2009. Accordingly, the Commission amends 16 CFR 1303.1(a) by substituting ''0.009 percent'' for ''0.06 percent,'' to become effective on that date. In addition, section 101(g) provides that any ban or rule promulgated under 16 CFR 1303.1 shall be considered a regulation promulgated under or for the enforcement of section 2(q) of the Federal Hazardous Substances Act (15 U.S.C. 1261(q)). Section 1303.1 is amended accordingly.

**List of Subjects in 16 CFR Part 1303**

Consumer protection, Hazardous substances, Infants and children, Labeling, Lead poisoning.

■ Accordingly, 16 CFR part 1303 is amended as follows:

## PART 1303—BAN LEAD-CONTAINING PAINT AND CERTAIN CONSUMER PRODUCTS BEARING LEAD-CONTAINING PAINT

■ 1. The authority citation for part 1303 is revised to read as follows:

**Authority:** Secs. 8, 9, 86 Stat. 1215–1217, as amended 90 Stat. 506, 122 Stat. 3016, (15 U.S.C. 2057, 2058), Sec. 101, 122 Stat. 3016.

■ 2. Amend § 1303.1 by revising paragraphs (a) introductory text and (c) and adding paragraph (d) to read as follows:

**§ 1303.1 Scope and application.**

(a) In this part 1303, the Consumer Product Safety Commission declares that paint and similar surface-coating materials for consumer use that contain lead or lead compounds and in which the lead content (calculated as lead metal) is in excess of 0.06 percent (0.06 percent is reduced to 0.009 percent effective August 14, 2009 as mandated by Congress in section 101(f) of the Consumer Product Safety Improvement Act of 2008, Pub. L. 110–314) of the weight of the total nonvolatile content of the paint or the weight of the dried paint film (which paint and similar surface-coating materials are referred to hereafter as ''lead-containing paint'') are banned hazardous products under sections 8 and 9 of the Consumer Product Safety Act (CPSA), 15 U.S.C. 2057, 2058. The following consumer products are also declared to be banned hazardous products:

* * * * *

(c) The Commission has issued the ban because it has found that there is an unreasonable risk of lead poisoning in children associated with lead content of over 0.06 percent in paints and coatings to which children have access and that no feasible consumer product safety standard under the CPSA would adequately protect the public from this risk. The 0.06 percent is reduced to 0.009 percent effective August 14, 2009 as mandated by Congress in section 101(f) of the Consumer Product Safety Improvement Act of 2008, Public Law 110–314.

(d) Any ban or rule promulgated under 16 CFR 1303.1 shall be considered a regulation of the Commission promulgated under or for the enforcement of section 2(q) of the Federal Hazardous Substances Act (15 U.S.C. 1261(q)).

■ 3. Amend § 1303.2 by revising paragraph (b)(2) to read as follows:

**§ 1303.2 Definitions.**

* * * * *

(b) * * *

(2) *Lead-containing paint* means paint or other similar surface coating materials containing lead or lead compounds and in which the lead content (calculated as lead metal) is in excess of 0.06 percent (0.06 percent is reduced to 0.009 percent effective August 14, 2009) by weight of the total nonvolatile content of the paint or the weight of the dried paint film.

* * * * *

Dated: December 15, 2008.

**Todd A. Stevenson,**

*Secretary, Consumer Product Safety Commission.*

[FR Doc. E8–30238 Filed 12–18–08; 8:45 am]

**BILLING CODE 6355–01–P**

## CONSUMER PRODUCT SAFETY COMMISSION

### 16 CFR Part 1500

### Exemption From Classification as Banned Hazardous Substance; Exemption for Boston Billow Nursing Pillow and Substantially Similar Nursing Pillows

**AGENCY:** Consumer Product Safety Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commission is issuing a rule to exempt the Boston Billow Nursing Pillow and substantially similar nursing pillows from the Commission's regulations banning infant cushions/pillows set forth in the Commission's regulations at 16 CFR 1500.18(a)(16)(i).

**DATES:** The rule becomes effective on December 19, 2008.

**FOR FURTHER INFORMATION CONTACT:** Suad Wanna-Nakamura, Directorate for Health Sciences, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, Maryland 20814; telephone (301) 504–7252; e-mail *snakamura@cpsc.gov.*

**SUPPLEMENTARY INFORMATION:**

**A. Background**

Between 1985 and 1992, there were 35 infant deaths associated with the use of infant cushions/pillows (also known, among other names, as ''baby beanbag pillows'' and ''beanbag cushions''). In almost all of the cases where the infant's position could be determined, the infant was in a prone, face down, position. 55 FR 42202. The Commission initiated a rulemaking proceeding to determine whether a ban was necessary to address an unreasonable risk of injury and death associated with these types of infant cushions/pillows. Due to the number of infant deaths associated with these products, the Commission proposed a rule to ban infant cushions/pillows with certain characteristics. 56 FR 32352. On June 23, 1992, the Commission issued a rule codified at 16 CFR 1500.18(a)(16)(i), banning infant cushions/pillows that: (1) Have a flexible fabric covering; (2) are loosely filled with a granular material, including but not limited to, polystyrene beads or pellets; (3) are easily flattened; (4) are capable of conforming to the body or face of an infant; and (5) are intended or promoted for use by children under one year of age. 57 FR 27912.

**B. Petition**

On July 17, 2005, Boston Billows, Inc. (Boston Billows) submitted a petition requesting an amendment to 16 CFR 1500.18(a)(16)(i)(A)–(E) to allow an exception to the ban. The petitioner is the manufacturer of the Boston Billow Nursing Pillow, a granularly filled, C-shaped pillow intended for use by mothers when breastfeeding.

**C. The ANPR**

The Commission issued an advance notice of proposed rulemaking (ANPR) on September 27, 2006, to assess whether a rulemaking was necessary to address any unreasonable risk of injury or death which may be associated with infant cushions/pillows. 71 FR 56418. In addition to the Boston Billow Nursing Pillow, which met the criteria of the ban, there appeared to be a proliferation of other infant cushions/pillows or pillow-like products in the marketplace, including nursing pillows which met some, but not all, of the criteria set forth in the ban. After review of the comments, incident reports and other available information, the Commission determined there was insufficient data or product information on infant cushions or pillow-like products, other than the Boston Billow Nursing Pillow, to proceed with further rulemaking on those products at this time. Accordingly, the Commission issued a notice in the **Federal Register** on September 3, 2008, terminating the rulemaking on infant cushions/pillows or pillow-like products intended for use by infants, other than with respect to the Boston Billow Nursing Pillow and substantially similar nursing pillows. 73 FR 51386.

**D. The Proposed Exemption**

The ban on infant cushions/pillows was promulgated pursuant to the Federal Hazardous Substances Act (FHSA), 15 U.S.C. 1261 *et seq.* Section 2(f)(1)(D) of the FHSA defines ''hazardous substance'' to include any toy or other article intended for use by children which the Commission determines, by regulation, presents an electrical, mechanical, or thermal hazard. 15 U.S.C. 1261(f)(1)(D). An article may present a mechanical hazard if its design or manufacture presents an unreasonable risk of personal injury or illness during normal use or when subjected to reasonably foreseeable damage or abuse. 15 U.S.C. 1261(s). To grant Boston Billows' request for an exemption, the Commission must find that the Boston Billow Nursing Pillow does not present an unreasonable risk of injury from the mechanical hazard that the banning rule was intended to prevent.

The Commission preliminarily found that based on the incident data on infant cushions and nursing pillows for the period of January 1992 through May 2008, there have been no reported deaths associated with infant cushions meeting the definition of a banned infant cushion/pillow since 1992. However, there were 531 infant deaths associated with pillows and cushions that did not meet the definition of a banned infant cushion/pillow. The majority of these incidents involved adult pillows and sofa cushions which possessed many of the same characteristics as the banned bean bag cushions. These products have soft covers and flexible filling material that can conform to an infant's face. A variety of pillow types and cushions with different types of filling including foam, feathers, and polyester were involved in the incidents.

The Commission also preliminarily found that in the vast majority of the 531 deaths associated with pillows and cushions, the infants were found in the prone position, lying on top of the pillow/cushion or with the head or neck propped on the pillow/cushion. A quarter of the deaths occurred in infant cribs, bassinets, cradles and playpens, while the rest occurred outside the normal infant sleep areas, such as on adult beds, on sofas, or on the floor. As with the banned infant bean bag cushion, these pillows and cushions can cause death by suffocation/asphyxiation when an infant is placed to sleep face down on them. The Commission preliminarily determined that the analysis of the data does not reveal an increased risk due to any specific type of pillow or cushion filling, but rather it was the softness and malleability which are inherent properties of pillows that are the primary risk factors. Although the comparative risk of suffocation based upon filling was unknown, the greatest common risk factor was that infants were found in the prone position, face down, in the majority of the 531 deaths.

In light of the ongoing risks posed by infant cushions/pillows when used in the sleep environment, the Commission found no justification for repealing the ban on infant cushions/pillows at this time. However, nursing pillows perform a related but different function than infant cushions/pillows. The purpose of nursing pillows is to provide a place for the mother to rest her arms while breastfeeding. The nursing pillow may also serve to give moldable but firm support to enhance comfort during extended periods when changing position during breastfeeding is difficult. The main risk of suffocation arises if the nursing pillow enters into the infant sleeping environment because suffocation can occur if children fall asleep on them in the prone position. However, an infant placed to sleep on any pillow or cushion, including a nursing pillow, in the prone position, is at risk for suffocation, regardless of size, type, shape of pillow or filling. The Commission's preliminary review showed that when used for its intended purpose—nursing—the risk of infant suffocation on nursing pillows, including the Boston Billow Nursing Pillow, is very low. Accordingly, based on the staff's assessment, the Commission issued a notice of proposed rulemaking (NPR) proposing an exemption for the Boston Billow Nursing Pillow and substantially similar nursing pillows that would otherwise be banned under the Commission's regulations banning infant cushions/pillows. 73 FR 51384.

**E. Comments on the NPR**

Seven comments were received on the NPR from board certified lactation consultants, all in support of an exemption of the Boston Billow Nursing Pillow. According to the commenters, the unique design and flexibility of the Boston Billow Nursing Pillow provides for better positioning and comfort of breastfeeding mothers, particularly mothers who have delivered by Caesarean section, had post-delivery surgery, or were nursing premature infants.

**F. The Final Rule**

Based on the staff's assessment, the incident data, and the comments, the Commission concludes that an exemption from the ban on infant cushions/pillows should be granted for the Boston Billow Nursing Pillow and substantially similar nursing pillows. A substantially similar nursing pillow is a pillow designed to be used only as a nursing aide for breastfeeding mothers. For example, one that is tubular in form, C- or crescent-shaped to fit around a nursing mother's waist, round in circumference and filled with granular material. An estimated 900,000 new nursing pillows are sold annually and nursing pillows are used by approximately 1.8 million mothers. Exempting the Boston Billow Nursing Pillow would increase consumer choice by allowing consumers an alternative to the nursing pillows already in the marketplace.

However, the Commission continues to emphasize that prone sleeping is a high risk factor for infant suffocation on cushions/pillows. The limited physical and developmental capabilities of infants render them susceptible to danger from suffocation in certain sleeping environments. Physiological abnormalities and delays in the development of vital systems can further hamper an infant's ability to react to a hazardous condition. Infants who are not placed on their backs are especially at risk for suffocation on any type of soft pillow, regardless of the type of filling.

In 1992, the American Academy of Pediatrics, in an effort to reduce the risk of Sudden Infant Death Syndrome (SIDS), recommended that babies always be placed on their backs when put to sleep. As a result of this campaign, SIDS deaths between 1992 and 2004 in the United States decreased from 5,000 per year to 2,246 per year (based on vital statistics data of the United States). Although there has been a steady decrease in SIDS deaths, the Commission has found that there has not been a similar decrease in infant deaths associated with pillows and cushions. Even though the recommendation to place infants to sleep on their backs is being promoted, the Commission believes that the data indicates that there are still a significant number of people who continue to place infants to sleep in the prone position. For this reason, the Commission intends to increase its dissemination of information targeted at the population of caregivers whose infants are not placed to sleep in the supine position. Increased compliance with the recommendation for supine sleep, as well as continued vigilance in ensuring a safe sleeping environment, would have benefits in reducing the risk of

infant suffocation deaths caused by adult pillows, sofa cushions, and other pillows as well as further reducing incidents involving SIDS.

**G. Effective Date**

This rule exempts the Boston Billow Nursing Pillow and substantially similar nursing pillows that would otherwise be banned under the FHSA. Because the rule grants an exemption, it is not subject to the requirement under the Administrative Procedure Act (APA) that a rule must be published 30 days before it takes effect. 5 U.S.C. 553(d)(1). The rule lifts an existing restriction and allows a product not previously permitted. Thus, the Commission believes it is appropriate for the rule to become effective upon publication in the **Federal Register**.

**H. Impact on Small Businesses**

The NPR discussed the Commission assessment of the impact that a rule to exempt the Boston Billow Nursing Pillow and similar nursing pillows might have on small businesses. There are approximately 15 firms that either manufacture or import nursing pillows. Most, if not all, firms are considered to be small businesses. Because the exemption is deregulatory in nature and will not increase production costs on businesses, the Commission concludes that the proposed amendment exempting the Boston Billow Nursing Pillow and substantially similar nursing pillows would not have a significant impact on a substantial number of small entities.

**I. Environmental Considerations**

The National Environmental Policy Act and the Council on Environmental Quality Act regulations, and CPSC procedures for environmental review require the Commission to assess the possible environmental effects associated with the proposed exemption. As discussed in the NPR, a proposed exemption for nursing pillows is expected to have little or no potential for affecting the human environment, and is considered to fall within the ''categorical exclusions'' under the CPSC regulations that cover its environmental review procedures (see 16 CFR 1021.5(c)(1)). The Commission concludes that the rule would have no adverse effect on the environment and thus, no environmental assessment or environmental impact statement is required in this proceeding.

**J. Executive Orders**

According to Executive Order 12988 (February 5, 1996), agencies must state in clear language the preemptive effect, if any, of new regulations. The preemptive effect of this exemption is stated in section 18 of the FHSA. 15 U.S.C. 1261n.

**List of Subjects in 16 CFR Part 1500**

Consumer protection, Hazardous materials, Hazardous substances, Imports, Infants and children, Labeling, Law enforcement, and Toys.

**K. Conclusion**

■ For the reasons stated above, the Commission amends title 16 of the Code of Federal Regulations as follows:

## PART 1500—HAZARDOUS SUBSTANCES AND ARTICLES: ADMINISTRATION AND ENFORCEMENT REGULATIONS

■ 1. The authority for part 1500 continues to read as follows:

**Authority:** 15 U.S.C. 1261–1278.

■ 2. Amend section 1500.18 by revising paragraph (a)(16)(i) introductory text to read as follows:

**§ 1500.18 Banned toys and other banned articles intended for use by children.**

* * * * *

(a) * * *

(16) * * *

(i) Any article known as an ''infant cushion'' or ''infant pillow,'' and any other similar article, which has all of the following characteristics (But see § 1500.86(a)(9)):

* * * * *

■ 3. Section 1500.86 is amended by adding a new paragraph (a)(9) to read as follows:

**§ 1500.86 Exemptions from classification as banned toy or other banned article for use by children.**

(a) * * *

(9) Boston Billow Nursing Pillow and substantially similar nursing pillows that are designed to be used only as a nursing aide for breastfeeding mothers. For example, are tubular in form, C- or crescent-shaped to fit around a nursing mother's waist, round in circumference and filled with granular material.

Dated: December 15, 2008.

**Todd A. Stevenson,**

*Secretary, Consumer Product Safety Commission.*

[FR Doc. E8–30248 Filed 12–18–08; 8:45 am]

**BILLING CODE 6355–01–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

### 23 CFR Parts 620, 635, 636, and 710

**[FHWA Docket No. FHWA–2008–0136]**

**RIN 2125–AF29**

## Fair Market Value and Design-Build Amendments

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Final rule.

**SUMMARY:** The FHWA is revising its regulations to require State departments of transportation (DOT) and other public authorities to obtain fair market value as part of any concession agreement involving a facility acquired or constructed with Federal-aid highway funds. Additionally, the FHWA is revising its regulations to permit public agencies to compete against private entities for the right to obtain a concession agreement involving such facilities. Also, the FHWA is revising its design-build regulations to permit contracting agencies to incorporate unsuccessful offerors' ideas into a design-build contract upon the acceptance of a stipend.

**DATES:** *Effective Dates:* This rule is effective January 18, 2009.

**FOR FURTHER INFORMATION CONTACT:** Mr. Marcus J. Lemon, Chief Counsel, Mr. Michael Harkins, Office of Chief Counsel, or Mr. Steve Rochlis, Office of Chief Counsel, (202) 366–0740, Federal Highway Administration, 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 and Filing**

Internet users may access this document, the notice of proposed rulemaking (NPRM), and all comments received by the U.S. DOT by visiting *http://www.regulations.gov.* It is available 24 hours each day, 365 days each year. Electronic submission and retrieval help and guidelines are available under the help section of the Web site.

An electronic copy of this document may also be downloaded by accessing the Office of the Federal Register's home page at: *http://www.archives.gov* or the Government Printing Office's Web page at *http://www.gpoaccess.gov/nara.*

**I. Background**

In recent years, some State and local governments have entered into

concession agreements to provide for the long-term development, construction, operation, and maintenance of a public highway. Under these agreements, which are typically in the form of lease agreements, the State or local government grants the right to a third party concessionaire to collect revenues or fees from the use of a public highway for a certain period of time in return for compensation, usually in the form of a large up-front lease payment or structured payments that are payable over the life of the agreement.

Current FHWA regulations do not contemplate the use of concession agreements. While 23 U.S.C. 156 requires State and local agencies to charge fair market value (FMV) for the sale, lease, or use of any real property acquired with funding made available under the Highway Trust Fund, it excludes sales, leases, or uses for utility use and occupancy or for a title 23, United States Code, eligible transportation project. In the context of concession agreements, the FHWA is concerned that this broad exception for transportation projects could be construed to exempt concession agreements from the fair market value requirement, which is contrary to the FHWA interpretation of 23 U.S.C. 156. Moreover, FHWA regulations at 23 CFR 620.203(j) specifically provide that State DOTs need not charge a public agency for a relinquishment of a Federal-aid facility when the facility will continue to operate as a public highway. This final rule confirms the application of the FMV requirement of 23 U.S.C. 156 to concession agreements. Additionally, this final rule amends the FHWA design-build regulations to permit State DOTs to incorporate the ideas of unsuccessful offerors to a design-build contract upon the acceptance of a stipend by the offeror.

As will be discussed in more detail below, a number of commenters were opposed to the adoption of the FMV requirements proposed in the NPRM. While some commenters were fundamentally opposed to the use of concession agreements in general, most of the comments expressing opposition to the adoption of the FMV requirements appear based on the belief that the proposed regulations would have forced a State to use a public-private partnership when that State wishes to utilize a public toll agency. This was not the intent. The purpose of these regulations is merely to implement the FMV requirement of 23 U.S.C. 156 whenever a federally funded highway is subject to a concession agreement. Given the requirement of 23 U.S.C. 156, and the increased use of concession agreements, it is important to ensure that these transactions result in a fair return for the taxpayers' investment.

The FHWA appreciates all of the comments received in response to the NPRM and has made a number of changes to the proposed regulations. These changes ensure the States are afforded maximum discretion in choosing to transfer highways to other public entities and the broadest flexibility in determining what constitutes FMV whenever the State chooses to utilize a concession. These changes are discussed in more detail below.

## II. Requests for Extension of the Comment Period

The FHWA received 8 requests to extend the comment period established in the NPRM, which ended on November 7, 2008. These requests came from the International Bridge, Tunnel and Turnpike Association (IBTTA), Texas Department of Transportation (TxDOT), Texas State Senator Robert Nichols, Harris County Judge Ed Emmett, Miami-Dade Expressway Authority, Georgia State Road and Tollway Authority (SRTA), Texas Council of Engineering Companies (TCEC), and American Highway Users Alliance (AHUA). One commenter, Robert W. Poole, Jr., supported the November 7, 2008, deadline. After considering the requests from the IBTTA and TxDOT, the FHWA extended the comment period until November 21, 2008. Notice of this extension was published in the **Federal Register** on November 13, 2008, at 73 FR 67117, and posted in the rulemaking docket on November 10, 2008. Since all other remaining requests for extension appear to relate to the original November 7, 2008, deadline, the FHWA deems the extension to November 21, 2008, to be responsive to these requests.

## III. Summary of Comments Received to the Notice of Proposed Rulemaking (NPRM)

The FHWA published its NPRM on October 8, 2008, at 73 FR 58908. In response to the NPRM, the FHWA received 34 comments. The commenters include State DOTs, toll authorities, elected officials, associations, public interest groups, contractors, and individuals. The majority of the comments regarding the fair market value (FMV) requirements were negative, and 8 commenters urged the FHWA to rescind the rulemaking. In general, the main objection to the adoption of the FMV requirements appears to be the perception that the FHWA is attempting to displace State and local decision-making. However, the majority of the comments regarding the design-build amendments were mainly supportive. The FHWA considered each of these comments in adopting this final rule.

The majority of the comments addressed several common issues. The following discussion summarizes the major comments submitted to the docket by the commenters on the NPRM, notes where and why changes have been made to the rule, and, where relevant, explains why particular recommendations or suggestions have not been adopted.

## IV. Discussion of NPRM Comments Concerning Fair Market Value Requirements

### *A. Legal Interpretation of 23 U.S.C. 156*

The American Association of State Highway Transportation Officials (AASHTO), the American Trucking Associations (ATA), the Pennsylvania Turnpike Commission (PTC), and Michael Baker Jr., Inc. (Baker), each commented that the FHWA's proposed regulation requiring FMV for concession agreements overrides an express statutory exemption to the FMV requirement in 23 U.S.C. 156. Specifically, AASHTO, PTC, and Baker argue that the FHWA's proposed regulation requiring FMV for concession agreements overrides an express statutory exemption for transportation projects. Section 156(a) of title 23, United States Code, provides ''[A] State shall charge, at a minimum, fair market value for the sale, use, lease, or lease renewal (other than for utility use and occupancy *or for a transportation project eligible for assistance under this title*) of real property acquired with Federal assistance made available from the Highway Trust Fund (other than the Mass Transit Account).'' (Emphasis added).

The FHWA respectfully disagrees with AASHTO's, PTC's, and Baker's analyses. A concession agreement is not a title 23, United States Code, eligible transportation project. Rather, a concession agreement is a transaction under which a public entity leases a public highway to a third party and grants the third party the authority to collect revenues from the operation of the highway in return for compensation to be paid to the public entity. The FHWA does not believe that such a lease transaction constitutes a transportation project within the meaning of the ''transportation project'' exemption in 23 U.S.C. 156(a). There is

certainly nothing related to the transactions costs, in and of themselves, that would be title 23, United States Code, eligible. Moreover, 23 U.S.C. 101(a)(21) defines ''project'' to mean ''[a]n undertaking to construct a particular portion of a highway, or if the context so implies, the particular portion of a highway so constructed or any other undertaking eligible for assistance under this title.'' Thus, the term ''transportation project'' is limited to the undertaking to construct a highway. While a concession agreement may provide for certain title 23, United States Code, eligible improvements to be made on the facility, the FHWA believes that the improvements to be made, which may be title 23, United States Code, eligible, must be separated from the lease whenever a concession agreement is involved for purposes of 23 U.S.C. 156.

Also, the ATA argues that the FMV requirement of 23 U.S.C. 156 applies only to non-highway uses of right-of-way (ROW) airspace. The FHWA agrees that 23 U.S.C. 156, as originally enacted at section 126 of the Surface Transportation and Uniform Relocation Assistance Act (STURAA) of 1987, Public Law 100–17, 101 Stat. 132, 167 (1987), limited the application of the statute to highway right-of-way airspace. However, in section 1205 of the Transportation Equity Act for the 21st Century (TEA–21), Public Law 105–178, 112 Stat. 107, 184 (1998), Congress amended 23 U.S.C. 156 to expand the application of the statute to all real property acquired with Federal assistance, not just the airspace. Additionally, while reference to non-highway uses to the application of the FMV requirement of 23 U.S.C. 156, as it was enacted in 1987, might have been a logical conclusion since the statute applied to only airspace, the TEA–21 amendments to 23 U.S.C. 156 expanded the application of the FMV requirement to all real property, including existing highways. There is nothing in the legislative history to the TEA–21 amendments to suggest that Congress intended to limit the expanded application of 23 U.S.C. 156 to only non-highway uses. Rather, the express statutory language provides that the FMV requirement applies to all real property acquired with assistance from the Highway Trust Fund (other than the Mass Transit Account).

*B. General Objections to Tolling, Public-Private Partnerships, and Characterization of Concession Payments as Operating Costs*

The ATA, the Owner-Operator Independent Drivers Association (OOIDA), and AHUA each objected to the use of tolls, statements that the fuel tax is not a sustainable form of revenue, public-private partnerships (although AHUA supports concessions and public-private partnerships for new capacity and new road construction), and the FHWA's characterization of concession payments as operating costs for purposes of the revenue use restrictions for the Federal toll programs. Additionally, the Wisconsin Department of Transportation (WisDOT) stated that it does not support public-private partnerships that involve long-term leases. The FHWA does not view these comments as directly relevant to the proposed regulations. The FHWA's reference to these issues in the NPRM was provided merely as background information. The use of tolling and public-private partnerships will continue to occur regardless of the implementation of these regulations. Similarly, the FHWA's characterization of a concession payment as an operating cost will also continue. Furthermore, nothing in these regulations would require WisDOT to enter into a public-private partnership involving a long-term lease. Therefore, the FHWA makes no changes to the proposed regulations as a result of these comments.

*C. Reduced State Flexibility and Displacement of State Law*

A number of commenters objected to what they perceived as reduced State and local government flexibility and/or a displacement of State law. These commenters include the Texas Toll Authorities (joint comments submitted by the following 9 Texas toll authorities: Alamo Regional Mobility Authority, Cameron County Regional Mobility Authority, Camino Real Regional Mobility Authority, Central Texas Regional Mobility Authority, Grayson County Regional Mobility Authority, Harris County Toll Road Authority, Hidalgo County Regional Mobility Authority, North East Texas Regional Mobility Authority, and North Texas Tollway Authority), PTC, Baker, IBTTA, New Hampshire Department of Transportation (NHDOT), New York State Department of Transportation (NYSDOT), New York State Thruway Authority, Senator Kay Bailey Hutchison, Texas State Senator Robert Nichols, Texas State Representative Linda Harper-Brown, and Harris County Judge Ed Emmett. Generally, these commenters expressed the concern that the proposed regulations would limit the ability of State and local governments to transfer highways between governmental entities without charge or for a charge in transactions that are not intended to represent consideration for a sale or a lease.

In developing the regulations proposed in the NPRM, the FHWA did not intend to adversely affect the ability of State and local governments to transfer highways to other governmental entities without charge whenever a transaction is intended to resolve inherently governmental decisions in determining governmental jurisdiction, ownership, control, or other responsibilities with respect to the operation of a public highway. Rather, the regulations were intended to apply only to those transactions that are essentially commercial in nature (that is, for purposes of this rule, where the transfer is conducted in the context of an arms-length transaction and where the price is intended to represent the FMV of the facility). As such, the proposed regulations retained the rules governing ''relinquishments'' under 23 CFR Part 620, except where a transaction between governmental entities would constitute a concession agreement.

The Texas Toll Authorities commented that there may be transactions between governmental entities that may involve a payment to reimburse the State for previously incurred costs in developing the facility. The Texas Toll Authorities recommended that the definition of ''concession agreement'' should be clarified to take this factor into account. After considering this comment, as well as all the comments regarding the lack of State and local government flexibility, the FHWA has amended its definition of ''concession agreement'' to exclude agreements between government entities, even when compensation is paid, where the primary purpose is to determine governmental ownership, control, jurisdiction, or other responsibilities with respect to the operation of a highway from the definition. The definition further provides that a highway agency's determination as to whether an agreement's primary purpose is to determine these governmental responsibilities is controlling.

The Florida Department of Transportation (FDOT) requested a clarification that the proposed rule change will not preclude Florida's Turnpike Enterprise from operating and collecting tolls on federally assisted facilities, whose ownership is still maintained by FDOT. The FHWA did not intend for the proposed rules to do so, and with the modifications made to the final rule, it should be clear that these regulations do not affect this

arrangement between FDOT and Florida's Turnpike Enterprise.

*D. Direct Competition Between Public and Private Entities*

SRTA, Texas State Representative Linda Harper-Brown, Texas State Senator Robert Nichols, Association of General Contractors (AGC), and Zachry Construction each commented that competition between public and private entities is unfair. SRTA, Texas State Representative Linda Harper-Brown, and Texas State Senator Robert Nichols commented that such competition would be unfair to public entities while AGC and Zachry Construction commented that such competition is unfair to private entities. SRTA notes that public sector agencies have more restrictions on how they may structure debt. Zachry Construction notes that both entities have different legal and accounting standards, such as with respect to the payment of taxes, insurance and bonding costs, different overhead cost structures, risk management profiles, and operation and maintenance philosophies. Additionally, the IBTTA notes that statutory constraints on public agencies, differences in legal and accounting standards, and risk assessment philosophies are some significant differences between public and private entities. The FHWA agrees that there may be some differences between public and private entities. However, the FHWA does not believe that these differences are so significant to conclude that either type of entity would have a significant competitive advantage for a concession agreement. More significantly, the FHWA is concerned that a highway agency's inability to permit any kind of competition between public and private entities for concession agreements may be discouraging any type of competition for concession agreements. Since the existing rules prohibit any kind of competition, States are forced to completely forego a competition if they wish to consider a public toll agency. Therefore, the FHWA has made no change to the rule allowing public entities to compete against private entities for concession agreements.

Corridor Watch commented that the use of concession agreements should be limited to agreements with private entities, contending that the public gains no benefit from requiring their own State agencies to demand FMV from another public entity. The FHWA disagrees with this comment and believes that highway agencies should have the flexibility to offer a concession agreement to another public agency if authorized to do so under State law.

*E. Best Value*

AASHTO, PTC, NYSDOT, IBTTA, and Debevoise & Plimpton each commented that the definition of ''best value'' should be expanded to include other qualitative considerations. NHDOT commented that FMV is much more than the maximum price that may be received, and should include other qualitative considerations. The FHWA agrees. The definition of ''best value'' was not intended to be an exhaustive list of factors. Therefore, the definition of ''best value'' is expanded to include policy considerations that are not necessarily quantifiable but that a highway agency considers important. It is the FHWA's intent that the list of factors in this definition continue to be a flexible, open-ended list to allow State and local governments to take into account factors that they feel best fits their needs.

The American Automobile Association (AAA) commented that the most appropriate method to award a concession agreement is on a best value basis. The PTC commented that the States should have flexibility in how they go about determining FMV and that, in no event, should the award to the highest bidder be universally required. The FHWA agrees that the States should have flexibility in determining FMV, and further agrees that the best value approach may be more desirable. However, in order to ensure maximum flexibility in the approach to be used in determining FMV, the FHWA declines to make best value the only approach that may be used.

Additionally, AGC commented that State and local agencies should spell out in detail the weight that will be given to each factor to be used in the FMV evaluation. Debevoise & Plimpton commented that, where best value is the method chosen to determine FMV, the highway agency should be required to identify the considerations that will be used to determine best value. The FHWA agrees that any process used by the highway agency should be as transparent as possible. However, the FHWA believes that the decision regarding how the process will be conducted is most appropriately addressed by State law. Thus, the FHWA has amended section 710.709(a) to specify that if best value is used, the highway agency should, but is not required to, identify the criteria to be used in determining best value as well as the weight to be afforded to the criteria.

*F. Guidance Regarding the Determination of Fair Market Value*

AASHTO, FDOT, Georgia Department of Transportation (GDOT), PTC, Texas Toll Authorities, IBTTA, AGC, Baker, Robert W. Poole, Jr., and Debevoise & Plimpton each commented that the FHWA should provide guidance regarding how FMV should be determined whenever a competitive process is not used. AASHTO, PTC, Texas Toll Agencies, AGC, and Baker, were concerned that the lack of standards to be used in determining FMV could subject a State to an arbitrary FHWA decision regarding whether FMV has been obtained. PTC and Baker further noted that the proposed regulations do not give effect to any State laws or court decisions that may be relevant for determining FMV within a particular State. These comments regarding the lack of standards in determining FMV also relate to comments made by Robert W. Poole, Jr., Greater Houston Partnership, Gulf Coast Regional Mobility Partners, Texas Council of Engineering Companies, Harris County Judge Ed Emmett, and Texas State Representative Linda Harper-Brown that the market valuation process in Texas is troublesome and unworkable. Greater Houston Partnership, Gulf Coast Regional Mobility Partners, and Harris County Judge Ed Emmett expressed further concern that the process used for establishing FMV could cause project delays.

AAA and Robert W. Poole, Jr., commented that the determination of FMV, in instances where a competition is not conducted, must not involve negotiated compromises and, instead, be arrived at through a transparent process. Mr. Poole suggests that a ''Public Sector Comparator'' process, such as the processes used in Australia and British Columbia, would be an acceptable transparent process. Debevoise & Plimpton also suggests that FMV may be determined by comparing the public benefits brought by the terms of a concession agreement against those where a highway agency retains the rights assigned to a concessionaire.

The FHWA agrees that the lack of standards regarding how to arrive at FMV could create problems. The FHWA further agrees that FMV is most appropriately determined in accordance with State law. Therefore, the FHWA has amended the regulations in section 710.709(d) to defer to a State as to whether FMV has been obtained in accordance with State law. The FHWA also agrees with the need for transparency. Thus, if there is no

competition and if the highway agency represents that it has entered into a concession agreement for FMV, whatever that amount may be, the highway agency must also obtain an independent third party assessment and make that assessment publicly available. While the highway agency is not bound to accept the third party assessment, the fact that the assessment is publicly available may compel the highway agency to disclose how it arrived at its amount.

With respect to the comments urging the FHWA to require highway agencies to use a Public Sector Comparator, or specify certain standards to be used in making the FMV determination, the FHWA declines to do so. While the FHWA agrees that a transparent process should be established, the FHWA believes that highway agencies should have the flexibility to determine FMV in accordance with their own laws and policies. However, the FHWA does support the use of the public sector comparator process, as recommended by Mr. Poole, and essentially embraced by Debevoise & Plimpton. By deferring to the States on how to arrive at FMV, as well as whether the amount obtained constitutes FMV, the potential for project delays should be minimal.

*G. Prospective Application*

AASHTO, PTC, IBTTA, and Zachry Construction commented that the regulations should be clarified to ensure that the regulations apply prospectively, and that any concession agreement that has already been executed is ''grandfathered'' under existing regulations. The FHWA agrees with this comment and has revised section 710.705 to clarify that the regulations apply only to concession agreements executed after the effective date of this rule.

*H. Price Established Through Competition*

Debevoise & Plimpton commented that any price established through a competitive process should be determinative of whether FMV has been received, not just presumed. Robert W. Poole, Jr., notes that a market value cannot be negotiated, but only realized through arm's length bidding. GDOT inquired whether a value arrived at through a competitive process involving only one bidder constitutes FMV. The FHWA agrees with the premise of the comments that a value established through a fair and open competitive process constitutes FMV. As such, the FHWA has modified section 710.709(c) to provide that any proposal procured through a competitive process with multiple bidders shall be deemed FMV. However, whenever only one bidder is involved, the highway agency will need to determine whether the proposal constitutes FMV. Like any solicitation, the highway agency will need to evaluate the proposal against its own estimate to determine whether to accept the bid. Thus, the FHWA has amended section 710.709(c) to provide that a concession agreement awarded through a competitive process with only one bidder is presumed to be FMV. The highway agency may overcome the presumption if not to be FMV based on its own estimates.

While the FHWA has established certain degrees of deference to proposals awarded through competitive processes, it is not the FHWA's intent for any highway agency to be forced to accept any proposal, even if awarded through a competitive process with multiple bidders. The highway agency may, for a variety of reasons, decide not to accept a proposal. Thus, the FHWA has added a sentence to ensure that nothing in the regulations can be construed to force a highway agency to accept a proposal.

*I. Highest Bid Received*

Robert W. Poole, Jr., commented that the phrase ''highest bid received'' could be construed to require States to seek the largest possible up-front payment. Mr. Poole notes that many arrangements involve long-term leases where payments are made on a regular basis throughout the term of the lease. As such, Mr. Poole recommends clarifying that FMV may mean the bid yielding the highest net present value of payments over the life of the concession agreement. The FHWA agrees with Mr. Poole that the method for determining FMV should include transactions that do not involve single, up-front payments. In the proposed regulations, the FHWA had intended the term ''best value'' to be broad enough to include any standard the State may use that is not simply high bid. However, in order to ensure the regulations are clear that structured payments over the life of the lease may be properly considered in determining FMV, the FHWA has added Mr. Poole's suggested edits to section 710.709(a). However, the FHWA declines to delete the phrase ''highest bid received'' from regulation. The FHWA believes that the States should have maximum flexibility in determining how they wish to determine FMV.

*J. Federally Funded Highway*

Zachry Construction commented that the definition of federally funded highway should be revised to exclude highways constructed with TIFIA loan proceeds. Section 156 of title 23, United States Code, applies to real property acquired with Federal assistance made available from the Highway Trust Fund (other than the Mass Transit Account). Since TIFIA funding is made available, at least in part, from the Highway Trust Fund, the FHWA declines to make Zachry Construction's suggested change. Also, Debevoise & Plimpton commented that the concept of Federal assistance in the definition of federally funded highway should be limited to funds made available from the Highway Trust Fund. Since 23 U.S.C. 156 limits the concept of Federal assistance to funds from the Highway Trust Fund, the FHWA accepts this change. Accordingly, the definition of federally funded highway has been amended to replace the phrase ''title 23, United States Code'' with ''Highway Trust Fund (other than the Mass Transit Account).''

*K. Definition of Fair Market Value*

Debevoise & Plimpton commented that the definition of FMV should be revised to reflect the customary market definition, where the terms reflect an agreement by both parties to a transaction. The FHWA agrees with this comment and has amended the definition of FMV to include this concept. Debevoise & Plimpton further commented that the word ''price'' should be substituted with the word ''terms.'' The FHWA declines to make this change because, consistent with Debevoise & Plimpton's earlier comment, the change would not reflect the customary definition. However, the FHWA does agree with the essence of Debevoise & Plimpton's concern that a proposal based on best value, which may include a consideration of qualitative factors, be considered to satisfy the definition of FMV. Accordingly, the FHWA has added a sentence providing that a concession agreement based on best value shall be deemed FMV. The FHWA has also added some clarifying language to the phrase ''on the open market'' to make clear that the highway agency is not required to compete a concession agreement on the open market. FMV may be satisfied if an amount is developed ''as if'' the concession agreement is offered on the open market.

*L. Relationship to Toll Programs*

Debevoise & Plimpton commented that there could be a potential conflict between the toll revenue use restrictions contained in the various Federal toll programs, such as 23 U.S.C. 129, and the concession agreement. As such,

Debevoise & Plimpton suggested that language should be added to clarify that the toll revenue use restrictions are automatically deemed satisfied once the tolled highway become subject to a concession agreement. The FHWA declines to incorporate this comment. Toll revenues generated from the operation of any highway operating under a Federal toll program must be used for the specified revenue use restrictions under such program. Provisions contained in concession agreements cannot trump these requirements. State DOTs are responsible for ensuring compliance with these provisions. While the FHWA declines to incorporate this comment, it is worth noting that all the toll facilities subject to both a Federal toll program and a concession agreement appear to be operating without any difficulty.

PTC commented that it is inappropriate to address the criteria for participation in the highway tolling pilot programs in the context of a rulemaking regarding how States should value concession agreements. Specifically, the PTC argues that the Federal tolling provisions establish no FMV criteria for what constitutes a valid operational cost. While the FHWA agrees with PTC that this rulemaking should not address any requirements with respect to the criteria for participation in a Federal tolling program, the FHWA disagrees with the PTC that there are no limits as to what constitutes a valid operating cost for lease payments.

As explained in the NPRM, the Federal toll programs generally require toll revenue to be used first for debt service, then to provide a reasonable return on investment to any private party financing a project, and for the costs that are necessary for the proper operation and maintenance of the facility. With the exception of the ISRRPP and ISCTPP, toll revenues in excess of these uses may be applied to other projects eligible for assistance under title 23, United States Code. If a lease payment is proposed that is based on factors completely unrelated to the value of the facility, such as Statewide transportation funding needs, then the lease payment becomes excess toll revenue. While such a payment could be made under toll programs allowing for excess toll revenue to be used for other title 23, United States Code, eligible purposes (after the needs for debt service, providing a reasonable return on investment to a private party, and operation and maintenance are provided for), the lease payment is problematic for programs, such as the ISRRPP and ISCTPP, that do not allow any excess toll revenue to be used.

The toll programs were referenced in the preamble of the NPRM merely to note that the establishment of FMV for concession agreements would help State and local governments comply with Federal toll program requirements, not to create a new rule of applicability for such programs. As such, the FHWA has amended the authority section for Subpart G to refer simply to FMV requirement of 23 U.S.C. 156.

**V. Discussion of NPRM Comments Concerning Design-Build Amendments**

Eleven entities submitted comments on the proposed design-build amendments. All but one of the comments submitted were supportive of the amendments. The major comments concerning the proposed design-build amendments are discussed below.

*A. Is the Stipend Mandatory?*

NYSDOT, New York State Thruway Authority, GDOT, and Zachry Construction requested that the FHWA clarify whether the offering or acceptance of a stipend is mandatory. NYSDOT and New York State Thruway Authority noted that they support the amendment so long as the decision to offer a stipend is optional on the part of the contracting agency. GDOT requested a clarification as to whether a State is prohibited from incorporating an unsuccessful offeror's ideas if a stipend is not offered. Zachry Construction noted that the acceptance of a stipend should be optional on the part of the contractor. In considering these comments, the FHWA agrees that the decision as to whether to offer a stipend is optional on the part of the contracting agency and that if a stipend is offered, its acceptance must be optional on the part of the contractor. Forcing a contractor to relinquish its ideas to a contract it did not win could stifle competition. The American Council of Engineering Companies (ACEC) makes the point that contractors may either decide not to submit a proposal or hold back on its most innovative ideas with the assumption that additional design concepts could be later incorporated into the final design. Thus, FHWA agrees that contracting agencies should have the flexibility to use unsuccessful offeror's ideas, but only if the contracting agency offers, and the contractor accepts, a stipend. The FHWA has modified section 636.113(b) to clarify these issues.

*B. Amount of the Stipend*

AGC and ACEC commented that the amount of the stipend should be for the FMV of those ideas or based on a formula related to the value of the project. The New York State Thruway Authority noted that it was concerned about potential disputes regarding the amount of the stipend. The FHWA does not believe it is necessary to specify how the amount of the stipend should be determined. The amount of a stipend should be determined by the contracting agency. The primary purpose of a stipend is to provide an incentive to a contractor to expend resources to develop a proposal. The amount of the stipend offered must be enough to induce a contractor to submit a proposal in order for it to be effective. Likewise, if a contracting agency wishes to appropriate an offeror's ideas into a contract it did not win, the contracting agency will need to determine how much its stipend will need to be in order for the contractor to accept.

*C. Predetermined Process*

Ms. Carolyn Bergeman Langelotti commented that allowing contracting agencies to incorporate unsuccessful offeror's concepts into the final contract will discourage competition and promote unethical actions by contracting agencies to select pre-determined contractors. The FHWA believes that the use of stipends, as well as the optional nature of the decision to accept a stipend, will encourage competition. Furthermore, the FHWA is unaware of any circumstance in which a contracting agency has engaged in any unethical practices or failed to properly follow a fair and competitive process in the manner Ms. Langelotti suggests. Therefore, the FHWA declines to accept this comment.

*D. Firms Submitting Multiple Bids*

WisDOT commented that it is concerned that a firm may break up into smaller units and submit multiple bids with the intent of receiving both a stipend and an actual contract. The FHWA does not believe this is a major concern. It does not seem to be advantageous for a firm to either divide its resources when developing a proposal or to expend extra resources to submit multiple bids, especially in light of the fact that a stipend is not intended to compensate a contractor for all the costs it incurred in developing a proposal. Therefore, no changes to the final regulation have been made as a result of this comment.

**Rulemaking Analyses and Notices**

*Executive Order 12866 (Regulatory Planning and Review) and USDOT Regulatory Policies and Procedures*

The FHWA and the Office of Management and Budget (OMB) have determined that this action is not a significant regulatory action within the meaning of Executive Order 12866 and is not significant within the meaning of U.S. Department of Transportation regulatory policies and procedures. It is anticipated that the economic impact of this rulemaking will be minimal. These changes will not adversely affect, in a material way, any sector of the economy. In addition, these changes will not interfere with any action taken or planned by another agency and will not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. Consequently, a full regulatory evaluation is not required.

AASHTO, IBTTA, PTC, and Corridor Watch submitted comments contending that this action would be a significant regulatory action within the meaning of Executive Order 12866. AASHTO, IBTTA, and PTC contend this rule is economically significant because concession agreements can exceed $100 million. The FHWA disagrees with this assessment. This rule is procedural in nature and does not mandate concession agreements. Rather, it describes the processes that must be undertaken in determining FMV, as required by 23 U.S.C. 156.

Corridor Watch asserted that this rule is significant because it would adversely affect the economy by dramatically increasing the costs of public transportation and public transportation project delivery. The FHWA also disagrees with this assessment. This rule is procedural in nature and is not directed at public transportation. The purpose of the rule is to provide direction with respect to how States can comply with the FMV requirement of 23 U.S.C. 156 when entering into a concession agreement.

*Regulatory Flexibility Act*

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 60l–612) the FHWA has evaluated the effects of this action on small entities and has determined that the proposed action will not have a significant economic impact on a substantial number of small entities. OOIDA commented that this rulemaking will impact small businesses, because the policy promotes concession agreements, especially the implementation of tolls on non-tolled facilities. The FHWA disagrees with this comment. This action does not affect any funding distributed under any of the program administered by the FHWA. It ensures that State and local governments comply with both 23 U.S.C. 156 to receive FMV and the Federal tolling provision listed above regarding operating expenses whenever a concession agreement is executed involving a Federally funded highway. For these reasons, the FHWA certifies that this action will not have a significant economic impact on a substantial number of small entities.

*Unfunded Mandates Reform Act of 1995*

This rule will not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 109 Stat. 48). This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $128.1 million or more in any one year (2 U.S.C. 1532).

*Executive Order 13132 (Federalism Assessment)*

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, and the FHWA has determined that this action will not have sufficient federalism implications to warrant the preparation of a federalism assessment. The FHWA has also determined that this action will not preempt any State law or State regulation or affect the States' ability to discharge traditional State governmental functions. Corridor Watch and the Pennsylvania Turnpike Commission commented that the rule has federalism implications that require a federalism assessment under Executive Order 13132. Section 156, title 23, United States Code, requires States to obtain FMV for the sale, use, lease, or lease renewal of real property, which includes concession agreements. This rule provides for the procedures by which a State can comply with this statutory requirement. Any federalism implications arising from this rule are attributable to 23 U.S.C. 156. Additionally, the Federal Government has a substantial interest in ensuring that FMV is received on facilities in which there is a Federal investment.

*Executive Order 13211 (Energy Effects)*

The FHWA has analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use, dated May 18, 2001. The FHWA has determined that it is not a significant energy action under that order since it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required.

*Executive Order 12372 (Intergovernmental Review)*

Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.

*Paperwork Reduction Act*

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501), Federal agencies must obtain approval from the OMB for each collection of information they conduct, sponsor, or require through regulations. The FHWA has determined that this action does not contain collection of information requirements for the purposes of the PRA.

*Executive Order 12988 (Civil Justice Reform)*

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

*Executive Order 13045 (Protection of Children)*

The FHWA has analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. The FHWA certifies that this action would not cause any environmental risk to health or safety that might disproportionately affect children.

*Executive Order 12630 (Taking of Private Property)*

The FHWA has analyzed this proposed rule under Executive Order 12630, Governmental Actions and Interface with Constitutionally Protected Property Rights. The FHWA does not anticipate that this action would affect a taking of private property or otherwise have taking implications under Executive Order 12630.

*National Environmental Policy Act*

The agency has analyzed this action for the purpose of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4347) and has determined that this action will not have any effect on the quality of the environment. Corridor Watch

commented that a NEPA analysis is required because there are environmental justice issues associated with this rulemaking. FHWA disagrees with this comment. Additionally, FHWA notes that two categorical exclusions apply to this rulemaking; namely, 23 CFR 771.117(c)(11) (determination of payback under 23 U.S.C. 156 for property previously acquired with Federal-aid participation) and 23 CFR 771.117(c)(20) (promulgation of rules, regulations, and directives).

*Executive Order 12898 (Environmental Justice)*

The FHWA has analyzed this action under Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, dated February 16, 1994, and the U.S. Department of Transportation Order To Address Environmental Justice in Minority Populations and Low-Income Populations, dated April 15, 1997. Executive Order 12898 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/or low-income populations in the United States. In developing this rule in compliance with Executive Order 12898, the FHWA has determined that this rule does not raise any environmental justice concerns.

Corridor Watch commented that there are environmental justice issues with this rule because this rule will impact community, social fabric, and local economies. FHWA disagrees. This rule does not require the use of concession agreements or tolling. The purpose of this rule is to provide for procedures to ensure that State and local governments comply with both 23 U.S.C. 156 to receive FMV whenever a concession agreement is executed involving a federally funded highway.

*Regulation Identification Number*

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

**List of Subjects**

*23 CFR Part 620*

Grant programs—transportation, Highways and roads, Rights-of-way.

*23 CFR Part 635*

Construction and maintenance, Grant programs—transportation, Highways and roads, Reporting and recordkeeping requirements.

*23 CFR Part 636*

Design-build, Grant programs—transportation, Highways and roads.

*23 CFR Part 710*

Grant programs—transportation, Highways and roads, Real property acquisition, Rights-of-way, Reporting and recordkeeping requirements.

Issued on: December 15, 2008.

**Thomas J. Madison, Jr.,**

*Federal Highways Administrator.*

■ In consideration of the foregoing, the FHWA amends chapter I of title 23, Code of Federal Regulations, as set forth below:

## PART 620—ENGINEERING

■ 1. The authority citation for part 620 continues to read as follows:

**Authority:** 23 U.S.C. 315 and 318; 49 CFR 1.48, 23 CFR 1.32.

■ 2. Amend § 620.203 by revising paragraph (b) to read as follows:

### § 620.203 Is the stipend amount eligible for Federal participation?

* * * * *

(b) Other than a conveyance made as part of a concession agreement as defined in section 710.703, for purposes of this section, *relinquishment* is defined as the conveyance of a portion of a highway right-of-way or facility by a State highway agency (SHA) to another Government agency for highway use.

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## PART 635—CONSTRUCTION AND MAINTENANCE

■ 3. The authority citation for part 635 continues to read as follows:

**Authority:** Sec. 1503 of Public Law 109–59, 119 Stat. 1144; 23 U.S.C. 101 (note), 109, 112, 113, 114, 116, 119, 128, and 315; 31 U.S.C. 6505; 42 U.S.C. 3334, 4601 *et seq.*; Sec. 1041(a), Public Law 102–240, 105 Stat. 1914; 23 CFR 1.32; 49 CFR 1.48(b).

■ 4. Revise § 635.112(e) to read as follows:

### § 635.112 Advertising for bids and proposals.

* * * * *

(e) Except in the case of a concession agreement, as defined in section 710.703 of this title, no public agency shall be permitted to bid in competition or to enter into subcontracts with private contractors.

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## PART 636—DESIGN-BUILD CONTRACTING

■ 5. The authority citation for part 636 continues to read as follows:

**Authority:** Sec. 1503 of Public Law 109–59, 119 Stat. 1144; Sec. 1307 of Public Law 105–178, 112 Stat. 107; 23 U.S.C. 101, 109, 112, 113, 114, 115, 119, 128, and 315; 49 CFR 1.48(b).

■ 6. Amend § 636.113 by revising paragraph (b) and adding paragraph (c) to read as follows:

### § 636.113 Is the stipend amount eligible for Federal participation?

* * * * *

(b) Unless prohibited by State law, you may retain the right to use ideas from unsuccessful offerors if they accept stipends. If stipends are used, the RFP should describe the process for distributing the stipend to qualifying offerors. The acceptance of any stipend must be optional on the part of the unsuccessful offeror to the design-build proposal.

(c) If you intend to incorporate the ideas from unsuccessful offerors into the same contract on which they unsuccessfully submitted a proposal, you must clearly provide notice of your intent to do so in the RFP.

■ 7. Revise § 636.513 by designating the existing text as paragraph (a) and adding a new paragraph (b) to read as follows:

### § 636.513 Are limited negotiations allowed prior to contract execution?

* * * * *

(b) Limited negotiations conducted under this section may include negotiations necessary to incorporate the ideas and concepts from unsuccessful offerors into the contract if a stipend is offered by the contracting agency and accepted by the unsuccessful offeror and if the requirements of section 636.113 are met.

## PART 710—RIGHT-OF-WAY AND REAL ESTATE

■ 8. The authority citation for part 710 continues to read as follows:

**Authority:** Sec. 1307 of Public Law 105–178, 112 Stat. 107; 23 U.S.C. 101(a), 107, 108, 111, 114, 133, 142(f), 156, 204, 210, 308, 315,

317, and 323; 42 U.S.C. 2000d *et seq.*, 4633, 4651–4655; 49 CFR 1.48(b) and (cc), 18.31, and parts 21 and 24; 23 CFR 1.32.

■ 9. Revise § 710.403(d)(5) to read as follows:

**§ 710.403 Management.**

* * * * *

(d) * * *

(5) Use for transportation projects eligible for assistance under title 23 of the United States Code, provided that a concession agreement, as defined in section 710.703, shall not constitute a transportation project.

* * * * *

■ 10. Add new Subpart G to Part 710 to read as follows:

## Subpart G—Concession Agreements

Sec.



**Authority:** 23 U.S.C. 156 and 315; 23 CFR 1.32; 49 CFR 1.48.

**§ 710.701 Purpose.**

The purpose of this subpart is to prescribe the standards that ensure fair market value is received by a highway agency under concession agreements involving federally funded highways.

**§ 710.703 Definitions.**

As used in this subpart:

(a) *Best value* means the proposal offering the most overall public benefits as determined through an evaluation of the amount of the concession payment and other appropriate considerations. Such other appropriate considerations may include, but are not limited to, qualifications and experience of the concessionaire, expected quality of services to be provided, the history or track record of the concessionaire in providing the services, timelines for the delivery of services, performance standards, complexity of the services to be rendered, and revenue sharing. Such appropriate considerations may also include, but are not limited to, policy considerations that are important, but not quantifiable, such as retaining the ability to amend the concession agreement if conditions change, having a desired level of oversight over the facility, ensuring a certain level of maintenance and operations for the facility, considerations relative to the structure and amount of the toll rates, economic development impacts and considerations, or social and environmental benefits and impacts.

(b) *Concession agreement* means an agreement between a highway agency and a concessionaire under which the concessionaire is given the right to operate and collect revenues or fees for the use of a federally funded highway in return for compensation to be paid to the highway agency. A concession agreement may include, but not be limited to, obligations concerning the development, design, construction, maintenance, operation, level of service, and/or capital improvements to a facility over the term of the agreement. Concession agreement shall not include agreements between government entities, even when compensation is paid, where the primary purpose of the transaction is not commercial in nature but for the purpose of determining governmental ownership, control, jurisdiction, or responsibilities with respect to the operation of a federally funded highway. The highway agency's determination as to whether an agreement between government entities constitutes a concession agreement shall be controlling.

(c) *Concessionaire* means any private or public entity that enters into a concession agreement with a highway agency.

(d) *Fair market value* means the price at which a highway agency and concessionaire are ready and willing to enter into a concession agreement for a federally funded highway on, or as if in, the open market for a reasonable period of time and in an arm's length transaction to any willing, knowledgeable, and able buyer. For purposes of this subpart, a concession agreement based on best value shall be deemed fair market value.

(e) *Federally funded highway* means any highway (including highways, bridges, and tunnels) acquired with Federal assistance made available from the Highway Trust Fund (other than the Mass Transit Account). A highway shall be deemed to be acquired with Federal assistance if Federal assistance participated in either the purchase of any real property, or in any capital expenditures in any fixtures located on real property, within the right-of-way, including the highway and any structures located upon the property.

(f) *Highway agency* means any State transportation department or other public authority with jurisdiction over a federally funded highway.

**§ 710.705 Applicability.**

This subpart applies to all concession agreements involving federally funded highways that are executed after January 18, 2009.

**§ 710.707 Fair Market Value.**

A highway agency shall receive fair market value for any concession agreement involving a federally funded highway.

**§ 710.709 Determination of Fair Market Value.**

(a) Fair market value may be determined either on a best value basis, highest net present value of the payments to be received over the life of the agreement, or highest bid received, as may be specified by the highway agency in the request for proposals or other relevant solicitation. If best value is used, the highway agency should identify, in the relevant solicitation, the criteria to be used as well as the weight afforded to the criteria.

(b) In order to be considered fair market value, the terms of the concession agreement must be both legally binding and enforceable.

(c) Any concession agreement awarded pursuant to a competitive process with more than one bidder shall be deemed to be fair market value. Any concession agreement awarded pursuant to a competitive process with only one bidder shall be presumed to be fair market value. Such presumption may be overcome only if the highway agency determines the proposal to not be fair market value based on the highway agency's estimates. Nothing in this subpart shall be construed to require a highway agency to accept any proposal, even if the proposal is deemed fair market value. For purposes of this subsection, a competitive process shall afford all interested proposers an equal opportunity to submit a proposal for the concession agreement and shall comply with applicable State and local law.

(d) If a concession agreement is not awarded pursuant to a competitive process, the highway agency must receive fair market value, as determined by the highway agency in accordance with State law, so long as an independent third party assessment is conducted and made publicly available.

(e) Nothing in this subpart is intended to waive the requirements of Part 172, Part 635, and Part 636 whenever any Federal-aid (including TIFIA assistance) is to be used for a project under the concession agreement.

[FR Doc. E8–30147 Filed 12–18–08; 8:45 am]

BILLING CODE 4910–22–P

**DEPARTMENT OF LABOR**

**Wage and Hour Division**

**29 CFR Parts 3 and 5**

**RIN 1215–AB67**

## Protecting the Privacy of Workers: Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction

**AGENCY:** Wage and Hour Division, Employment Standards Administration, Department of Labor.

**ACTION:** Final rule.

**SUMMARY:** In this final rule, the Department of Labor (Department or DOL) revises regulations issued pursuant to the Davis-Bacon and Related Acts and the Copeland Anti-Kickback Act to better protect the personal privacy of laborers and mechanics employed on covered construction contracts.

**DATES:** *Effective Date:* January 18, 2009, except § 5.5(a)(3)(ii)(A) and (a)(3)(ii)(B)(1), which contain information collection requirements that have not been approved by OMB. The Wage and Hour Division will publish a document in the **Federal Register** announcing the effective date. See **SUPPLEMENTARY INFORMATION** for dates of applicability.

**FOR FURTHER INFORMATION CONTACT:** Richard M. Brennan, Director, Office of Interpretations and Regulatory Analysis, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S–3506, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: (202) 693–0051 (this is not a toll-free number). Copies of this notice may be obtained in alternative formats (Large Print, Braille, Audio Tape or Disc), upon request, by calling (202) 693–0023 (not a toll-free number). TTY/TDD callers may dial toll-free (877) 889–5627 to obtain information or request materials in alternative formats.

Questions of interpretation and/or enforcement of regulations issued by this agency or referenced in this notice may be directed to the nearest Wage and Hour Division (WHD) District Office. Locate the nearest office by calling our toll-free help line at (866) 4USWAGE ((866) 487–9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto the WHD's Web site for a nationwide listing of WHD District and Area Offices at: *http://www.dol.gov/esa/whd/america2.htm*.

**SUPPLEMENTARY INFORMATION:**

### I. Background

The Department published a Notice of Proposed Rulemaking in the **Federal Register** on October 20, 2008 (73 FR 62229), inviting comments until November 19, 2008, on revisions to update certain regulatory standards to better protect worker privacy for contracts covering federally financed and assisted construction.

### II. Summary of Comments

The Department received 37 total comments on the NPRM from a variety of individuals (7), trade and professional associations (6), labor unions (12), governmental entities (5), Members of Congress (3 letters signed by a total of 16 members), law firms (2), and others (2).

Four commenters generally supported the proposed rule. Of the four, three cited protecting the employee's privacy as the major factor for their support. The fourth comment expressed support for the Department's goals of increased privacy and decreased burden through electronic reporting but noted that the commenter had business interests coextensive with such an initiative. One of these commenters, a state government entity, believed the employer is in a better position to protect an employee's personal information than government agencies enforcing prevailing wage requirements.

The agency also received from several trade associations and a government agency more specific comments in support of protecting worker privacy and/or reducing unnecessary burdens, but suggesting alternatives to the proposal. One commenter from a trade association supported the Department's efforts to protect workers' privacy under the proposed rule. The commenter, however, raised concerns that the proposed rule could be read to prohibit subcontractors from providing addresses and social security numbers in submissions to the prime contractors, even though prime contractors continue to have responsibility for compliance of subcontractors under the regulations. As a result, the commenter recommended that the Department proceed with the proposed rule, but clarify that ''prime contractors may continue to require subcontractors to provide such information to the prime contractors for its own records, without submission to the government.'' The commenter also recommended the government expand efforts allowing electronic payroll submission systems, to ensure the systems are cost-efficient, reliable, and user-friendly.

One commenter from a federal government agency (United States Department of Defense—Department of the Navy) suggested that if address and social security information are totally unavailable to contracting agencies, there could be an impediment for enforcement. The commenter generally endorsed requiring contractors and subcontractors to maintain and provide addresses and social security numbers to the government upon request and/or that the prime contractor be required to compile social security numbers and up-to-date addresses from subcontractors even if they are not included in the currently-required weekly certified payrolls. The commenter suggested adding explicit language to the regulations to make it clear that ''failure to provide such information on a timely basis would carry the same regulatory consequences as failure to provide timely certified payroll reports.'' The commenter also strongly supported the submission of certified payroll by electronic means to reduce burden.

A number of other commenters agreed that there were privacy issues with certified payroll requirements, particularly with regard to the use of social security numbers, but raised concerns that lack of access to addresses and social security numbers might work as a hardship for those monitoring compliance. For example, some noted that removing addresses from certified payrolls may impact the ability of agencies to locate and interview workers for the purposes of auditing prevailing wage compliance on contracts or disbursing back wages to employees following a finding of their employer's non-compliance. Four of these commenters supported the continued need for some level of an individual worker identification number and recommended the Department of Labor consider alternatives—three suggested using the last four digits of the social security number and one suggested creating a unique employee identification instead.

A majority of the comments raised concerns that the proposed changes could result in difficulties in enforcing the applicable prevailing wage laws because weekly submissions of certified payrolls containing social security numbers and addresses for individual workers are useful to government investigators and auditors in ensuring compliance with the Davis-Bacon and Related Acts and/or Copeland Act. Some commenters also noted that contractors and subcontractors do not always cooperate with government agencies in prevailing wage compliance

audits or investigations. Additional concerns raised by the commenters include: Prevailing wage enforcement at the state and federal level could become more costly; the change could result in increased opportunities for fraud by contractors and subcontractors; the rule is unnecessary because there are already safeguards in place to protect worker privacy; and/or a superior solution would be to require better protection (e.g., encryption of data) of the certified payrolls by government agencies and the regulated community.

Most comments in opposition (19) were simply blanket criticisms of the proposed changes with little to no analysis. Twelve of these comments also argued that, because federal law generally prohibits the release of addresses and social security numbers, the proposed rule is not needed. Several of these commenters were members of Congress who requested that the Department extend the comment period. Notably, however, no other stakeholders in the regulated community requested an extension of the comment period. A number of other commenters in this group, and others below, criticized the length of the comment period, but still provided timely comments.

Several commenters expressed concerns that lack of individual identifying information could increase the time and effort necessary for government agencies to conduct prevailing wage investigations or audits. With regard to the privacy of workers, several commenters suggested the alternative of requiring the government and contractors to restrict the information to only those who need access. Several commenters suggested that government agencies and stakeholders should consider increasing electronic submission of certified payroll records to improve efficiency, but did not believe that the current process was a public burden or endangered worker privacy.

One commenter referenced the Department of Labor's Office of Apprenticeship and the need to have individual information to verify apprenticeship status for workers. The commenter was concerned that with only a name to compare, and not an address and social security number, there could be difficulties in verifying the identity of individual workers in apprenticeship programs. The commenter also suggested that reducing reporting requirements in general, even to protect privacy, may increase the chance unscrupulous contractors and subcontractors will be able to hide violations of prevailing wage requirements to the detriment of honest contractors and subcontractors. Several other commenters also suggested that without the current weekly reporting requirements, some contractors and subcontractors could find it easier to intentionally not comply with the prevailing wage laws.

One commenter stated that the proposed change erroneously places too much value on personal privacy over the government duty to enforce the Davis-Bacon Act. This commenter and others recommended that the Department focus on requiring government agencies to better protect personal identifying information rather than reduce reporting requirements. Several commenters also questioned the Department's assertion that this change will reduce public ''reporting burdens.''

One commenter (International Union of Operating Engineers) opposed the proposed rule because of concerns that the change could somehow result in ''misclassification of workers, underpayment of wages, fringe benefit abuses and illegal kickbacks on federal construction projects.'' This commenter also questioned the Department's statement that contractors will continue to be required to maintain employee addresses and social security numbers, the Department's reliance on *Building & Construction Trades Department* v. *Donovan*, 712 F.2d 611 (D.C. Cir, 1983), and whether there was any evidence that government agencies and contractors are unable to appropriately protect personal information currently.

One state government agency (Illinois Department of Labor) raised concerns that the changes could hinder efforts to enforce applicable laws as well as its own use of home addresses and social security numbers in state investigations. The agency also recommended the Department consider requiring additional privacy protections from government agencies on releasing personal identifying information rather than reduce weekly reporting requirements.

One commenter from a state Construction Trades Council noted a specific situation in which certified payrolls could have helped to verify appropriate payment of prevailing wages, but the payrolls turned out to be unhelpful because of contractor errors. In addition, the commenter was concerned that the proposed changes could cause budget issues as state agencies could have greater difficulty and costs in monitoring prevailing wage compliance and conducting investigations. Other commenters also suggested that any reduction in reporting burden as a result of the proposed rule could be offset by the potential for an increase in time spent by contractors and subcontractors in responding to subsequent investigations.

One commenter, on behalf of its building and construction trade clients, opposed the proposed rule because of concerns that the comment period was too short, questioned whether there was any need to better protect worker's privacy, and disagreed that there would be any actual reduction in burden. The commenter suggested that the 30-day comment period did not provide enough time under the Administrative Procedure Act. Finally, the commenter noted the specific characteristics of the construction industry could make it more likely workers will not receive prevailing wages and/or fringe benefits without government having access to personally identifying information on weekly certified payrolls.

The Building and Construction Trade Department, AFL-CIO or ''BCTD'' submitted comments on behalf of 13 national and international organizations, and more than 300 State and Local Building and Construction Trades Councils. In addition to making a number of points similar to those discussed above, BCTD suggested that the proposed rule did not meet the requirements of a memorandum advising federal agencies that significant final regulatory changes should generally be implemented before November 2008. BCTD also: (1) Echoed concerns of other commenters that the Department misread the *Building & Construction Trades Department* v. *Donovan*, 712 F.2d 611 (D.C. Cir, 1983) opinion; (2) stated it did not believe the current requirements were ''unnecessarily intrusive and clearly outweigh the privacy concerns cited by DOL''; (3) noted the Office of Management and Budget did not mandate reductions in the collection of social security numbers and home addresses on certified weekly payrolls; (4) suggested the changes could ''embolden unscrupulous contractors and subcontractors to disregard their obligations;'' and (5) stated it did not believe the reasons offered by the Department ''individually or collectively'' supported the proposal.

## III. Summary of Pertinent Laws

Section 1 of the Davis-Bacon Act (DBA), as amended, 40 U.S.C. 3141 requires that each contract over $2,000 to which the United States or the District of Columbia is a party for the construction, alteration, or repair of public buildings or public works shall contain a clause setting forth the minimum wages to be paid to various

classes of laborers and mechanics employed under the contract. The DBA requires contractors or their subcontractors to pay workers employed directly upon the site of the work no less than the locally prevailing wages and fringe benefits paid on projects of a similar character as determined by the Secretary of Labor. Regulations in 29 CFR part 5 contain the Davis-Bacon and Related Acts required contract clauses, and descriptions and interpretations of the labor standards requirements.

The Copeland Anti-Kickback Act, 40 U.S.C. 3145, requires, among other things, that contractors and subcontractors performing work on most federally financed or assisted construction contracts furnish weekly a statement with respect to the wages paid each worker during the preceding week. *See* 29 CFR 3.3(b), 3.4. Under the regulations, contractors must submit weekly a copy of all payrolls to the federal agency contracting for or financing the construction project, if the agency is a party to the contract, but if the agency is not such a party, the contractor will submit the payrolls to the applicant, sponsor, or owner, as the case may be, for transmission to the contracting agency. 29 CFR 5.5(a)(3)(ii)(A). A signed ''Statement of Compliance'' indicating the payrolls are correct and complete and that each laborer or mechanic has been paid not less than the proper Davis-Bacon and Related Act prevailing wage rate for the work performed must accompany the payroll. *Id.* 3.3(b), 5.5(a)(3)(ii)(B). Regulations implementing the Copeland Act are contained in 29 CFR parts 3 and 5.

The current regulations for the Davis-Bacon and Related Acts (DBRA), 29 CFR part 5, require that certified payrolls be provided to the contracting government office for each week of work: ''The payrolls submitted shall set out accurately and completely all of the information required, including 'name, address, and Social Security number of each such worker * * *.''' 29 CFR 5.5(a)(3)(i), (ii). These requirements flow down to subcontractors as well. *Id.* 5.5(a)(6).

In addition to the statutory authorities above, Reorganization Plan No. 14 of 1950 conferred upon the Secretary of Labor the authority to coordinate the administration and enforcement of the labor standards provisions of the above laws by the federal agencies providing the federal funding or assistance for the covered construction activities. *See* 5 U.S.C. Appendix.

The Secretary delegated her authority under the Davis-Bacon Act, 40 U.S.C. 3141; the Copeland Act, 40 U.S.C. 3145; Reorganization Plan No. 14 of 1950; the Tennessee Valley Authority Act, 16 U.S.C. 831; and the Contract Work Hours and Safety Standards Act, as amended, 40 U.S.C. 3701, *et seq.* to the Assistant Secretary for Employment Standards Administration. *See* Secretary's Order 01–2008, issued May 30, 2008, and published in the **Federal Register** on June 6, 2008 (73 FR 32424).

## IV. Response to Comments and Discussion of Final Rule

The Department appreciates the many constructive suggestions and criticisms of the proposal, and it has carefully considered all of the comments, analyses, and arguments made for and against the proposed changes.

The Department has determined that its experience in enforcing the requirements of the Davis-Bacon and Related Acts and Copeland Act do not require weekly submissions to the government (in the form of certified payroll statements) to include complete social security numbers and home addresses for individual workers (alongside the workers' specific weekly income and benefits amounts as currently required). The Department finds that this information is personal to the worker and that any unnecessary disclosures and submittal to contractors, other entities, and/or the government creates an exposure to identity theft and the invasion of privacy for workers. The Department believes workers in the construction industry performing work on a covered project under the Davis-Bacon and Related Acts are entitled to have their personal addresses and social security numbers kept as private as possible.

In fact, the requirements for including complete social security numbers and home addresses on certified payrolls does not comport with recent efforts to limit the use of personally identifying information in government generally. For example, the President recently issued revised Executive Order No. 9397 on November 18, 2008, which amended a 1930s directive mandating the use social security numbers in interactions with government to make it permissible instead of mandatory: ''It is the policy of the United States that Federal agencies should conduct agency activity that involve personal identifiers in a manner consistent with protection of such identifiers against unlawful use.''

Moreover, reducing the collection of information on certified payrolls is in accord with Office of Management and Budget guidelines. As noted in the NPRM, the Office of Management and Budget issued a Memorandum in 2007 directing government agencies to reduce ''the volume of collected and retained [personal identifying] information to the minimum necessary; [and limit] access to only those individuals who must have such access.'' OMB Memorandum M–07–16 at 2. Although several commenters disagreed, the Department reads the Memorandum as clearly both a directive to safeguard information and to reduce collection of such information where possible.

Indeed, other government agencies have adopted privacy protection policies and noted the very real dangers of identity theft. As stated by the U.S. Social Security Administration: ''Identity theft is one of the fastest growing crimes in America. A dishonest person who has your Social Security number can use it to get other personal information about you. Identity thieves can use your number and your good credit to apply for more credit in your name. Then, they use the credit cards and do not pay the bills. You may not find out that someone is using your number until you are turned down for credit or you begin to get calls from unknown creditors demanding payment for items you never bought. Someone illegally using your Social Security number and assuming your identity can cause a lot of problems.'' *See http://www.ssa.gov/pubs/10064.html.*

As noted in more detail in the NPRM, Congress has also focused on protecting the privacy interests of workers (*see, e.g.,* the Privacy Act, the Health Insurance Portability and Accountability Act (HIPAA)) and courts have specifically noted the privacy issues regarding public disclosures of certified payrolls under the Freedom of Information Act. *See, e.g., Sheet Metal Workers Int'l Ass'n, Local No. 19* v. *U.S. Veterans Affairs*, 135 F.3d 891 (3d Cir. 1998) (disclosure of names, social security numbers, or addresses on certified payrolls would constitute unwarranted invasion of privacy); *Painting Indus. Of Haw. Mkt. Recovery Fund* v. *United States Dep't of Air Force*, 26 F.3d 1479 (9th Cir. 1994) (names and addresses).

The Department believes that the final rule strikes the appropriate balance between the ability to enforce the law and the need to protect the privacy interests of workers. Some commenters expressed concern that the proposed change may impact enforcement or increase costs. The Department, however, did not find the comments submitted compelling nor does the Department's enforcement experience suggest that continued effective enforcement and protecting the privacy interests of workers are mutually exclusive goals. The Department also

has determined that the added benefits of reducing burdens to the regulated community and government agencies and providing appropriate flexibility to Federal agencies, State agencies, and covered contractors and subcontractors argue in favor of the change.

In reviewing the comments, however, the Department has decided to make several modifications to the proposal. In order to address the concern that eliminating access to social security numbers could work as a hardship for those monitoring compliance in circumstances where there are multiple employees with the same names, the Department will continue to require an individual identifying number on certified payrolls. The Department will require that, in accord with suggestions received from the public, that certified payrolls continue to include a line item for contractors and subcontractors to include an individual identifying number for tracking purposes, which in virtually all cases, should be the last four digits of the workers' social security number. This will substantially limit the possibility of identity theft while still ensuring workers can be separately identified effectively by auditors and investigators.

In addition, contractors and subcontractors will be required to maintain and provide data to investigators demonstrating the appropriate payment of prevailing wages, including complete social security numbers and current home addresses for laborers and mechanics employed on covered contracts. This obligation is identified in the current regulations and will remain unchanged. Thus, government agencies and the Department of Labor remain entitled to request or review all relevant payroll information, including the addresses and social security numbers of individual workers, from contractors or subcontractors. In addition, prime contractors will continue to have an obligation to assist the government in auditing or investigating compliance, including assisting the government in obtaining records from subcontractors if necessary. In order to better delineate the obligations and responsibilities of contractors and subcontractors to cooperate and assist in audits or investigations regarding prevailing wage requirements, the Department has adopted the suggestion of one of the commenters to make this more explicit in the regulations as part of the final rule.

With regard to the suggestion that the Department instead require better safeguards of the information, the Department believes contractors, subcontractors and government agencies (as well as applicants, sponsors, and owners where they are involved in a covered project) have a general obligation to safeguard the personally identifying information of workers. The Department, however, does not believe it would be appropriate to require that certified payrolls be subject to some sort of one-size-fits-all protection such as encryption or restriction to use or review by specific persons only. Each government agency, contractor, and subcontractor may have different methods of safeguarding information, and the Department does not believe it is in a position to mandate any particular method that will be appropriate to all situations. In general, the Department believes the best way to prevent the misuse or loss of personally identifying information is not to require contractors, applicants, sponsors, owners, or government agencies to disseminate it unless necessary for a compelling government interest. To the extent information must be gathered to ensure prevailing wage law compliance, the individual government agencies and regulated community are in the best position to decide how to manage the information received and request additional information so personally identifying information is not lost or misused. As such, the Department has declined to add or substitute language mandating any particular type of security for certified payrolls.

With regard to concerns that any reduction in reporting will lead to fraud or less compliance or added costs, the Department does not believe the comments provide any concrete basis to support this allegation. Certified payrolls will continue to include all required wage and hour data, names and a personal identification number. Under the revised regulations, contractors and subcontractors will certify that they are maintaining the remaining information. The revised regulations require contractors and subcontractors to provide such information on request. Thus, the revised regulations do not limit the ability of investigators or auditors to get the appropriate information; rather, the revised regulations simply prevent the indiscriminate free-flow of personally identifiable information when the government has no need for it. In addition, most contractors and subcontractors on DBRA-covered projects make good faith efforts to abide by the law; violations often derive from a misunderstanding rather than intent. The Department does not believe this will change simply because the regulated community is no longer required to report their employees' home addresses and full social security numbers every week on certified payrolls. Moreover, contractors and subcontractors that falsify certify required certifications will continue to be subject to possible civil and criminal prosecution. *See* 29 CFR 5.5(a)(ii)(D).

With regard to suggestions that there is no evidence this change is necessary, the Department disagrees. Although the Department is unaware of any organized identity theft activity utilizing certified payrolls, there are daily examples of accidental disclosures of personally identifying information or intentional theft of such information. For example, on December 5, 2008, the Wall Street Journal reported that a state-level agency accidentally put the Social Security numbers of about 250,000 job seekers on the Internet for 19 days before a separate state agency noticed the security breach. The federal government has also lost computers or data containing significant amounts of personally identifying information (PII), including social security numbers and personal addresses. *See, e.g., http://www.usa.gov/veteransinfo.shtml* (discussing 2006 PII data breaches/computer thefts). Similarly, cities and labor unions have had identity theft occur in circumstances where personally identifying information is required to be disclosed to labor unions by the government. *See, e.g., Bell* v. *Michigan Council 25*, No. 246684, 2005 WL 356306 (Mich. App. Feb. 15, 2005) (City of Detroit employees and members of AFSCME Local 1023 sued union local and union treasurer for negligence when they suffered identity theft at hands of union treasurer's daughter). While it is unquestionable that government uses PII for legitimate purposes in many instances, there is certainly an interest in reducing the gathering and storing of PII to prevent the opportunity for identity theft and invasion of privacy. Moreover, the burden reduction identified below for the regulated community suggests there are added benefits that outweigh any alleged costs.

Several commenters questioned the Department's interpretation of *Building & Const. Trades' Dept., AFL–CIO* v. *Donovan*, 712 F.2d 611 (D.C. Cir. 1983). The court in that case held that the Copeland Act required covered contractors and subcontractors performing work on most federally financed or assisted construction contracts to furnish weekly a statement with respect to the wages paid each worker during the preceding week. Importantly, however, the court noted that there was no specific requirement

for what individualized wage information for each covered worker was necessary on the certified payroll submissions. *See id.* at 633. As noted in the NPRM, the Department does not believe there is any statutory requirement that the Department require social security numbers or addresses on certified payroll and a clear reading of the statutory law and the decision is that the Department has discretion for the specific requirements of weekly disclosures as long as the disclosures provide an appropriate amount of information. The Department therefore disagrees with the commenters' alternative characterization of the court's decision.

Similarly, one commenter's suggestion that there is some impropriety to the proposal based on the 30-day comment period under the Administrative Procedure Act is mistaken. The APA does not specify a particular comment period. For the very minor nature of the proposal in this case, 30 days is not overly short. Moreover, only a few commenters (all of whom were members of Congress) requested an extension at all, so there is no evidence the short period limited the public in their attempts to provide meaningful comments.

The Department also does not find that a May 2008 Memorandum from the White House Chief of Staff limits its right to finalize this rule as commenters suggested. The Memorandum specifically states that it was not intended to alter or impede government agencies in performing their responsibilities and that part of its purpose is to ensure agencies design regulations to minimize costs and maximize benefits. Therefore, the Department notes the May 2008 Memorandum does not preempt the 2007 OMB Memorandum M–07–16 discussed above nor the President's revised Executive Order No. 9397 of November 18, 2008—both of which promote agency compliance with limiting the collection and use generally of personally identifying information.

With regard to addresses of covered construction workers, it should be noted that this is not a substantial change to the current certified payroll requirements. The instructions to WHD's optional Form WH–347, which is a model for certified payroll submissions, currently specifies that addresses are only required for the first time the laborer or mechanic performs work on the contract and whenever there is a change of address. The final rule further limits that disclosure slightly by bringing the regulatory provisions in line with information collection needs—requiring contractors and subcontractors to make addresses and/or social security numbers of covered workers available to DOL or other government agency investigators and auditors upon request but not in weekly reports that are disseminated to a wider audience.

Accordingly, after a detailed review of the comments provided and consideration of the regulation in accordance with statutory requirements, the Department has determined that the requirement to furnish weekly a detailed payroll with respect to the wages paid each employee during the preceding week can be satisfied by a weekly submission of a payroll without home addresses and complete social security numbers. The regulatory changes merely remove the requirement to include a complete social security number and home address of each individual worker from documents that are provided weekly to the workers' non-employing government agencies, contractors, subcontractors, applicants, sponsors, and/or owners.

This change is in keeping with the Administration's overall objective of protecting the privacy interests of this nation's workers and reducing reporting burdens imposed on the public. Also, the Department believes the current requirement creates a burden on contractors and the government to safeguard copies of certified payrolls containing this type of personally identifying information regarding each week of every covered project. For example, one commenter noted a frequent need to redact just this sort of information in response to Freedom of Information Act (FOIA) requests. By removing this information from certified payrolls, the government will have less information to redact in responding to entities requesting copies of certified payrolls under the FOIA, which will save the government time and costs as well as improve speed in responding to such requests from the public.

Importantly, the final regulation does not change the requirement that the addresses and social security numbers of covered workers be maintained and made available to government agencies upon request to permit government agencies to investigate compliance with the requirements of the Davis-Bacon and Related Acts and/or Copeland Act, 29 CFR 5.5(a)(3)(i), (iii). In response to commenters noting some difficulty with retrieving this type of information upon occasion, however, the Department is providing explicitly in the revised text of the regulatory provisions (which is incorporated into covered construction contracts) that contractors and subcontractors must maintain this information and make it available upon request to government investigators and auditors.

Two implementing changes are needed to other aspects of the regulations to bring them in line with the final rule. WHD's optional Form WH–347, which is a model for certified payroll submissions, is to be amended to reflect these requirements and was the subject of a Paperwork Reduction Act notice as discussed more fully below. A conforming change to the certification required for certified payrolls is also included in the final rule regulatory text (changing the certification to that required to be provided by the final rule).

The Department received no comments on two issues noted in the proposal and so is implementing the two ministerial changes to reflect current practices. The first of these eliminates references in the regulations to Form WH–348, as the agency no longer sponsors the form. *See* 29 CFR 3.3(b). The information previously presented on Form WH–348 appears on Form WH–347 and was duplicative. In addition, the rule revises how interested parties may obtain Form WH–347, as the form is no longer available for purchase through the Government Printing Office. *See* 29 CFR 3.3(b) and 5.5(a)(3)(ii)(A).

Also, because the changes being made are minor and result in a net reduction in burden, the Department has determined that a 30-day effective date is appropriate. *See* section XVI below.

**V. Paperwork Reduction Act**

The Office of Management and Budget (OMB) has assigned control number 1215–0149 to the Davis-Bacon Certified Payroll information collection. In accordance with the Paperwork Reduction Act of 1995 (PRA), the October 20, 2008, NPRM solicited comments on the proposed revisions to this information collection. 44 U.S.C. 3506(c)(2). The Department also submitted a contemporaneous request for OMB review of the proposed revisions, in accordance with 44 U.S.C. 3507(d). On October 28, 2008, the OMB issued a notice that continued the current authority for existing information collection requirements. The OMB also asked the Department to resubmit the information collection request upon promulgation of a final rule and after considering public comments on the NPRM. While the Department received comments regarding substantive aspects of the information collection, no comments directly addressed the methodology for

estimating the public burden under the PRA.

Under the final rule, the contractor's staff must still perform a search/research function to pull each employee's social security number from its records to encode the last four digits as an identifier, and the burden computation for the final rule must include all the time involved in searching for and compiling the required data. Thus, there will be less of a reduction in burden for omitting portions of the Social Security numbers that are not put onto the weekly certified payroll report forms. DOL therefore is amending the burden reduction in the estimate from the original two minutes to a one minute reduction (per response). Accordingly, the Department has revised its estimate that each response to this information collection takes approximately 54 minutes to 55 minutes. In order to facilitate a full understanding of all the issues involved and avoid unnecessary duplicative statements, public comments addressing the information collection requirements imposed by this final rule are discussed in the comment summary portion of this preamble.

Interested parties may obtain a prototype Davis-Bacon Certified Payroll, Form WH–347, via the Wage and Hour Division's Forms Web site at *http://www.dol.gov/esa/whd/forms/wh347instr.htm*, by contacting the Wage and Hour Division at 1–866–4US–WAGE (1–866–487–9243), or by visiting a Wage and Hour Division District Office. A list of District Office addresses is available on the Internet at *http://www.dol.gov/esa/whd/america2.htm*. Form WH–347 is also available through the forms.gov Web site. While use of Form WH–347 is optional, it is mandatory for contractors performing on covered projects to provide the information specified in 29 CFR 3.3, 5.5(a)(3). Responses are not confidential; however, FOIA exemptions may allow for the redaction of certain information that respondents submit. In addition, the Department as well as contracting agencies use the information provided in administering the labor standards provisions of covered Federally financed or assisted construction projects. The information also may be used in administrative and legal proceedings.

Generally, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. 5 CFR 1320.8(b)(3)(vi). The Department has resubmitted the revised Davis-Bacon Certified Payroll information collection to the OMB for approval, and the Department intends to publish a notice announcing the OMB's decision regarding this information collection request. A copy of the information collection request can be obtained at *http://www.RegInfo.gov* or by contacting the Wage and Hour Division as shown in the **FOR FURTHER INFORMATION CONTACT** section of this preamble. The terms of the existing information collection authorization will remain in effect until the OMB finally approves the new information collection request or this final rule takes effect on January 18, 2009, whichever date is later.

*Purpose and Use:* The Copeland Act requires contractors and subcontractors performing work on most federally financed or assisted construction contracts to furnish weekly a statement with respect to the wages paid each worker during the preceding week. *See* 40 U.S.C. 3145; 29 CFR 3.3(b), 3.4. Contractors must submit weekly a copy of all payrolls to the federal agency contracting for or financing the construction project, if the agency is a party to the contract, but if the agency is not such a party, the contractor will submit the payrolls to the applicant, sponsor, or owner, as the case may be, for transmission to the contracting agency. 29 CFR 5.5(a)(3)(ii)(A). A signed ''Statement of Compliance'' indicating the payrolls are correct and complete and that each laborer or mechanic has been paid not less than the proper Davis-Bacon Act prevailing wage rate for the work performed must accompany the payroll. *Id.* 3.3(b), 5.5(a)(3)(ii)(B). Contractors must also maintain these records for three years after completion of the work. *Id.* 3.4(b), 5.5(a)(3)(i).

More specifically, the current regulations require contractors performing work on projects subject to Davis-Bacon Act provisions to retain the name, address, social security number, correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in Davis-Bacon Act section 1(b)(2)(B)), daily and weekly number of hours worked, deductions made, and actual wages paid to each worker on the contract. *Id.* 5.5(a)(3)(i). Whenever the Secretary of Labor has found under 29 CFR 5.5(a)(1)(iv) that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in Davis-Bacon Act section 1(b)(2)(B), the contractor must maintain records showing that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, that the plan or program has been communicated in writing to the laborers or mechanics affected, and the anticipated or actual costs incurred in providing such benefits. *Id.* Contractors employing apprentices or trainees under approved programs must maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs. *Id.*

Under this final rule, the Department is only removing the regulatory requirement that the weekly payroll submitted to the contracting agency contain each worker's entire social security number and address. The proposal does not remove the requirement for worker addresses and social security numbers to be retained in records maintained by the contractor or subcontractor. *Id.* 5.5(a)(3)(i). *See also id.* 5.5(a)(6). Government contracting officials and WHD staff may use the records maintained by contractors and subcontractors as well as the weekly certified payrolls to verify payment of the required wages for the work performed.

The Department has developed optional use Form WH–347, Payroll Form, which contractors may use to meet the payroll reporting requirements. *Id.* 3.3(b), 5.5(a)(3)(ii)(A). The form contains the basic payroll information that contractors must furnish each week they perform any work subject to Davis-Bacon Act provisions. The contractor also completes, dates, and signs a statement on the reverse side of the form to meet the certification requirement. The contractor submits the completed form weekly to the contracting agency. 29 CFR 5.5(a)(3)(ii)(A).

*Information Technology:* In accordance with the Government Paperwork Elimination Act (GPEA), 44 U.S.C. 3504, the WHD has posted Form WH–347 on the Internet (*http://www.dol.gov/esa/whd/forms/wh347.pdf*) in a printable and fillable format that automatically performs some mathematical calculations. Individual contracting agencies determine any electronic submission options, because contractors submit the information directly to each contracting agency, not to the Department. 29 CFR 5.5(a)(3)(ii)(A).

In 2004, WHD issued a letter to the U.S. Army Corps of Engineers and the Federal Highway Administration advising that the submission of electronic signatures satisfied the

requirements of the Copeland Act and its regulations. Similarly, the submission of photocopies or other automated duplication of the contractor's regular payrolls containing all of the required information pertinent to the government construction project(s) is sufficient to satisfy the payroll data requirements. 29 CFR 5.5(a)(3)(ii)(A).

A number of commenters on the proposed rule noted that there were additional applications and methods to improve efficiency in satisfying regulatory requirements and all commenters who discussed the issue endorsed additional use of technology, including electronic filing of certified payrolls. It is the Department's understanding that Web-based certified payroll compliance solutions exist and that some agencies and contractors have set up systems to comply electronically already. While a number of commenters suggested that the Department further study and endorse these initiatives, the Department of Labor has determined that specific methods of implementing cost savings and efficiencies through more effective use of technology are best left to the contracting community and individual government agencies. DOL encourages all government agencies to review proposals to allow contractors to submit information electronically or through allowing access to an appropriate agency approved limited-access Web-based portal providing the required information and certification. The Department believes these efforts, if properly reviewed and implemented in accord with this final rule and data privacy requirements, will decrease burden, increase the efficient use of resources and better ensure timely submission of certified payrolls to improve compliance. The Department therefore supports agencies in exploring and implementing any additional methods to improve efficient compliance with the certified payroll requirements.

*Public Burden Estimates:* This final rule introduces no new information collection requirements nor proposes any substantive or material changes to the existing information collection requirements noted above. The Department, however, is removing the requirement to report an employee's entire social security number and home address weekly, which the Department estimates will reduce the average reporting time from an average of 56 minutes per response to 55 minutes per response.

The Department bases the following burden estimates for this information collection on agency experience, except as otherwise noted. F.W. Dodge Report data for the period June 1, 2007, through May 31, 2008, indicate there were 109,323 State and local construction projects and 3032 federal construction projects. The Department estimates that approximately 33 percent of State and local construction projects utilize federal funds, resulting in an estimated 36,077 State and local construction projects being subject to Davis-Bacon labor standards (109,323 projects × 33 percent). Added to the 3032 federal projects, this would be an estimated 39,109 annual projects subject to Davis-Bacon labor standards.

The Department estimates these projects have an average of 8 contractors or subcontractors, resulting in 312,872 individual contractor and subcontractor projects (39,109 projects × 8 contractors and subcontractors per project = 312,872 individual projects).

To yield the estimated number of respondents, the Department estimates that, on a per capita basis, each covered construction contractor annually works on an average of four projects subject to Davis-Bacon Act provisions. Thus, 312,872 individual projects divided by 4 Davis-Bacon projects per contractor equals 78,218 respondents.

The Department also estimates that a typical contractor or subcontractor on average submits 23 certified payrolls per individual project. Thus, 312,872 individual projects multiplied by 23 weekly responses equal 7,196,056 total annual responses.

The 7,196,056 responses multiplied by 55 minutes (estimated time to complete Form WH–347 or its equivalent) equal 395,783,080 minutes or 6,596,385 hours (rounded).

An agency may not conduct an information collection unless it has a currently valid OMB approval and the Department has submitted the identified information collections contained in the rule to the OMB for review under the PRA. *See* 44 U.S.C. 3507(d); 5 CFR 1320.11. Please note that the current authorization for the Davis-Bacon Certified Payroll information collection expires April 30, 2009. On December 1, 2008, the Department's routine Paperwork Reduction Act notice for extension of the existing Davis-Bacon information collection requirements that are also the subject of this final rule closed. 73 FR 57153. No comments were received.

## VI. Executive Order 12866; Small Business Regulatory Enforcement Fairness Act; Regulatory Flexibility

This rule is not economically significant within the meaning of Executive Order 12866, or a ''major rule'' under the Unfunded Mandates Reform Act or Section 801 of the Small Business Regulatory Enforcement Fairness Act.

The Department believes that a reduction in the amount of information required on certified payrolls provided weekly under Davis-Bacon is a reduction in regulatory compliance costs. While some contractors may have to slightly reconfigure their systems to produce the revised version, most have access to computerized systems that can easily be revised to remove data. Those contractors who currently use the optional WH Form will actually have an overall decrease of total administrative costs.

*Conclusion:* The Department concludes that incorporating these changes into the Davis-Bacon regulations will not impose any measurable costs on any private or public sector entity.

Furthermore, because the rule will not impose any measurable costs on employers, the Department certifies that it would not have a significant economic impact on a substantial number of small entities. Accordingly, the Department need not prepare a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The Department has certified this conclusion to the Chief Counsel for Advocacy of the Small Business Administration.

## VII. Unfunded Mandates Reform Act

This rule has been reviewed in accordance with the Unfunded Mandates Reform Act of 1995 (UMRA). 2 U.S.C. 1501 *et seq.* For the purposes of the UMRA, the Department certifies that this rule does not impose any federal mandate that may result in increased expenditures by State, local, or tribal governments, or increased expenditures by the private sector, of more than $100 million in any year.

## VIII. Executive Order 13132 (Federalism)

The Department has reviewed this rule in accordance with the Executive Order on Federalism (Executive Order 13132, 64 FR 43255, Aug. 10, 1999). This rule does not have federalism implications as outlined in E.O. 13132. The rule does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

**IX. Executive Order 13175, Indian Tribal Governments**

The Department has reviewed this rule under the terms of Executive Order 13175 and determined it did not have ''tribal implications.'' The rule does not have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes.'' As a result, no tribal summary impact statement has been prepared.

**X. Effects on Families**

The Department certifies that this rule will not adversely affect the well-being of families, as discussed under section 654 of the Treasury and General Government Appropriations Act, 1999.

**XI. Executive Order 13045, Protection of Children**

The Department has reviewed this rule under the terms of Executive Order 13045 and determined this action is not subject to E.O. 13045 because it is not economically significant as defined in E.O. 12866 and it does not impact the environmental health or safety risks of children.

**XII. Environmental Impact Assessment**

The Department has reviewed this rule in accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, the regulations of the Council of Environmental Quality, 40 CFR part 1500 *et seq.*, and the Departmental NEPA procedures, 29 CFR part 11, and determined that this rule will not have a significant impact on the quality of the human environment. There is, thus, no corresponding environmental assessment or an environmental impact statement.

**XIII. Executive Order 13211, Energy Supply**

The Department has determined that this rule is not subject to Executive Order 13211. It will not have a significant adverse effect on the supply, distribution or use of energy.

**XIV. Executive Order 12630, Constitutionally Protected Property Rights**

The Department has determined that this rule is not subject to Executive Order 12630 because it does not involve implementation of a policy ''that has taking implications'' or that could impose limitations on private property use.

**XV. Executive Order 12988, Civil Justice Reform Analysis**

The Department drafted and reviewed this final rule in accordance with Executive Order 12988 and determined that the rule will not unduly burden the federal court system. The rule was: (1) Reviewed to eliminate drafting errors and ambiguities; (2) written to minimize litigation; and (3) written to provide a clear legal standard for affected conduct and to promote burden reduction.

**XVI. Dates of Applicability**

The revisions to § 5.5(a)(3)(ii)(A) and (B)(1) of Part 5 shall be applicable only as to contracts entered into pursuant to invitations for bids issued or negotiations concluded on or after the effective date of this rule, which is January 18, 2009.

**List of Subjects**

*29 CFR Part 3*

Government contracts, Labor, Paperwork, Law enforcement.

*29 CFR Part 5*

Government contracts, Labor, Paperwork, Law enforcement.

Signed at Washington, DC, this 11th day of December 2008.

**Victoria A. Lipnic,**

*Assistant Secretary, Employment Standards Administration.*

**Alexander J. Passantino,**

*Acting Administrator, Wage and Hour Division.*

■ For the reasons set forth above, Title 29, Subtitle A of the Code of Federal Regulations is amended by amending parts 3 and 5 as follows:

## PART 3—CONTRACTORS AND SUBCONTRACTORS ON PUBLIC BUILDING OR PUBLIC WORK FINANCED IN WHOLE OR IN PART BY LOANS OR GRANTS FROM THE UNITED STATES

■ 1. The authority citation for Part 3 is revised to read as follows:

**Authority:** R.S. 161, sec. 2, 48 Stat. 848; Reorg. Plan No. 14 of 1950, 64 Stat. 1267; 5 U.S.C. 301; 40 U.S.C. 3145; Secretary's Order 01–2008; and Employment Standards Order No. 2001–01.

■ 2. Amend § 3.3 by revising paragraph (b) to read as follows:

**§ 3.3 Weekly statement with respect to payment of wages.**

* * * * *

(b) Each contractor or subcontractor engaged in the construction, prosecution, completion, or repair of any public building or public work, or building or work financed in whole or in part by loans or grants from the United States, shall furnish each week a statement with respect to the wages paid each of its employees engaged on work covered by this part 3 and part 5 of this title during the preceding weekly payroll period. This statement shall be executed by the contractor or subcontractor or by an authorized officer or employee of the contractor or subcontractor who supervises the payment of wages, and shall be on the back of Form WH 347, ''Payroll (For Contractors Optional Use)'' or on any form with identical wording. Copies of Form WH 347 may be obtained from the Government contracting or sponsoring agency or from the Wage and Hour Division Web site at *http://www.dol.gov/esa/whd/forms/wh347instr.htm* or its successor site.

* * * * *

## PART 5—LABOR STANDARDS PROVISIONS APPLICABLE TO CONTRACTS COVERING FEDERALLY FINANCED AND ASSISTED CONSTRUCTION (ALSO LABOR STANDARDS PROVISIONS APPLICABLE TO NONCONSTRUCTION CONTRACTS SUBJECT TO THE CONTRACT WORK HOURS AND SAFETY STANDARDS ACT)

■ 3. The authority citation for part 5 is revised to read as follows:

**Authority:** 5 U.S.C. 301; R.S. 161, 64 Stat. 1267; Reorganization Plan No. 14 of 1950, 5 U.S.C. appendix; 40 U.S.C. 3141 *et seq.*; 40 U.S.C. 3145; 40 U.S.C. 3148; 40 U.S.C. 3701 *et seq.*; and the laws listed in 5.1(a) of this part; Secretary's Order 01–2008; and Employment Standards Order No. 2001–01.

■ 4. Amend § 5.5 paragraphs (a)(3)(ii)(A) and (a)(3)(ii)(B)(*1*) by revising to read as follows:

**§ 5.5 Contract provisions and related matters.**

(a) * * *

(3) * * * (ii)(A) The contractor shall submit weekly for each week in which any contract work is performed a copy of all payrolls to the (write in name of appropriate federal agency) if the agency is a party to the contract, but if the agency is not such a party, the contractor will submit the payrolls to the applicant, sponsor, or owner, as the case may be, for transmission to the (write in name of agency). The payrolls submitted shall set out accurately and completely all of the information required to be maintained under 29 CFR 5.5(a)(3)(i), except that full social security numbers and home addresses shall not be included on weekly transmittals. Instead the payrolls shall only need to include an individually

identifying number for each employee (*e.g.*, the last four digits of the employee's social security number). The required weekly payroll information may be submitted in any form desired. Optional Form WH–347 is available for this purpose from the Wage and Hour Division Web site at *http://www.dol.gov/esa/whd/forms/wh347instr.htm* or its successor site. The prime contractor is responsible for the submission of copies of payrolls by all subcontractors. Contractors and subcontractors shall maintain the full social security number and current address of each covered worker, and shall provide them upon request to the (write in name of appropriate federal agency) if the agency is a party to the contract, but if the agency is not such a party, the contractor will submit them to the applicant, sponsor, or owner, as the case may be, for transmission to the (write in name of agency), the contractor, or the Wage and Hour Division of the Department of Labor for purposes of an investigation or audit of compliance with prevailing wage requirements. It is not a violation of this section for a prime contractor to require a subcontractor to provide addresses and social security numbers to the prime contractor for its own records, without weekly submission to the sponsoring government agency (or the applicant, sponsor, or owner).

(B) * * *

(1) That the payroll for the payroll period contains the information required to be provided under § 5.5 (a)(3)(ii) of Regulations, 29 CFR part 5, the appropriate information is being maintained under § 5.5 (a)(3)(i) of Regulations, 29 CFR part 5, and that such information is correct and complete;

* * * * *

[FR Doc. E8–29886 Filed 12–18–08; 8:45 am]

**BILLING CODE 4510–27–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Parts 147 and 165

**[USCG–2008–0181]**

### Quarterly Listings; Anchorages, Safety Zones, Security Zones, Special Local Regulations, Regulated Navigation Areas, and Drawbridge Operation Regulations; Correction

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of expired temporary rules issued; correction.

**SUMMARY:** The Coast Guard published a document in the **Federal Register** of October 14, 2008, concerning expired temporary rules. The document contained an incorrect contact telephone number, an incorrect table entry, and an omission.

**FOR FURTHER INFORMATION CONTACT:** For questions on this notice contact Ms. Lesley Mose, Office of Regulations and Administrative Law, telephone (202) 372–3863. For questions on viewing, or on submitting material to the docket, contact Ms. Angie Ames, Program Manager, Docket Operations, telephone 202–366–5115.

### Correction

In the **Federal Register** of October 14, 2008, in FR Doc. E8–23956, on page 60629, in the second column under **FOR FURTHER INFORMATION CONTACT**, correct the Office of Regulations and Administrative Law telephone number to read ''202–372–3863''; on the same page, in the table, remove the entry for Docket No. USCG–2008–0102; and on page 60630, in the table insert the entry for Docket No. USCG–2008–0402 reading ''Boca Grande, FL, Safety Zones (Parts 147 and 165), 6/7/2008'' in numerical order.

Dated: December 9, 2008.

**S.G. Venckus,**

*Chief, Office of Regulations and Administrative Law.*

[FR Doc. E8–29736 Filed 12–18–08; 8:45 am]

**BILLING CODE 4910–15–P**

## POSTAL REGULATORY COMMISSION

### 39 CFR Part 3020

**[Docket Nos. MC2009–8 and CP2009–9; Order No. 147]**

### Administrative Practice and Procedure, Postal Service

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commission is adding a new international mail product to the Competitive Product List. This product is a contract between the United States Postal Service and Canada Post for inbound competitive services. It modifies and extends an existing agreement. The Commission's action is consistent with changes to applicable federal law and regulations and with a recent Postal Service request. Republication of the lists of market dominant and competitive products is also consistent with requirements in the law.

**DATES:** Effective December 19, 2008.

**ADDRESSES:** Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.*

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

**SUPPLEMENTARY INFORMATION:** *Regulatory History,* 73 FR 70681 (November 21, 2008).

The Postal Service seeks to add a new product identified as Canada Post-United States Postal Service Contractual Bilateral Agreement for Inbound Competitive Services (MC2009–8 and CP2009–9) to the Competitive Product List. For the reasons discussed below, the Commission approves the Request.

### I. Background

On November 13, 2008, the Postal Service filed a formal request pursuant to 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.* to add the Canada Post-United States Postal Service Contractual Bilateral Agreement for Inbound Competitive Services (Bilateral Agreement) to the Competitive Product List.[1] The Postal Service asserts that the Contractual Bilateral Agreement is a competitive product ''not of general applicability'' within the meaning of 39 U.S.C. 3632(b)(3). This Request has been assigned Docket No. MC2009–8.

The Postal Service contemporaneously filed notice, pursuant to 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5, that the Governors have established prices and classifications not of general applicability for inbound competitive services as reflected in the Bilateral Agreement. More specifically, the Bilateral Agreement, which has been assigned Docket No. CP2009–9, governs the exchange of Inbound Surface Parcel Post from Canada.

In support of its Request, the Postal Service filed a redacted version of the Governors' Decision establishing prices for the Bilateral Agreement. Attached to the Governors' Decision are proposed Mail Classification Schedule language; a redacted version of management's analysis of the Bilateral Agreement; certification of compliance with 39 U.S.C. 3633(a); certification of the Governors' vote;[2] and a Statement of Supporting Justification as required by 39 CFR 3020.32.[3] In addition, the Postal

[1] Request of United States Postal Service to Add Canada Post-United States Postal Service Contractual Bilateral Agreement for Inbound Competitive Services to the Competitive Product List, and Notice of Filing (Under Seal) the Enabling Governors' Decision and Agreement, November 13, 2008 (Request).

[2] *See* Attachment 1 to the Request.

[3] *See* Attachment 2 to the Request.

Service indicates that it filed an unredacted copy of the Governors' Decision, the Bilateral Agreement, and other supporting documents designed to establish compliance with 39 CFR 3015.5 under seal. Request at 2, n.2.

In the Statement of Supporting Justification, Lea Emerson, Executive Director, International Postal Affairs, asserts that ''[t]he addition of the [Bilateral] Agreement as a competitive product will enable the Commission to verify that the agreement covers its attributable costs and enables competitive products, as a whole, to make a positive contribution to coverage of institutional costs.'' *Id.* at 2. W. Ashley Lyons, Manager, Corporate Financial Planning, Finance Department, certifies that the contract complies with 39 U.S.C. 3633(a). Request, Attachment C. He observes that the Bilateral Agreement ''should not impair the ability of competitive products on the whole to cover an appropriate share of institutional costs.''*Id.*

The Postal Service filed much of the supporting materials, including the Governors' Decision and the Bilateral Agreement, under seal. It maintains that the Bilateral Agreement, related financial information, and the Governor's Decision should remain under seal as they contain pricing, cost, and other information that are highly confidential. Request at 2.[4]

The Postal Service has an existing bilateral agreement with Canada Post which is set to expire December 31, 2008. *Id.* at 3. The new prices and classifications modify the current agreement, extend it for 1 year, and are scheduled to take effect January 1, 2009, or ''after filing with and review by the Postal Regulatory Commission, whichever, is later.'' Request, Attachment 1, at 2.

In Order No. 134, the Commission gave notice of the two dockets, appointed a public representative, and provided the public with an opportunity to comment.[5] Pursuant to 39 CFR 3015.6, Chairman's Information Request No.1 was issued November 24, 2008. The Postal Service filed its response on December 1, 2008 as requested.[6]

## II. Comments

Comments were filed by the Public Representative.[7] No filings were submitted by other interested parties. The Public Representative's comments focus principally on confidentiality and pricing under the contract. Public Representative Comments at 3–4.

The Public Representative states that a sufficient rationale for maintaining the confidentiality of the documents under seal has been provided by the Postal Service. He reviewed the cost savings measures for the contract and determined that the contract is advantageous to the Postal Service and beneficial to the general public. *Id.* He notes that the Commission's 2007 Annual Compliance Determination (ACD) found that Inbound Surface Parcel Post under the bilateral agreement with Canada incurred a loss and the Postal Service is attempting to remedy this issue with this agreement.[8] Additionally, he observes that the pay-for-performance standards will improve the performance of both postal administrations. He concludes, *inter alia,* that the contract appears to meet each element of 39 U.S.C. 3633(a). *Id.* at 2.

## III. Commission Analysis

The Commission has reviewed the contract, the financial analysis provided under seal that accompanies it, the additional information filed by the Postal Service in response to the Chairman's Information Request, and the comments filed by the Public Representative.

*Statutory requirements.* The Commission's statutory responsibilities in this instance entail assigning the Bilateral Agreement with Canada Post for Inbound Competitive Services to either the Market Dominant Product List or to the Competitive Product List. 39 U.S.C. 3642. As part of this responsibility, the Commission also reviews the proposal for compliance with the Postal Accountability and Enhancement Act (PAEA) requirements. This includes, for proposed competitive products, a review of the provisions applicable to rates for competitive products. 39 U.S.C. 3633.

*Product list assignment.* In determining whether to assign the Bilateral Agreement with Canada Post for Inbound Competitive Services as a product to the Market Dominant Product List or the Competitive Product List, the Commission must consider whether

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

39 U.S.C. 3642(b)(1). If so, the product will be categorized as market dominant. The competitive category of products shall consist of all other products.

The Commission is further required to consider the availability and nature of enterprises in the private sector engaged in the delivery of the product, the views of those who use the product and the likely impact on small business concerns. 39 U.S.C. 3642(b)(3).

In Docket No. RM2007–1, Order No. 43, the Commission determined that Inbound Surface Parcel Post shipments tendered at negotiated rates are appropriately classified as competitive. The Canada Post Bilateral Agreement falls within this category.

The Postal Service asserts that its bargaining position is constrained by the existence of other shippers who can provide similar services, thus precluding it from taking unilateral action to increase prices without the risk of losing volume to private companies. Request, Attachment 2, at 2–3. The Postal Service also contends that it may not decrease quality or output without risking the loss of business to competitors that offer similar expedited delivery services. *Id.* Finally, the Postal Service states that the market for international parcel delivery services is highly competitive and that the agreement provides a benefit to Canada Post's and the Postal Service's small business customers by providing an additional option for shipping articles between the United States and Canada. It concludes that there should be little, if any negative impact on small business. *Id.* at 4.

No commenter opposes the proposed classification of the Canada Post-United States Postal Service Contractual Bilateral Agreement for Inbound Competitive Services, as competitive.

[4] The Postal Service indicates that the materials filed under seal constitute a subset of the overarching agreement between the parties, representing the parties' agreement concerning inbound competitive services. The Postal Service further indicates that the parties anticipate finalizing ''this and related agreements by mid-December, and any lingering details will not affect the rates, classification, or other fundamental basis for this Request and Notice.'' Request at 5, n.12.

[5] PRC Order No. 134, Notice and Order Concerning Bilateral Agreement with Canada Post For Inbound Competitive Services, November 18, 2008 (Order No. 134).

[6] Response of United States Postal Service to Chairman's Information Request No. 1 and Notice of Filing of Responsive Materials (Under Seal) December 1, 2008 (Response).

[7] Public Representative Comments in Response to United States Postal Service Request to add Canada Post-United States Postal Service Contractual Bilateral Agreement for Inbound Competitive Services, to the Competitive Product List, and Notice of Filing (Under Seal) the Enabling Governors' Decision and Agreement, December 3, 2008 (Public Representative Comments).

[8] In the ACD summary of International Mail, issued March 27, 2008, the Commission concludes that revenue for competitive Inbound Surface Parcel Post (at non-UPU rates) did not cover its corresponding attributable costs by a relatively small amount.

Having considered the statutory requirements and the support offered by the Postal Service, the Commission finds that the Canada Post-United Postal Service Contractual Bilateral Agreement for Inbound Competitive Services is appropriately classified as a competitive product and should be added to the Competitive Product List.

*Cost considerations.* The Postal Service's filing seeks to establish a new product for Inbound Surface Parcel Post from Canada. The Postal Service asserts the rates provide financial benefits for inbound competitive services which are better than those that would exist if the rates used are set by the Universal Postal Union (UPU) treaty. Request, Attachment 1B, at 1.

The Postal Service contends, as mentioned in the comments of the Public Representative, adding the Canada Post-United States Postal Service Contractual Bilateral Agreement for Inbound Competitive Services product will result in better cost coverage for Inbound Surface Parcel Post and address the Commission's concern about cost coverage as expressed in the Annual Compliance Determination for Fiscal Year 2007. The Commission's summary and findings for International Mail concluded that revenues for corresponding competitive Inbound Surface Parcel Post at non-UPU rates did not provide revenues that covered attributable costs. The Postal Service states that its financial analysis of the new prices negotiated in this agreement shows that this contract covers its attributable costs, and does not result in subsidization of competitive products by market dominant products and should not impair the ability of competitive products on the whole to cover an appropriate share of institutional costs. *Id.,* Attachment 1C, at 1.

Based on the data submitted and the comments received, the Commission finds that Canada Post-United States Postal Service Contractual Bilateral Agreement for Inbound Competitive Services should cover its attributable costs (39 U.S.C. 3633(a)(2)), should not lead to the subsidization of competitive products by market dominant products (39 U.S.C. 3633(a)(1)), and should have a positive effect on competitive products' contribution to institutional costs (39 U.S.C. 3633(a)(3)). Thus, an initial review of the proposed Canada Post-United States Postal Service Contractual Bilateral Agreement for Inbound Competitive Services indicates that it comports with the provisions applicable to rates for competitive products.

It is our understanding that this contract extension will terminate December 31, 2009. If this is not the case, the Postal Service shall promptly notify the Commission when the contract terminates, but no later than the actual termination date. The Commission will then remove the contract from the Mail Classification Schedule at the earliest possible opportunity.

In conclusion, the Commission approves the Canada Post-United States Postal Service Contractual Bilateral Agreement for Inbound Competitive Services as a new product. The revision to the Competitive Product List is shown below the signature of this Order and is effective upon issuance of this Order.

## IV. Ordering Paragraphs

*It is Ordered:*

1. Canada Post-United States Postal Service Contractual Bilateral Agreement for Inbound Competitive Services (MC2009–8 and CP2009–9) is added to the Competitive Product List as a new product under International Inbound Surface Parcel Post (at non-UPU) rates.

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

**List of Subjects in 39 CFR Part 3020**

Administrative practice and procedure, Postal Service.

By the Commission.

**Steven W. Williams,**

*Secretary.*

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

## PART 3020—PRODUCT LISTS

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

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

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

APPENDIX A TO SUBPART A OF SUBPART A OF PART 3020—MAIL CLASSIFICATION SCHEDULE

**Part A—Market Dominant Products**

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

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

Periodicals
- Within County Periodicals
- Outside County Periodicals

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

Special Services

APPENDIX A TO SUBPART A OF SUBPART A OF PART 3020—MAIL CLASSIFICATION SCHEDULE—Continued

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

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

Market Dominant Product Descriptions

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

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

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

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

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

APPENDIX A TO SUBPART A OF SUBPART A OF PART 3020—MAIL CLASSIFICATION SCHEDULE—Continued

- Money Orders [Reserved for Product Description]
- Post Office Box Service [Reserved for Product Description]

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

**Part B—Competitive Products**

Competitive Product List

Express Mail
- Express Mail
- Outbound International Expedited Services
- Inbound International Expedited Services
  - Inbound International Expedited Services 1 (CP2008–7)

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

Parcel Select

Parcel Return Service

International
- International Priority Airlift (IPA)
- International Surface Airlift (ISAL)
- International Direct Sacks—M-Bags
- Global Customized Shipping Services
- Inbound Surface Parcel Post (at non-UPU rates)
  - Canada Post—United States Postal Service Contractual Bilateral Agreement for Inbound Competitive Services (MC2009–8 and CP2009–9)
- International Money Transfer Service
- International Ancillary Services

Special Services
- Premium Forwarding Service

Negotiated Service Agreements
- Domestic
  - Express Mail Contract 1 (MC2008–5)
  - Express Mail Contract 2 (MC2009–3 and CP2009–4)
  - Express Mail & Priority Mail Contract 1 (MC2009–6 and CP2009–7)
  - Parcel Return Service Contract 1 (MC2009–1 and CP2009–2)
  - Priority Mail Contract 1 (MC2008–8 and CP2008–26)
  - Priority Mail Contract 2 (MC2009–2 and CP2009–3)
  - Priority Mail Contract 3 (MC2009–4 and CP2009–5)
  - Priority Mail Contract 4 (MC2009–5 and CP2009–6)
- Outbound International
  - Global Expedited Package Services (GEPS) Contracts
    - GEPS 1 (CP2008–5, CP2008–11, CP2008–12, and CP2008–13, CP2008–18, CP2008–19, CP2008–20, CP2008–21, CP2008–22, CP2008–23, and CP2008–24)
  - Global Plus Contracts
    - Global Plus 1 (CP2008–9 and CP2008–10)
    - Global Plus 2 (MC2008–7, CP2008–16 and CP2008–17)
- Inbound Direct Entry Contracts with Foreign Postal Administrations (MC2008–6, CP2008–14 and CP2008–15)

Competitive Product Descriptions
- Express Mail [Reserved for Group Description]
- Express Mail [Reserved for Product Description]
- Outbound International Expedited Services [Reserved for Product Description]
- Inbound International Expedited Services [Reserved for Product Description]
- Priority [Reserved for Product Description]
- Priority Mail [Reserved for Product Description]
- Outbound Priority Mail International [Reserved for Product Description]
- Inbound Air Parcel Post [Reserved for Product Description]
- Parcel Select [Reserved for Group Description]
- Parcel Return Service [Reserved for Group Description]
- International [Reserved for Group Description]
- International Priority Airlift (IPA) [Reserved for Product Description]
- International Surface Airlift (ISAL) [Reserved for Product Description]
- International Direct Sacks—M–Bags [Reserved for Product Description]
- Global Customized Shipping Services [Reserved for Product Description]
- International Money Transfer Service [Reserved for Product Description]
- Inbound Surface Parcel Post (at non-UPU rates) [Reserved for Product Description]
- International Ancillary Services [Reserved for Product Description]
- International Certificate of Mailing [Reserved for Product Description]
- International Registered Mail [Reserved for Product Description]
- International Return Receipt [Reserved for Product Description]

APPENDIX A TO SUBPART A OF SUBPART A OF PART 3020—MAIL CLASSIFICATION SCHEDULE—Continued

International Restricted Delivery [Reserved for Product Description]
International Insurance [Reserved for Product Description]
Negotiated Service Agreements [Reserved for Group Description]
Domestic [Reserved for Product Description]
Outbound International [Reserved for Group Description]

[FR Doc. E8–30169 Filed 12–18–08; 8:45 am]
**BILLING CODE 7710–FW–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 58

**[EPA–HQ–OAR–2006–0735; FRL–8754–9]**

**RIN 2060–AN83**

### National Ambient Air Quality Standards for Lead

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

**ACTION:** Correcting amendment.

**SUMMARY:** The EPA issued a final rule on November 12, 2008 (effective date January 12, 2009) that revised the National Ambient Air Quality Standard (NAAQS) for lead (Pb) and associated monitoring requirements. This document makes a minor correction to the November 12, 2008, action to correct a typographical error in the regulatory text for the rule.

**DATES:** This correction is effective January 12, 2009.

**FOR FURTHER INFORMATION CONTACT:** Mr. Kevin Cavender, Air Quality Assessment Division (C304–06), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–2364; fax number: (919) 541–1903; e-mail address: *Cavender.kevin@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

#### Background

The EPA issued a final rule on November 12, 2008 (effective date January 12, 2009) that revised the NAAQS for Pb and associated Pb monitoring requirements. As part of the Pb monitoring requirements, monitoring agencies are required to develop a plan for establishing Pb monitoring sites in accordance with the requirements of appendix D of Part 58. A number of requirements for this plan were listed including the identification of (1) the designation of any Pb monitors as either source-oriented or non-source-oriented according to Appendix D to 40 CFR part 58, (2) any source-oriented monitors for which a waiver has been requested or granted by the EPA Regional Administrator as allowed for under paragraph 4.5(a)(ii) of Appendix D to 40 CFR part 58, and (3) any source-oriented or non-source-oriented site for which a waiver has been requested or granted by the EPA Regional Administrator for the use of Pb-$PM_{10}$ monitoring in lieu of Pb-TSP monitoring as allowed for under paragraph 2.10 of Appendix C to 40 CFR Part 58. These requirements were correctly included in the amended regulatory text for 40 CFR Part 58 in the final rule. In describing the amendments to the existing regulatory text, EPA accurately included a reference adding paragraph 58.10 (b)(9) (which contains the first requirement identified above). Although the notice included the text of paragraphs 58.10 (b)(10) and (b)(11) (which contain the second and third requirements identified above), EPA inadvertently failed to specify that these paragraphs were also being added to the existing regulatory text in the amendatory language.

#### Need for Correction

As published, the regulatory text in the final regulation contains a minor error that, if not corrected, would result in an error in the publication of the regulatory amendment in the Code of Federal Regulations. This action merely addresses an error in describing how the CFR regulatory text is amended, and not the amended regulatory text itself. Thus it is proper to issue this action with out notice and comment. Section 553 of the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(B), provides that, when an Agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, the Agency may issue a rule without providing notice and an opportunity for public comment. We have determined that there is good cause for making this action final without prior proposal and opportunity for comment because the change to the rule is a minor technical correction, is non-controversial, and does not substantively change the agency actions taken in the final rule. We similarly have determined there is good cause for making this rule effective January 12, 2009, because that is the same day the revisions to the Pb NAAQS and the monitoring requirements become effective under the rule published November 12, 2008.

#### Corrections of Publication

The EPA issued a final rule on November 12, 2008 that revised the NAAQS for Pb and associated monitoring requirements. Instruction 15 on how the Code of Federal Regulations is amended inadvertently failed to identify two paragraphs as amendments to 40 CFR 58.10. As published in the November 12, 2008 final rule, instruction 15 reads as follows:

''15. Section 58.10, is amended by added paragraph subsections (a)(4) and adding paragraph (b)(9) to read as follows:''

In FR Doc. E8–25654 published November 12, 2008 (73 FR 66964), make the following correction. On page 67059, in the center column, amendatory instruction 15 is corrected to read as follows:

''15. Section 58.10, is amended by adding paragraph (a)(4) and adding paragraphs (b)(9) through (b)(11) to read as follows:''

#### List of Subjects in 40 CFR Part 58

Environmental protection, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: December 12, 2008.

**Robert J. Meyers,**

*Principal Deputy Assistant Administrator, Office of Air and Radiation.*

[FR Doc. E8–30199 Filed 12–18–08; 8:45 am]
**BILLING CODE 6560–50–P**

## GENERAL SERVICES ADMINISTRATION

### 41 CFR Part 102–74

**[FMR Amendment 2008-08; FMR Case 2008–102–3; Docket 2008–0001; Sequence 5]**

**RIN 3090–AI78**

### Federal Management Regulation; FMR Case 2008–102–3, Real Property Policies Update – Smoking Restrictions

**AGENCY:** Office of Governmentwide Policy, General Services Administration (GSA).

**ACTION:** Final rule.

**SUMMARY:** The General Services Administration is amending the Federal Management Regulation (FMR) to revise the restrictions on the smoking of tobacco products in leased or owned space under the jurisdiction, custody, or control of the Administrator of General Services. This final rule cancels and replaces in its entirety 41 CFR §§ 102–74.315 through 102–74.350 including the insertion of a new § 102–74.351.

**DATES:** *Effective Date*: December 19, 2008.

**FOR FURTHER INFORMATION CONTACT:** Mr. Stanley C. Langfeld, Director, Regulations Management Division, Office of Governmentwide Policy, General Services Administration, at (202) 501–1737, or by e-mail at *stanley.langfeld@gsa.gov* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat, Room 4041, GS Building, Washington, DC 20405, (202) 501–4755. Please cite FMR Amendment 2008–08, FMR Case 2008–102–3.

**SUPPLEMENTARY INFORMATION:**

## A. Background

1. On August 9, 1997, President Clinton signed Executive Order (E.O.) 13058, entitled ''Protecting Federal Employees and the Public From Exposure to Tobacco Smoke in the Federal Workplace,'' to establish a smoke-free environment for Federal employees and members of the public visiting or using Federal facilities (62 FR 43451, August 13, 1997).

2. On October 20, 1997, the U.S. General Services Administration (GSA) issued GSA Bulletin FPMR D–245, ''Protecting Federal Employees and the Public from Exposure to Tobacco Smoke in the Federal Workplace'' (62 FR 54461). In accordance with the requirements of E.O. 13058, GSA Bulletin FPMR D–245 prohibited the smoking of tobacco products in all interior space owned, rented or leased by the executive branch of the Federal Government, except in specially-equipped designated smoking areas, outdoor areas in front of air intake ducts and certain other residential and non-Federal occupied space. The bulletin also required the heads of executive agencies to evaluate the need to restrict smoking in courtyards and near doorways.

3. Studies conducted since the issuance of GSA Bulletin FPMR D–245 have concluded that cigarette smoking is the number one preventable cause of morbidity and premature mortality worldwide. Studies also have shown that the harmful effects of smoking are not confined solely to the smoker, but extend to co-workers and members of the general public who are exposed to secondhand smoke as well. Recognition of these facts is evidenced by the stricter laws on smoking enacted by several states over the past 10 years. Twenty-six states have banned smoking entirely in all of their State government buildings and 19 have banned smoking in all private work places.

4. Executive Order 13058 encourages the heads of executive agencies to evaluate the need to further restrict smoking at doorways and in courtyards under executive branch control and authorizes the agency heads to restrict smoking in these areas in light of this evaluation.

5. The proposed changes to the current smoking policy may affect conditions of employment for employees. Where there is an exclusive representative for the employees, executive branch agencies will be required to meet their collective bargaining obligations under the Federal Service Labor-Management Relations Act, as amended, 5 U.S.C. Ch. 71, Labor-Management Relations, before the proposed revisions to the existing smoking policy can be implemented.

## B. Executive Order 12866

The General Services Administration (GSA) has determined that this final rule is not a significant regulatory action for the purposes of Executive Order 12866.

## C. Regulatory Flexibility Act

This final rule is not required to be published in the **Federal Register** for comment. Therefore, the Regulatory Flexibility Act does not apply.

## D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FMR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

## E. Small Business Regulatory Enforcement Fairness Act

This final rule is exempt from Congressional review under 5 U.S.C. 801 since it relates solely to agency management and personnel.

## List of Subjects in 41 CFR Part 102–74

Facility Management.

Dated: December 8, 2008

**James A. Williams,**

*Acting Administrator of General Services.*

■ For the reasons set forth in the preamble, GSA amends 41 CFR part 102–74 of Subchapter C as set forth below:

## PART 102–74—FACILITY MANAGEMENT

■ 1. The authority citation for 41 CFR part 102–74 continues to read as follows:

**Authority:** 40 U.S.C. 121(c).

■ 2. Amend Subpart B of part 102–74 by revising §§ 102.74–315 through 102.74–350 and adding new § 102.74–351 to read as follows:

### § 102–74.315 What is the smoking policy for interior space in Federal facilities?

Pursuant to Executive Order 13058, ''Protecting Federal Employees and the Public From Exposure to Tobacco Smoke in the Federal Workplace'' (3 CFR, 1997 Comp., p. 216), it is the policy of the executive branch to establish a smoke-free environment for Federal employees and members of the public visiting or using Federal facilities. The smoking of tobacco products is prohibited in all interior space owned, rented or leased by the executive branch of the Federal Government.

### § 102–74.320 Are there any exceptions to the smoking policy for interior space in Federal facilities?

Yes, the smoking policy does not apply in—

(a) Any residential accommodation for persons voluntarily or involuntarily residing, on a temporary or long-term basis, in a building owned, leased or rented by the Federal Government;

(b) Portions of Federally owned buildings leased, rented or otherwise provided in their entirety to non-Federal parties;

(c) Places of employment in the private sector or in other non-Federal Governmental units that serve as the permanent or intermittent duty station of one or more Federal employees; and

(d) Instances where an agency head establishes limited and narrow exceptions that are necessary to accomplish agency missions. Such exceptions must be in writing, approved by the agency head and, to the fullest extent possible, provide protection of nonsmokers from exposure to environmental tobacco smoke. Authority to establish such exceptions may not be delegated.

### § 102–74.325 Are designated smoking areas authorized in interior space?

No, unless specifically established by an agency head as provided by § 102–74.320(d). A previous exception for designated smoking areas is being eliminated. All designated interior

smoking areas will be closed effective June 19, 2009. This six-month phase-in period is designed to establish a fixed but reasonable time for implementing this policy change. This phase-in period will provide agencies with time to comply with their obligations under the Federal Service Labor-Management Relations Act, as amended, 5 U.S.C. Ch. 71, Labor-Management Relations, in those circumstances where there is an exclusive union representative for the employees.

**§ 102–74.330 What smoking restrictions apply to outside areas under Executive branch control?**

Effective June 19, 2009, smoking is prohibited in courtyards and within twenty-five (25) feet of doorways and air intake ducts on outdoor space under the jurisdiction, custody or control of GSA. This six-month phase-in period is designed to establish a fixed but reasonable time for implementing this policy change. This phase-in period will provide agencies with time to comply with their obligations under the Federal Service Labor-Management Relations Act, as amended, 5 U.S.C. Ch. 71, Labor-Management Relations, in those circumstances where there is an exclusive union representative for the employees.

**§ 102–74.335 Who is responsible for furnishing and installing signs concerning smoking restrictions in the building, and in and around building entrance doorways and air intake ducts?**

Federal agency building managers are responsible for furnishing and installing suitable, uniform signs in the building, and in and around building entrance doorways and air intake ducts, reading ''No Smoking,'' ''No Smoking Except in Designated Areas,'' ''No Smoking Within 25 Feet of Doorway,'' or ''No Smoking Within 25 Feet of Air Duct,'' as applicable.

**§ 102–74.340 Who is responsible for monitoring and controlling areas designated for smoking by an agency head and for identifying those areas with proper signage?**

Agency heads are responsible for monitoring and controlling areas designated by them under § 102–74.320(d) for smoking and identifying these areas with proper signage. Suitable, uniform signs reading ''Designated Smoking Area'' must be furnished and installed by the occupant agency.

**§ 102–74.345 Does the smoking policy in this part apply to the judicial branch?**

This smoking policy applies to the judicial branch when it occupies space in buildings controlled by the executive branch. Furthermore, the Federal Chief Judge in a local jurisdiction may be deemed to be comparable to an agency head and may establish exceptions for Federal jurors and others as provided in § 102–74.320(d).

**§ 102–74.350 Are agencies required to meet their obligations under the Federal Service Labor-Management Relations Act where there is an exclusive representative for the employees prior to implementing this smoking policy?**

Yes. Where there is an exclusive representative for the employees, Federal agencies must meet their obligations under the Federal Service Labor-Management Relations Act, 5 U.S.C. Ch. 71, Labor-Management Relations, prior to implementing this section. In all other cases, agencies may consult directly with employees.

**§ 102–74.351 If a state or local government has a smoke-free ordinance that is more strict than the smoking policy for Federal facilities, does the state or local law or Federal policy control?**

The answer depends on whether the facility is Federally owned or privately owned. If the facility is Federally owned, then Federal preemption principles apply and the Federal policy controls. If the facility is privately owned, then Federal tenants are subject to the provisions of the state or local ordinance, even in the Federally leased space, if the state or local restrictions are more stringent than the Federal policy.

[FR Doc. E8–30180 Filed 12–19–08; 8:45 am]

BILLING CODE 6820–14–S

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

## Centers for Medicare & Medicaid Services

## 42 CFR Part 440

**[CMS–2234–F]**

**RIN 0938–A045**

## Medicaid Program; State Option To Establish Non-Emergency Medical Transportation Program

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Final rule.

**SUMMARY:** This final rule implements section 6083 of the Deficit Reduction Act of 2005, which provides States with additional State plan flexibility to establish a non-emergency medical transportation (NEMT) brokerage program, and to receive the Federal medical assistance percentage matching rate. This authority supplements the current authority that States have to provide NEMT to Medicaid beneficiaries who need access to medical care, but have no other means of transportation.

**DATES:** *Effective date:* These regulations are effective January 20, 2009.

**FOR FURTHER INFORMATION CONTACT:** Fran Crystal (410) 786–1195.

**SUPPLEMENTARY INFORMATION:**

### I. Background

*A. General*

For more than a decade, States have asked for the tools to modernize their Medicaid programs. The enactment of the Deficit Reduction Act of 2005 (DRA) (Pub. L. 109–171, February 8, 2006) provides States with new options to create programs that are more aligned with today's Medicaid populations and the health care environment. Cost sharing, benefit flexibility through benchmark plans, health opportunity accounts (HOA), and the flexibility to design cost-effective transportation programs provide opportunities to modernize Medicaid, make the cost of the program and health care more affordable, and expand coverage for the uninsured.

*B. Statutory Authority*

Section 6083 of the DRA amended section 1902(a) of the Social Security Act (the Act) by adding a new section 1902(a)(70), which allows States to amend their Medicaid State plans to establish a non-emergency medical transportation (NEMT) brokerage program without regard to statutory requirements for comparability, statewideness, and freedom of choice. This final regulation sets out provisions for implementing the brokerage programs which are within the flexibility granted by the statute.

### II. Provisions of the Proposed Rule

*A. Overview*

The Department of Health and Human Services (DHHS) began issuing guidance about the new flexibilities available to States within months of the enactment of the DRA. On March 31, 2006, DHHS issued a State Medicaid Director letter providing guidance on the implementation of section 6083 of the DRA. We issued an NPRM on August 24, 2007 (72 FR 48604). This proposed regulation proposed, among other things, to formalize the guidance issued on NEMT programs. The proposed regulation would add a new paragraph (4) to 42 CFR 440.170(a).

*B. Requirements for State Plans*

Under § 431.53, States are required in their title XIX State plans to ensure necessary transportation of Medicaid beneficiaries to and from providers. Expenditures for transportation may be claimed as administrative costs, or a State may elect to include transportation as medical assistance under its State Medicaid plan.

Before enactment of the DRA, if a State wanted to provide transportation as medical assistance under the State plan, it could not restrict beneficiary choice by selectively contracting with a broker, nor could it provide services differently in different areas of the State without receiving, under section 1915(b) of the Act, a waiver of freedom of choice, comparability, and state-wideness otherwise required by section 1902(a) of the Act. These waivers allowed States to selectively contract with brokers and to operate their programs differently in different areas of the State.

The DRA gives the States greater flexibility in providing NEMT. States are no longer required to obtain a section 1915(b) waiver in order to provide NEMT as an optional medical service through a competitively contracted broker. A State plan amendment for such a brokerage program eliminates the administrative burden of the 1915(b) biannual waiver renewal. Under new section 1902(a)(70) of the Act, a State may now use a NEMT brokerage program when providing transportation as medical assistance under the State plan, notwithstanding the provisions of sections 1902(a)(1), 1902(a)(10)(B), and 1902(a)(23) of the Act, concerning state-wideness, comparability, and freedom of choice, respectively.

Current regulations provide that when a State includes transportation in its State plan as medical assistance, it is required to use a direct vendor payment system that is consistent with applicable regulations at § 440.170(a)(2), and it must also comply with all other requirements related to medical services, including freedom of choice, comparability, and state-wideness. To implement the provisions of section 1902(a)(70) of the Act, we proposed revising § 440.170(a) to add a new paragraph (4), ''Non-emergency medical transportation brokerage program,'' to reflect the increased flexibility allowed by the DRA.

We proposed allowing, at the option of the State, the establishment of a NEMT brokerage program. We believe that this may prove to be a more cost-effective way of providing transportation for individuals eligible for medical assistance under the State plan, who need access to medical care or services, and have no other means of transportation.

As provided by the statute, we proposed specifying in § 440.170(a)(4) that the broker could provide for transport services that include wheelchair vans, taxis, stretcher cars, bus passes, tickets, secured transportation and other forms of transportation otherwise covered under the State plan. We interpreted ''secured transportation'' at section 1902(a)(70)(A) of the Act to mean a form of transportation containing an occupant protection system that addresses the safety needs of disabled or special needs individuals.

The DRA also provides that other forms of transportation may be included as determined by the Secretary to be appropriate. We did not propose to determine any additional transportation services to be generally appropriate. However, as noted above, we proposed to allow States to identify additional transportation alternatives that were otherwise covered under the State plan and which were not limited to services already available through transportation brokers. We proposed to review these alternatives in the State plan amendment approval process for transportation services generally. In that process, we proposed that CMS would consider the individual circumstances in the State and apply utilization controls as necessary. For example, air transportation could be appropriate in States with significant rural populations and low population density, but not in other States. Even in those States, air transportation might only be suitable with appropriate utilization controls. Thus, we proposed to make this determination in the context of our review of State plan amendments based on the information furnished by the State.

At § 440.170(a)(4), we proposed that the competitive bidding process be consistent with applicable DHHS regulations at 45 CFR 92.36, based on the State's evaluation of the broker's experience, performance, references, resources, qualifications and cost, and that the contract with the broker include oversight procedures to monitor beneficiary access and complaints, and ensure that transport personnel are licensed, qualified, competent, and courteous. We proposed that State and local bodies that wish to serve as brokers compete on the same terms as non-governmental entities.

We proposed in paragraph § 440.170(a)(4)(ii) to include prohibitions on broker self-referrals and conflict of interest, based on the prohibitions on physician referrals under section 1877 of the Act (42 U.S.C. 1395(nn)). Section 1877 of the Act generally prohibits a physician from making referrals for certain designated health services payable by Medicare to an entity with which he or she (or an immediate family member) has a financial relationship (ownership or compensation), unless an exception applies. In addition, to prevent other types of fraud and abuse, the anti-kickback provisions in section 1128B(b) of the Act (42 U.S.C. 1320a-7b(b)) and the provisions in the civil False Claims Act (31 U.S.C. 3729) also would apply to this transportation program as they apply to the Medicaid program generally.

We believe the statute provides that section 1877 of the Act and the applicable regulations be used as a model for establishing broker prohibitions on referrals, conflicts of interest, and impermissible kickbacks, in order to prevent fraud and abuse.

As we stated in the proposed rule, a financial relationship, as defined in the regulations implementing section 1877 of the Act at § 411.354(a), includes any direct or indirect ownership or investment interest in an entity that furnishes designated health services and any direct or indirect compensation arrangement with an entity that furnishes designated health services (DHS).

Section 1877 of the Act includes exceptions to certain ownership, investment, and compensation arrangements. In addition, section 1877(b)(4) of the Act allows the Secretary to create an exception in the case of any other financial relationship that does not pose a risk of program or patient abuse.

For purposes of new § 440.170(a)(ii)(A), we proposed that the term ''transportation broker'' include contractors, owners, investors, Boards of Directors, corporate officers, and employees.

We proposed to use the definition of ''financial relationship'' as set forth in regulations at § 411.354(a) by means of cross-reference, with the term ''transportation broker'' substituted for ''physician'' and ''non-emergency transportation'' substituted for ''DHS.'' We proposed to use the definition of ''immediate family member'' or ''member of a physician's immediate family'' as set forth in the physician self-referral provisions in § 411.351, with the term ''transportation broker'' substituted for ''physician.''

Based on the prohibitions in section 1877 of the Act, we proposed that the broker be an independent entity, in that the broker could not itself provide transportation under the contract with the State and that the broker could not refer or subcontract to a transportation service provider with which it has certain financial relationships, unless certain exceptions applied. Federal funds could not be used for any prohibited referrals.

Similar to some of the ownership exceptions in section 1877 of the Act, we proposed including exceptions for a non-governmental broker that provided transportation in a rural area (as defined in § 412.62(f)(1)(iii)) when there was no other qualified provider available; when the necessary transportation provided by the non-governmental broker was so specialized that no other qualified provider was available; or when the availability of qualified providers other than the non-governmental broker was insufficient to meet the existing need.

For purposes of this regulation we proposed that a qualified provider would be any Medicaid participating provider or other provider determined by the State to be qualified. A ''rural area,'' as defined in § 412.62(f) (1)(iii), is any area that is outside an urban area. An ''urban area'' is defined in § 412.62(f)(1)(ii). These exceptions would address specific circumstances in which there was a lack of transportation resources and there was documentation to support these exceptions.

Governmental Brokerages

We did not wish to prevent a government entity that was awarded a brokerage contract through the competitive bidding process from referring an individual in need of transportation service to a government transportation provider that was generally available in the community. Therefore we proposed to include an exception to allow such a governmental broker to provide an individual transportation service or to arrange for the individual transportation service by referring to or subcontracting with another government-owned or controlled transportation provider, when certain conditions were met that would assure an arms-length transaction.

The broker would first be required to be a distinct governmental unit, and the contract could not include payment of costs other than those unique to the distinct brokerage function. This means that the contract could not provide for payment of costs normally shared with or paid by other governmental units (such as a regional transportation authority). This requirement would ensure that the distinct broker unit did not have direct financial conflicts of interest resulting from commingling funding with State or local general revenue funds. Second, the broker would have to document, after considering the specific transportation needs of the individual, that the government provider was the most appropriate, effective, and lowest cost alternative for each individual transportation service. Third, the broker would have to document that for each individual transportation service, the Medicaid program was paying no more than the rate charged to the general public. Because there could still be conflicts of interest resulting from management oversight from a parent or related governmental unit, we considered proposing to limit the exception to circumstances where the distinct unit governmental broker was independent of external review and oversight by the parent entity. However, we believe that the proposed conditions will be sufficient to protect against inappropriate inter-governmental referrals.

We solicited comments, suggestions, and examples regarding the following exceptions mentioned above: The service area is rural and there is no other Medicaid participating or qualified provider available except the non-governmental broker; the transportation provided by the non-governmental broker is so specialized that no other qualified provider is available (including comments on how ''specialized'' should be defined); available qualified providers other than the non-governmental broker are insufficient to meet the need; the broker is a distinct government unit and is paid only for costs that are unique to the distinct brokerage function and the broker documents that services provided by any other governmental entity are the most appropriate, least costly alternative, and the Medicaid program is paying no more than the rate charged to the public.

Additionally, we proposed to include a prohibition on a broker accepting any form of remuneration or payment from a transportation provider in exchange for influencing a referral or subcontract for transportation services. We also proposed that in referring or subcontracting with transportation providers, the broker be prohibited from withholding necessary transportation from a recipient or providing transportation that was not the most appropriate and cost-effective means of transportation.

Under section 1905(a)(28) of the Act, the Secretary is given the authority to specify any other medical care which can be covered by the State. We therefore proposed using this authority to make Federal financial participation available at the medical assistance rate for the cost of the brokerage contract, providing that such a contract complied with the requirements set forth in this regulation.

In accordance with Federal requirements in sections 1902(a)(2) and 1903(w) of the Act and applicable Federal regulations described at § 433.50 through § 433.74, under the brokerage contract with the State Medicaid agency, the non-Federal share of the Medicaid payments made for operating a transportation brokerage program could only be derived from permissible sources and would have to comply with the applicable statute and regulations cited above. Also, the return of any Medicaid payments (directly or indirectly) to a State or local government entity under the NEMT brokerage program would be prohibited.

We proposed that the State, in contracting with the broker, would be required to specify that violation of these provisions would be deemed to be a breach of contract and that the State could move to terminate the contract with the broker.

## III. Analysis of and Response to Public Comments on the Proposed Rule

We received a total of 63 timely items of correspondence that raised many different issues. Many of the commenters represented State and local transportation agencies, regional transportation programs, non-profit and for-profit transportation providers, and national associations that represent various aspects of the transportation industry. The remaining comments were from individuals, medical associations and hospitals, human services agencies, and advocacy groups. A summary of the issues and our responses follow:

*General Comments:* Many commenters praised us for establishing a process which is consistent with the requirements set forth in section 6083 of the DRA of 2005 and which will facilitate the establishment of NEMT brokerage arrangements for State Medicaid programs. Many commenters also praised the overall flexibility provided to States in developing cost-effective quality transportation programs. However, many commenters raised concerns about other aspects of the proposed regulation. A summary of the public comments we received and our responses to the comments are set forth below.

Comments related to paperwork and other burdens are addressed in the Collection of Information Requirements and Regulatory Impact Statement sections in this preamble.

*Comment:* Several commenters said that the regulation required States to establish a brokerage program, and one commenter objected to CMS requiring States to establish a transportation brokerage because a transportation brokerage is counterproductive, costly and conflicts with the appropriate Federal and State roles of the Medicaid Federal/State partnership. Some commenters suggested that CMS clarify in the final rule that this regulation and the new transportation brokerage option applies only to transportation brokerages when a State chooses to adopt this new flexibility provided by section 6083 of the DRA and the regulation does not apply to the other options States have for assuring the availability of transportation to access Medicaid services.

*Response:* We wish to clarify that this final rule applies only to transportation brokerages when a State chooses to adopt this new flexibility provided by section 6083 of the DRA. In enacting section 6083 of the DRA, the Congress acted to supplement the current authority that States have to provide NEMT to Medicaid beneficiaries by adding an additional option for providing a NEMT brokerage program under State plan authority. Neither the statute nor this final rule requires States to select this new option. States continue to have the flexibility to provide NEMT as an administrative expense or as an optional medical service. States that wish to establish a NEMT brokerage program without being required to comply with the prohibitions against self-referral, or general Medicaid requirements such as freedom of choice, comparability and state-wideness may continue to do so through the 1915(b) waiver process. The requirements of this final rule apply only to those States that have chosen to obtain State Plan authority to provide NEMT as a medical service through a broker.

*Comment:* Most of the comments on prohibitions came from regional transportation associations or transportation providers. These commenters disagreed with the prohibition on the broker itself providing transportation, or making a referral to or subcontracting with a transportation provider with which it has a financial relationship. Several commenters asserted that this prohibition was not practical and would limit the number of entities that could bid on a brokerage contract or the number of participating providers. Further, the commenters declared that these prohibitions could possibly limit competition to for-profit brokers, reduce State flexibility in designing the Medicaid transportation program. Moreover, CMS was applying the principles of section 1877 of the Act too broadly and in a way that was not meaningful or useful to States. Some commenters said that CMS' interpretation of the DRA was not consistent with the intent of the DRA itself because the proposed conflict of interest language was being applied in a way that is not in the best interest of the overall management of the NEMT program. A commenter also said that a broker providing transportation is not analogous to a physician making referrals for certain designated health services because the organizational set-ups of the two are vastly different, and unlike physicians, profit is not a concern for governmental transportation agencies.

Several commenters said that the unintended consequence of restricting a company from both managing and providing transportation services would be the creation of an anti-business climate that would likely force already efficient and effective transportation agencies into choosing between the ''broker role'' and the ''provider role,'' and could potentially leave one of these roles unfilled.

*Response:* In enacting section 6083 of the DRA, the Congress responded in part to public concern that ownership by the broker of a company that provides transportation may result in higher costs and a greater potential for fraud and abuse. Therefore, the Congress looked to recognized prohibitions against self-referral under section 1877 of the Act to guide the Secretary in establishing safeguards against conflict of interest and fraud and abuse. The Congress expressly directed the Secretary to develop requirements for brokers that are similar to the prohibitions on self-referral and conflict of interest that are found under section 1877 of the Act.

Generally, section 1877 of the Act prohibits physicians from making referrals for certain designated health services payable by Medicare to an entity with which the physician or the physician's immediate family has a financial relationship, unless an exception applies. In some cases brokers who own or partly own provider companies may be actively involved in the businesses, while in other cases they may merely be passive investors. Nevertheless, these relationships constitute a conflict of interest because of the potential for fraud and abuse. As in similar physician cases, brokers that also provide transportation could possibly over-utilize higher cost services provided by their own transport companies or possibly bill for services that did not occur. It is this potential for fraud and abuse that these prohibitions have been designed to limit.

While the business of medicine and the business of providing transportation are not necessarily the same, we disagree that physician referral prohibition rules cannot be applied to transportation brokers. We can identify a number of operational similarities between physicians and brokers that justify our decision to include several prohibitions and exceptions. Similar to a physician who refers patients for medical services brokers refer beneficiaries for transportation services. In both cases the potential for over-utilization, inflated costs, and fraudulent billing is higher when the individual (be it a physician or broker) making the referral is allowed to refer to a service owned or partially owned by the individual.

Understanding that there are circumstances where there may be an insufficient number of available providers, we adopted exceptions similar to those in section 1877 of the Act and created exceptions where there are insufficient transportation resources. Under these exceptions, a non-governmental entity awarded a brokerage contract through the competitive bidding process will be permitted to provide transportation in order to meet access requirements. Similarly, we have created exceptions for governmental brokers that we believe will also guard against conflict of interest. We also understand that some rural areas may be underserved and we have created an exception to allow the broker to either use or create its own resources in order to assure that all beneficiaries have access to necessary medical services. Furthermore, we do not agree that the prohibitions would create an anti-business environment, but instead, we believe that such prohibitions would actually level the playing field and promote competition.

*Comment:* Several commenters disagreed with the prohibition on non-governmental broker self-referral unless the broker can prove that there is no other qualified provider available. One commenter felt that the exceptions should not be permanent because the capacity of other providers may increase over time. One commenter stated that, in general, the proposed rule provided

sound rules for State Medicaid brokerage programs. However, the commenter thought that the conflict of interest provisions were overly broad and suggested that the provisions be modified as follows: (1) The broker should be permitted the discretion to use its own resources or refer to another provider with which it has a financial relationship when deemed necessary by the broker to provide timely, cost-effective and quality transportation, or to otherwise protect the health and welfare of the beneficiary; (2) the broker should be subject to a 10% limit on self-referral in a calendar month, except during the first 90 days of the brokerage contract, when there should be no limit on broker self-referral.

*Response:* We do not agree with the suggestion that the broker be given blanket discretion to use its own resources or to refer to another provider in which it has a financial interest when deemed necessary by the broker to comply with the contractual requirements of timeliness, cost-effectiveness and quality. Allowing the broker unlimited discretion would be contrary to the prohibitions on self-referral that we believe are required by the statute, and could create opportunities for conflict of interest. We recognize that due to unforeseen circumstances a gap may occur in the provider network from time to time. However, should such a gap occur, we expect the State to: Determine when the broker may temporarily step in to fill such a gap; assure that insufficiencies in the provider network are not chronic or lengthy; and assure that the broker is fulfilling its contractual obligation to maintain an adequate network of available qualified contracted providers. We also expect the State to provide sufficient oversight to ensure that when contracting with transportation providers the broker does not offer reimbursement that is so low that local transportation providers are unwilling to participate, thus creating a need for the broker to provide the transportation itself.

Allowing the broker to self-refer no more than 10 percent of the time during a calendar month or to self refer an unlimited number of times during the first 90 days of the brokerage contract would not achieve the purpose of the prohibition against self-referral. By the starting date of the brokerage program the broker must have a contracted network of providers that is sufficient to provide adequate access for beneficiaries, and the broker should also be ready to meet all other requirements of the contract with the State.

*Comment:* One commenter wrote that the final rule should include other exceptions found in the Stark regulation so that ''innocent and appropriate'' financial relationships between a broker and a NEMT provider do not preclude the provider from participating in the network. The commenter also suggested that the final rule include provisions that allow the broker to have a contract with a NEMT provider for a line of business that is unrelated to the NEMT brokerage business, such as: Rental of space and equipment; personal services arrangements; payments for bona fide services; fair market value compensation arrangements; risk sharing arrangements; compliance training; indirect compensation arrangements; community wide health information systems; charitable donations; and isolated transactions, found at § 411.357(a), (b), (d), (f), (i), (j), (l), (n), (o), (p), and (u), and exceptions for publicly traded securities and mutual funds at § 411.356(a) and § 411.356(b). The commenter also requested that the final rule address the scenario in which the broker also provides emergency medical transportation (EMS) in the same community in which it acts as a NEMT broker. The commenter requested that the broker explicitly be permitted to provide NEMT services or make a referral to another transportation service provider even though a financial relationship for EMS services existed between the parties.

*Response:* We considered the commenters' suggestion that we include in the final rule additional exceptions for certain kinds of financial relationships similar to those found at § 411.356 and § 411.357. We are very concerned about financial relationships that may directly or potentially affect the financial interests that are attributed to either the broker or the subcontracted provider. Compensation relationships such as leasing agreements and contracts for similar lines of business between the broker and a potential subcontracted transportation provider, although seemingly innocent or unrelated, may pose the risk of program abuse. Therefore, in this final rule we have decided not to change the prohibitions or exceptions found in the NPRM.

*Comment:* Many of the commenters believed that the proposed rule contravenes the policies, concepts, and principles of Executive Order 13330 and the Interagency Coordinating Council on Access and Mobility (CCAM), which stresses the importance of coordination of public transportation at the Federal level. These commenters argued that the proposed rule would defeat the efforts of the CCAM and United We Ride to coordinate transportation. A number of commenters also stated that the proposed rule was inconsistent with the statutory creation of a locally-developed, coordinated public transit human service transportation planning process established by the Safe, Accountable, Flexible, Efficient Transportation Equity Act (SAFETEA–LU), Public Law 109–59 (codified at 49 U.S.C. sections 5301, *et seq.*) and carried out by the Federal Transit Administration (FTA). These commenters suggested that CMS withdraw the proposed rule and submit the matter to the Federal Interagency Transportation Coordinating Council on Access and Mobility (CCAM) and United We Ride program to ensure that the new CMS rulemaking is consistent with CCAM policy and the United We Ride Program initiatives.

*Response:* Executive Order 13330 (69 FR 9185, February 24, 2004) stresses the importance of coordination of public transportation at the Federal level. However, it does not direct Federal agencies to ignore the policies and rules of their particular programs in order to do so. For programs such as Medicaid, the policies of the CCAM are appropriate as long as they do not conflict with the policies and rules of the Medicaid program. The provisions of the proposed rule did not preclude State Medicaid agencies from participating in efforts to coordinate the use of transportation resources consistent with the guidance issued by the CCAM, as long as those coordination efforts recognize that the Medicaid program's responsibility is limited to ensuring cost-effective transportation for beneficiaries to and from Medicaid providers.

In terms of financing, Medicaid is not responsible for the general operation or deficit financing of public or private transportation providers. Medicaid is a joint federal-state financed program. Federal Medicaid funding must be matched by non-federal funding unless there is express authority under federal law for other federal funds to be used for purposes of the non-federal Medicaid matching share, and no such Medicaid authority currently exists. We understand that the FTA SAFETEA–LU statutory language at 49 U.S.C. 5310, 5311, 5316, and 5317 allows States to use Federal Medicaid dollars to fulfill State requirements to draw down Federal transportation grant funds. In that circumstance however, where Federal Medicaid matching funds are included as State match when drawing down FTA grants, Federal Medicaid

funding would not be available to match the part of any future State expenditures funded by the SAFETEA–LU grant because federal statutes authorizing the SAFETEA–LU grant program do not expressly authorize use of SAFETEA–LU funds for matching other federal funds.

*Comment:* Many commenters felt that if the proposed rule were implemented it would interfere with a State's ability to develop coordinated transportation services. Some commenters suggested that there needs to be a special section of the regulation that deals with coordinated transit services, that States that have rural regional transit agencies need to conceptualize an efficient mechanism to bring Medicaid into coordinated service, and that NEMT brokerages for coordinated rural regional systems should be allowed to reside with the rural regional transit system providing the regional transit agency can show that the total cost to Medicaid is significantly reduced by parallel coordinated service contracts with other human services agencies. One commenter said that human service transportation would be reduced if Medicaid were to be taken out of the coordination mix. One State transportation agency objected to any requirement that the brokerage function be devoted exclusively to Medicaid funded transportation. Another State Transportation Department suggested that CMS add language to the final rule that includes as a criterion for selecting the broker consideration of the benefits of a coordinated transportation system.

*Response:* The statute did not specifically address coordinated transportation. Coordination of transportation services is a positive goal and we encourage States to develop coordinated transportation systems in order to promote efficiency and cost-effectiveness. However, it should be noted that Medicaid funds may only be used for Medicaid services provided to eligible beneficiaries. When administering the Medicaid NEMT program, States must comply with all applicable Medicaid policies and rules regardless of whether the Medicaid rules interfere with their ability to coordinate their transportation efforts.

*Comment:* Many commenters disagreed with the requirement for governmental brokers to document with respect to the individual's specific transportation needs that the government provider is the most appropriate and lowest cost alternative, and that the Medicaid program is paying no more than the rate charged to the general public. The commenters said that the documentation requirement will result in additional and costly recording-keeping. One commenter objected to any requirement that a governmental broker using other governmental entities as transportation providers document that the transportation is the least costly and most appropriate for each beneficiary because it precludes government social service agencies from being used by the broker to provide transportation.

*Response:* We do not believe that this documentation requirement will result in significantly more record-keeping. Medicaid laws and regulations, as well as CMS guidance, have always required that there be documentation of medical services that are provided to beneficiaries and that they be made available to CMS upon request. In general, documentation should include verification of eligibility, verification that the service was provided on the date claimed and information about the cost of services. When NEMT is provided as a medical service there should be documentation, not only that the specific ride was provided, but that a Medicaid reimbursable service other than the transportation itself was actually provided on the dates when transportation was claimed. We do not agree that the documentation required when a governmental broker refers to another government entity would prohibit government social service agencies from being used as transportation providers. Given the nature of the client populations served by many of the social service agencies, governmental brokers should not find it difficult to document that the social service agency is the most appropriate and least costly provider of transportation for their client(s).

For the purposes of the final rule, the additional documentation required for the NEMT brokerage would not be significant and should be relatively simple. An annual comparison of the fees paid by Medicaid under the brokerage program for fixed route transportation to the fees charged to the general public for fixed route transportation, and a comparison of the fees paid by Medicaid for public paratransit services to the fees charged to other agencies for comparable public paratransit services, should be all that is necessary.

*Comment:* Many of the commenters disagreed with the proposed requirement that Medicaid pay no more than the rate charged to the general public for the same type of ride when a governmental broker is a provider of transportation or refers to or subcontracts with another governmental transportation provider. Commenters expressed concern that the actual cost of providing public transportation, particularly publicly provided paratransit rides (that is, door-to-door or curb-to-curb services usually provided to those who are disabled) to the Medicaid population far exceeds the fees charged to the general public because public transit services are subsidized by Federal, State, and local funds, which allows the fares paid by the general public to be set lower than the actual cost of providing the ride. The commenters maintain that prohibiting Medicaid from being charged its fully allocated cost will shift the financial burden of public transit and paratransit trips to State and local entities that fund public transportation. Therefore, the public fare, particularly for paratransit rides, should not be used as a measure to set Medicaid's payment. Medicaid should be charged the fully allocated costs for paratransit rides consistent with this provision and Medicaid's responsibility to assure NEMT.

Many commenters pointed out the fact that the Americans with Disability Act (ADA) requires that States provide disabled members of the public with comparable paratransit services wherever public fixed-route services are offered, and the amount that can be charged to disabled members of the public for comparable public paratransit services may not exceed twice the amount charged to the public for similar fixed-route services. However, these guidelines also say that agencies which purchase publicly-provided paratransit trips for their disabled clients may pay more than the rate charged to disabled individuals receiving a comparable paratransit ride.

*Response:* In general, States have established rules prohibiting Medicaid from paying more for a covered service than what other third-party payers (for example, health insurers) are charged for the same service. In the case of publicly-provided transportation on fixed routes, while there are other third-party payers (for example, State Human Service agencies) that often cover and reimburse these trips for their clients, we have been informed that such third-parties or agencies generally pay the same amount as the public is charged for these rides. Therefore, we are prohibited from paying more than the public is charged for public transportation on a fixed-route trip.

In the case of publicly-provided paratransit services and rides, based on the comments received and the information provided, we believe that it is appropriate and consistent with current practice for Medicaid to pay

more than the rate charged to disabled individuals for a comparable ride. Based on principles of accounting and financing found in OMB Circular A–87 and section 1902(a)(30) of the Act and 45 CFR 92.36, pertaining to procurements, we believe that Medicaid, through its NEMT program with government brokers, can pay a fare for publicly provided paratransit trips that represents reasonable costs and which is no more than the fare paid for similar paratransit trips by other State Human Services agencies. Therefore, in this final rule we have modified the regulations text at § 440.170(a)(4)(ii)(B)(4)(iii) to require the governmental broker to document that Medicaid is paying for public fixed-route transportation at a rate that is no more than the rate charged to the general public, and no more than the rate charged to other State human services agencies for public paratransit services.

The commenters appear to be concerned about potential limitations on Medicaid payment for public transportation services. The final rule as revised is consistent with current practice and when the State awards a brokerage contract to a governmental transportation broker that is itself a provider of transportation or who refers or subcontracts with another government entity this should not have a significant effect on Medicaid payments to transportation providers. We could have precluded governmental brokers from providing transportation or referring beneficiaries to governmentally-operated transportation altogether. Instead, we provided for safeguards to ensure that governmental brokers operate as independently as non-governmental brokers. We believe that these safeguards will ensure that such transportation will be cost-effective and that the transportation referral will be based on the best interests of the beneficiary, while at the same time meeting the mandate to provide transportation that is the least costly appropriate mode.

*Comment:* Several commenters disagreed with the requirements of the proposed rule and felt that States were best equipped to design their own systems to prevent the kind of abusive practices and conflicts of interest that might arise when a broker is involved in direct service delivery. These commenters believed that States should be permitted to decide how to institute proper controls that would eliminate any conflicts of interest. A number of commenters said that regional transportation systems and public transportation systems operating as the NEMT broker have the best opportunity and means to coordinate transportation for the benefit of the public. One commenter believed that the State's Department of Transportation and not the Health and Human Services Medicaid program should coordinate Medicaid transportation.

*Response:* States have broad flexibility to construct an array of NEMT programs that meet each State's diverse needs in terms of geography, transportation infrastructure, and targeted populations, and this final rule preserves this flexibility. However, Medicaid NEMT programs have long been identified by State and Federal Inspector General Reports (for example, HHS, OEI–04095–00 140) as having a high potential for fraud and abuse. As a means of reducing the risk of fraudulent and abusive practices that result in unnecessary or inappropriate use of Medicaid transportation and the loss of millions of Medicaid dollars, the statute specifies that certain provisions be included in the contract between the State and the NEMT broker. The statute also directs us to establish prohibitions on broker referrals and conflict of interest. As a result we have implemented the contract requirements and the prohibitions as provided for in statute.

*Comment:* One commenter stated that the proposed rule prohibited non-profit transportation providers from being paid more than a governmental broker.

*Response:* We assume the commenter intended to speak about how the proposed rule prohibited non-profit brokers from being paid more than a governmental broker and therefore believe the commenter misunderstood how the proposed rule distinguishes between two types of brokers, governmental and non-governmental. There is no restriction on a non-profit broker that is not a governmental entity from negotiating rates with public transportation providers.

*Comment:* Several commenters said the language requiring the contract with a governmental broker to ''provide for payment that does not exceed actual costs calculated as a distinct unit, excluding personnel or other costs shared with or allocated from parent or related entities,'' is ambiguous and can be read two ways, either to include or exclude these costs in the final analysis. Several commenters opposed requiring the public entity broker to be a distinct governmental unit. One commenter expressed the need for further clarification of the requirement that a public broker be a distinct governmental unit and was concerned that the brokerage function would be required to be devoted to only Medicaid-funded transportation, which is directly contrary to the policies established under EO 13330. Another commenter believed that this language was too restrictive and would potentially limit the number of entities that would be eligible to bid.

*Response:* We agree that this sentence is confusing. Therefore, we have amended this final rule by making it clear, at § 440.170(a)(4)(ii)(B)(4)(i), that if the government broker wishes to be excepted from the self-referral prohibition, the government broker's contract with the State Medicaid agency must specify that the government broker will not charge the Medicaid agency for any personnel or other costs that are shared with, or allocated from, parent or related governmental entities. We expect the governmental broker to maintain an accounting system as though it were a distinct unit, such that all funds allocated to the Medicaid brokerage program and all costs charged to the brokerage program will be completely separate from any other program. Costs that are shared with or allocated from other governmental entities will not be paid by Medicaid.

*Comment:* One commenter said that the proposed rule does not make allowances for currently existing models that meet the financial, oversight, and contracting requirements of the proposed rule. Another commenter wrote that the proposed rule failed to consider any best practices already in place.

*Response:* States with existing NEMT brokerage models that do not meet all of the requirements of the DRA and this final rule have other options available, such as obtaining 1915(b) waiver authority or providing NEMT as an administrative expense. The 1915(b) waiver authority process does not prohibit the broker from self-referring nor does it require that the broker be selected through competitive bidding. Providing NEMT as an administrative expense provides States with the greatest flexibility in designing their program.

*Comment:* One commenter noted that the proposed rule did not mandate provision of bus passes or other fare media for those Medicaid recipients who are able to use public transportation, while another commenter contended that bus passes were not addressed at all in the proposed rule. One commenter suggested that if a Medicaid trip were directed by a broker to a bus, a transit provider should be reimbursed by Medicaid for the cost of a monthly bus pass whether the cost is higher or lower

than the fare for a single trip on the same bus because the pass could be used indefinitely during the month. Several commenters also pointed out that mileage reimbursement was not specifically listed as a transportation service and the proposed rule was unclear as to whether the State could continue to provide this option without securing CMS approval. One commenter requested that CMS specify in the final rule that mileage reimbursement is permitted.

*Response:* In designing a NEMT brokerage program, States have the option to direct the broker to include bus passes and mileage reimbursement, or to allow the broker to determine which payment methodologies it will use to reimburse for transportation services, including mileage reimbursement and bus passes. Since public transportation is generally the least costly method of transporting beneficiaries, we would expect that the broker would first determine if the physical condition of the beneficiary allows them to use public fixed route transportation before scheduling a more costly paratransit service. However, when bus or transit passes are being considered as a method of paying for trips on public transportation, Medicaid cost effectiveness rules outlined in a December 26, 1996 State Medicaid Director Letter require that the cost of the bus pass must be compared to, and may not exceed, the aggregate cost of the individual trips that will be taken by the beneficiary to access Medicaid providers during that month and on the same bus.

*Comment:* One commenter stated that because this regulation will shift costs to States and local governments, CMS should examine the proposed rule in the context of the recently published proposed rule, ''Medicaid Program; Elimination of Reimbursement Under Medicaid for School Administration Expenditures and Costs Related to Transportation of School-Age Children Between Home and School'' (72 FR 51397) (September 7, 2007) which would eliminate Medicaid reimbursement for administrative costs related to school based transportation. The commenter indicated that the school-based transportation proposed rule is significantly related to this proposed rule because it would also shift a significant additional financial burden to State and local governments, and local transit agencies.

*Response:* While we understand the commenter's concerns about the proposed changes to Medicaid funding of school-based transportation, we believe it is only tangentially related to NEMT.

*Comment:* Several commenters felt that CMS should be more prescriptive about the quality, qualifications, operations standards, and State monitoring of brokers and beneficiary due process rights, and that the proposed rule provided no specificity or guidance on how States should provide and track oversight of the broker. One commenter said that CMS failed to require States to ensure that brokers offered the most appropriate and least costly ride, and that CMS should amend the regulation by adding a reference to 42 CFR 440.230, and also include the requirement that States provide in the State plan a description of the State's specific requirements for the broker. Another commenter provided the following list of requirements that should be included in the final rule: (1) Providers should prove financial stability; (2) provider vehicles should pass rigid vehicle inspections; (3) all providers should be required to carry insurance coverage that is equal to the coverage required for State and local commercial carriers; (4) all providers should be required to have a comprehensive driver training program; (5) providers should be required to meet all applicable Federal, State, and local licensing requirements; (6) companies providing Medicaid transportation should have experience and expertise in providing quality passenger transportation; and (7) Medicaid agency oversight should include annual inspections.

*Response:* We believe that States are in the best position to design their NEMT brokerage program and oversight procedures, and we expect States to set specific operations standards that at a minimum include: Quality standards for vehicle safety; staff competency; timeliness; access standards; licensing requirements; and grievance procedures. We also expect States to design and implement oversight procedures as required and outlined in the regulations text of this final rule at § 440.170(a)(4)(i)(B). The specific criteria for providers provided by the commenter presents a comprehensive guide and we expect States to include all of these in their oversight of brokers and the brokerage program. We believe that to be more prescriptive in this final rule would limit the flexibility that States need in order to develop their Medicaid transportation brokerage programs.

Section 1902(a)(30) of the Act requires that all Medicaid services be administered consistent with efficiency, economy, and quality of care and we interpret quality to include timeliness. The proposed rule at § 440.170(a)(4)(ii)(D) also requires the brokers to provide the most appropriate and cost-effective means of transportation for each beneficiary. We therefore expect the broker to provide each individual beneficiary with the most appropriate and cost-effective means of transportation and to provide that transportation in a timely fashion so that beneficiaries do not miss scheduled medical appointments. Because it is important that beneficiaries arrive at medical appointments in a timely fashion and that they not be subjected to excessively long waiting periods to return home, in the final rule we have revised the text at § 440.170(a)(4)(i)(B) to require the broker to also have oversight procedures to ensure that transportation is timely and at § 440.170(a)(4)(i)(C) we modified the regulations text to include the requirement that the State regularly audit the timeliness of transportation provided through the brokerage program.

We do not understand the commenters' suggestion that we amend the regulation by adding a reference to § 440.230, since this particular citation discusses the amount, duration, and scope of covered services under the State plan, and we do not believe it to be relevant. We believe the commenter may have thought that utilization control under § 440.230(d) included regulatory oversight.

*Comment:* One commenter stated that the terms ''broker and brokerage'' are misnomers and suggested that the terminology that should be used is ''transportation program'' or ''transportation services.''

*Response:* In this final rule we did not replace the terms ''broker and brokerage'' with ''transportation program'' or ''transportation services'' because the statute specifically uses ''broker and brokerage'' and, therefore clearly provides States with the option to establish a transportation brokerage program under the State plan authority. We understand that NEMT brokerage programs may vary from State to State. However, the most fundamental functions of a NEMT broker are to be a single point of contact for beneficiaries to request transportation assistance, and to directly arrange the least costly and most appropriate type of transportation for each beneficiary.

*Comment:* A number of commenters requested that in the final rule we clarify several terms used in the proposed rule. One commenter asked CMS to clarify the terms ''competent'' and ''courteous,'' while another said

that use of the definition of ''rural area'' found at § 412.62(f) would cause confusion, and that CMS should instead use the term ''non-urbanized area'' as defined in Federal transit laws.

*Response:* The statute allows both the State and the broker to take responsibility for ensuring that transportation is provided in a competent and courteous manner. In considering whether to define these terms in the final rule, we concluded that States, working with the broker, must determine the competency and courtesy of transport services and staff.

We understand that some commenters believe it would be less confusing if we replaced the term ''rural area'' with ''non-urbanized area'' and use the Federal Transit Administration definition. However, whenever possible, Medicaid regulations have maintained a long history of being consistent with Medicare regulations. For the purposes of this final rule the definition of ''rural area'' as defined at § 412.62(f)(1)(iii) will remain consistent with the definition as exists in the Medicare program.

*Comment:* Two commenters said that our proposed definition of ''secured transportation'' is unclear and must be clarified. Moreover, one commenter said that as written in the preamble to the proposed rule, it appears that standard airbags in a sedan would qualify, and if the intent of CMS is to address vehicle standards, including wheelchair security and occupant restraints such as those contained in 49 CFR 38.23(d), the regulation should so specify.

*Response:* In the proposed rule we requested comments on the definition of ''secured transportation'' but received only two comments. These comments expressed the need for clarification and one suggested that we adopt 49 CFR 38.23(d) as the definition of secured transportation if our intent was to define vehicle standards. In requesting comments on the definition of ''secured transportation'' it was not our intent to solicit comments on how to define vehicle standards. We therefore believe the definition in the proposed rule is sufficiently general to permit the State ample flexibility in the design of their brokerage program and have not changed this definition in the final rule.

*Comment:* One commenter, representing a State, said that some States delegate responsibility for NEMT to multiple regions or counties within the State, and that the rule should be amended to specifically allow a State to submit and receive State Plan approval of a general brokerage program template, including contract language, that would be used by each county or subdivision for implementing individual broker arrangements. Approval of such a template would eliminate the need for CMS to approve each individual brokerage program regardless of whether it was included in the initial SPA or added at a later date.

*Response:* We recognize that some States have chosen to delegate responsibility for the NEMT brokerage program to individual counties or regions of the State rather than contracting with a state-wide broker. In this model, each county or region operates a separate brokerage program that meets the needs of its beneficiaries, and each brokerage program may vary from area to area within the State. We believe that under this type of model we are obligated to review and approve each separate brokerage program in order to ensure that no conflict of interest exists in any of the various brokerages within the State and that each brokerage program complies with the other statutory and regulatory requirements of a brokerage program.

*Comment:* Several commenters said that the requirement that government entities and public transportation operators must compete in a competitive bidding process on the same terms as non-governmental entities conflicted with current State laws that allow government entities the right of first refusal. They believed that requiring governmental entities to compete on the same terms as non-governmental entities would create an additional burden just to avoid the perception that there is some inherent conflict of interest for governmental transportation providers that operate as a broker.

*Response:* While some States may have laws that allow governmental entities the right of first refusal, it is important to note that Section 6083 of the DRA expressly requires competitive bidding, and it did not specifically exempt State and local bodies that wish to serve as brokers from being selected through a fair and open competitive bidding process. We proposed to adopt the applicable provisions of the methodology for competitive bidding set out at 45 CFR 92.36 and do so in the final rule. We are adopting those provisions of 92.36 applicable to the competitive bidding program set out at 92.36(b)–(i). However, we note that we are excluding 92.36(a), which does not set out competitive bidding standards.

*Comment:* One commenter said that the regulation mirrors the DRA provisions in which the general Medicaid principles of freedom of choice, comparability, and state-wideness do not apply and that both the statute and the proposed rule contravene the intent of the Medicaid program by granting the State the authority to offer a higher level of service to some Medicaid beneficiaries but not to all.

*Response:* The statute provides that NEMT brokerage programs be implemented without regard to freedom of choice, comparability, and state-wideness in order to allow States to use competitive bidding to identify and select the most cost-effective and efficient NEMT broker. Because NEMT needs may differ from region to region it may be necessary to offer certain services in one area of the State but not in another. In creating this new option for States, the statute provides States with the greatest flexibility to customize their brokerage programs to meet the needs of all beneficiaries in all areas of the State, and for States to take advantage of the cost saving measures that NEMT brokers can offer. We note that for a number of years States have implemented NEMT brokerage programs under 1915(b) waiver authority in selected areas of the State without regard to freedom of choice, comparability, and or state-wideness. Both the statute and this final regulation make it possible to provide NEMT through a broker without regard to freedom of choice, comparability, and state-wideness, while maintaining the highest level of services for all Medicaid beneficiaries.

*Comment:* One commenter believed that the requirement that the beneficiary have no other means of transportation found in § 440.170(a)(4) of the proposed rule could significantly limit the number of Medicaid-enrolled individuals who could benefit from the Medicaid NEMT program. The commenter believed that CMS failed to take into account beneficiaries who normally have another means of transportation but cannot utilize it due to their current medical condition, and that this failure could lead to these beneficiaries being denied transportation assistance. The commenter requested that we amend the language to read ''that the beneficiary must have no other available'' means of transportation.

*Response:* We did not adopt in this final rule the commenter's suggestion that we amend the language in § 440.170(a)(4) by adding the word ''available,'' because we believe that States and brokers understand that they must take into consideration the beneficiary's physical condition when determining if the beneficiary has another means of getting to and from a medical service.

*Comment:* One commenter requested that we clarify treatment of a federally qualified health center (FQHC) with regard to NEMT services because FQHC services, including transportation, are mandatory and the State can include transportation costs in the Prospective Payment System (PPS) per visit payment or in its Alternative Payment Methodology (APM) per visit payment. The commenter further stated that a State's decision to contract with a broker does not eliminate the legal obligation to allow an FQHC to continue to provide and be reimbursed for transportation through the PPS or APM payment.

*Response:* In agreeing with the commenter we wish to clarify that a State's decision to establish a NEMT brokerage program does not preclude the State from allowing an FQHC to continue to provide for and be paid for transportation as part of the Prospective Payment System per visit payment or as part of the Alternative Payment Methodology per visit payment. We assume that a State's request for proposal would indicate this in accordance with the State's policy.

*Comment:* The August 24, 2007 proposed rule proposed an exception to the prohibition on self-referral for governmental brokers that prohibited Medicaid from paying more than the general public rate for public transit services. Many of the State transportation agencies that commented believed the regulation would create an unfunded mandate by shifting costs to State and local governments. These commenters contended that even though the general public fare is heavily subsidized by State and Federal funds it still does not accurately represent the full cost of providing paratransit services. The commenters also said the increased financial burden on States that would be created should Medicaid not pay the full cost of a paratransit trip, along with the additional capital costs that would be needed to fund the resulting increased demand for paratransit services, would exceed the $120 million dollar threshold for a major rule. Many commenters disagreed that the proposed rule would have no consequential effect on State, local and tribal governments and requested that CMS either reconsider this requirement and allow a Medicaid governmental broker to pay the fully allocated cost for public paratransit, or withdraw the regulation and perform and make publicly available a detailed study of the number of trips likely to be shifted to local responsibility, as well as the financial impact of those trips.

*Response:* We considered all of the comments on the governmental broker not paying more than the public rate and have revised § 440.170(a)(4)(ii)(B)(4)(iii) in this final rule so as to now require that in the case of a governmental broker, the rate paid by Medicaid for publicly provided fixed route transportation be no more than the rate paid by the public, and the rate paid by Medicaid for public paratransit represent reasonable costs and be comparable to the rate paid for similar paratransit trips by other State human services agencies. We therefore believe that this final rule does not create an unfunded mandate for States, localities, tribal governments, or the private sector.

*Comment:* In the proposed rule two commenters suggested that the collection of information requirements were significantly understated. One commenter said that according to their experience it took five hours to initially complete the State plan amendment preprint, and an additional nine hours to respond in writing to requests from CMS for additional information. Another commenter noted that the level of documentation required for governmental entities that are brokers is extensive, costly, and unnecessarily duplicative of the annual monitoring of expenditures that is required by the Department of Transportation.

*Response:* In order to minimize the amount of time needed to complete a State plan amendment establishing a NEMT brokerage program, we designed a five-page preprint that allows the State to complete almost all of the sections by checking a box next to each answer. We expect that prior to completing the preprint a State will have fully developed the information that describes the brokerage program and can insert or attach this information to the preprint. With that assumption in mind, we estimated that it would take no more than 12 minutes to check off the appropriate boxes and to insert or attach any already created information concerning the NEMT brokerage program that is necessary to complete the State plan amendment.

With regard to additional documentation requirements created by the proposed rule, Medicaid laws and regulations, as well as CMS guidance, have always required States to maintain documentation of the medical services that are provided to beneficiaries. The requirement in the proposed rule that States, through the broker, document each specific ride that was provided and that a Medicaid reimbursable service other than transportation was actually provided on the date transportation was provided is not a new collection of information.

In this final rule we revised the requirement that governmental brokers document that Medicaid paid no more for public transportation than the rate charged to the general public and have instead included a requirement that in the case of a governmental broker, there be documentation that Medicaid paid no more for public fixed route transportation than the general public, and no more for public paratransit services than the rate charged to other human services agencies for a comparable ride. We believe this documentation requirement to be relatively simple and to require no more than an annual comparison of the fees paid by Medicaid under the brokerage program to the fees charged to the general public for fixed route transportation, and a comparison of the fees paid by Medicaid (under the broker program) for public paratransit services to the fees paid by other human services agencies for comparable public paratransit services. We do not believe that the documentation requirement for government brokers set forth in the proposed rule represents any substantial additional time and cost. Therefore, we have not revised the collection of information estimate in this final rule.

## IV. Provisions of the Final Regulations

We are maintaining the majority of the provisions set out in the August 24, 2007 proposed rule, with several exceptions. The provisions of this final rule that differ from the proposed rule with comment period are as follows:

(1) We have modified the regulations text at § 440.170(a)(4)(i)(B) by adding the additional requirement that the broker have oversight procedures to monitor and ensure the timeliness of the transportation provided to beneficiaries.

(2) We have modified the regulations text at § 440.170(a)(4)(ii)(B)(4) by removing the requirement that the broker be a ''distinct government entity.'' However, in § 440.170(a)(4)(ii)(B)(4)(i), we continue to expect the governmental broker to maintain an accounting system as though it were a distinct unit, such that all funds allocated to the Medicaid brokerage program and all costs charged to the brokerage program will be completely separate from any other program. We have also clarified that costs shared with other governmental entities cannot be allocated to the brokerage program.

(3) We have modified the regulations text at § 440.170(a)(4)(ii)(B)(4)(iii) by removing the requirement that the broker document that the Medicaid

program is paying no more than the rate charged to the general public and replacing it with the requirement that the broker document that the Medicaid program is paying no more than the rate charged to the general public for public fixed-route transportation and no more than the rate charged to other agencies for comparable public paratransit services.

(4) We have modified the regulations text at § 440.170(a)(4)(i)(C) by adding the additional requirement that the State provide oversight and regularly audit the broker to ensure the timeliness of the transportation provided to beneficiaries.

## V. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 30-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506I(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

We solicited public comment on each of these issues for the following sections of this document that contain information collection requirements:

*State Option To Establish a Non-Emergency Medical Transportation Brokerage Program [§ 440.170(a)]*

Section § 440.170(a) provides States with the option to submit a State plan amendment (SPA) to establish a non-emergency medical transportation (NEMT) brokerage program. To effectuate this option, States must submit an amendment to their existing State plan. CMS has provided States with a letter providing guidance on this provision and the implementation of the DRA, and an associated SPA preprint for use by the States to modify their Medicaid State plan should they choose to implement this option.

The preprint is a total of 5 pages and we estimate that it will take no more than 12 minutes for a State to actually complete and submit the template to CMS. The potential number of respondents is 56 (50 States, the District of Columbia, and five territories); however, we do not expect the territories or all 50 states to respond. We estimate that only five States will submit annually. Once approved, the State will not need to resubmit unless it is materially changing the brokerage program. The burden associated with this requirement is approved under OMB #0938–0993. We submitted a copy of this final rule to OMB for its review of the information collection requirements described above. These requirements are not effective until they have been approved by OMB.

If you comment on these information collection and record keeping requirements, please mail copies directly to the following:

Centers for Medicare & Medicaid Services, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, *Attn.:* Melissa Musotto, CMS–2234–F, Room C5–14–03, 7500 Security Boulevard, Baltimore, MD 21244–1850.

Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, *Attn:* CMS Desk Officer, CMS–2234–F, Fax (202) 395–6974.

## VI. Regulatory Impact Statement

We examined the impact of this rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), Executive Order 13132 on Federalism and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Order 12866 (as amended by Executive Order 13258, which merely reassigns responsibility of duties) directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million; or more in any 1 year). We estimate that this regulation will have estimated budget savings of $145 million between FY 2008 and FY 2012 due to the implementation of section 6083 of the Deficit Reduction Act of 2005. No single year will exceed $100 million, therefore, this rule will not reach the economic threshold and thus is not considered a major rule.

The RFA requires agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $6.5 million to $30.5 million in any 1 year. Individuals and States are not included in the definition of a small entity. We are not preparing an analysis for the RFA because we have determined, and the Secretary certifies, that this rule would not have a significant economic impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 100 beds. We are not preparing an analysis for section 1102(b) of the Act because we have determined, and the Secretary certifies, that this rule would not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. That threshold level is currently approximately $127 million. This rule would have no consequential effect on State, local, or tribal governments in the aggregate, or by the private sector, of $127 million.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. Since this regulation would not impose any costs on State or local governments, the requirements of E.O. 13132 are not applicable.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

**List of Subjects in 42 CFR Part 440**

Grant programs—health, Medicaid.

■ For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR chapter IV as set forth below:

## PART 440—SERVICES: GENERAL PROVISIONS

■ 1. The authority citation for part 440 continues to read as follows:

**Authority:** Sec. 1102 of the Social Security Act (42 U.S.C. 1302), as amended.

■ 2. A new authority citation is added in numerical order to § 440.1 to read as follows:

**§ 440.1 Basis and purpose.**

* * * * *

1902(a)(70), State option to establish a non-emergency medical transportation program.

* * * * *

■ 3. Section 440.170 is amended by revising paragraph (a)(2) and adding new paragraph (a)(4) to read as follows:

**§ 440.170 Any other medical care or remedial care recognized under State law and specified by the Secretary.**

(a) * * *

(2) Except as provided in paragraph (a)(4), transportation, as defined in this section, is furnished only by a provider to whom a direct vendor payment can appropriately be made by the agency.

* * * * *

(4) Non-emergency medical transportation brokerage program. At the option of the State, and notwithstanding § 431.50 (statewide operation) and § 431.51 (freedom of choice of providers) of this chapter and § 440.240 (comparability of services for groups), a State plan may provide for the establishment of a non-emergency medical transportation brokerage program in order to more cost-effectively provide non-emergency medical transportation services for individuals eligible for medical assistance under the State plan who need access to medical care or services, and have no other means of transportation. These transportation services include wheelchair vans, taxis, stretcher cars, bus passes and tickets, secured transportation containing an occupant protection system that addresses safety needs of disabled or special needs individuals, and other forms of transportation otherwise covered under the state plan.

(i) Non-emergency medical transportation services may be provided under contract with individuals or entities that meet the following requirements:

(A) Is selected through a competitive bidding process that is consistent with 45 CFR 92.36(b) through (i) and is based on the State's evaluation of the broker's experience, performance, references, resources, qualifications, and costs.

(B) Has oversight procedures to monitor beneficiary access and complaints and ensure that transportation is timely and that transport personnel are licensed, qualified, competent, and courteous.

(C) Is subject to regular auditing and oversight by the State in order to ensure the quality and timeliness of the transportation services provided and the adequacy of beneficiary access to medical care and services.

(D) Is subject to a written contract that imposes the requirements related to prohibitions on referrals and conflicts of interest described at § 440.170(a)(4)(ii), and provides for the broker to be liable for the full cost of services resulting from a prohibited referral or subcontract.

(ii) Federal financial participation is available at the medical assistance rate for the cost of a written brokerage contract that:

(A) Except as provided in paragraph (a)(4)(ii)(B) of this section, prohibits the broker (including contractors, owners, investors, Boards of Directors, corporate officers, and employees) from providing non-emergency medical transportation services or making a referral or subcontracting to a transportation service provider if:

(*1*) The broker has a financial relationship with the transportation provider as defined at § 411.354(a) of this chapter with ''transportation broker'' substituted for ''physician'' and ''non-emergency transportation'' substituted for ''DHS''; or

(*2*) The broker has an immediate family member, as defined at § 411.351 of this chapter, that has a direct or indirect financial relationship with the transportation provider, with the term ''transportation broker'' substituted for ''physician.''

(B) Exceptions: The prohibitions described at clause (A) of this paragraph do not apply if there is documentation to support the following:

(*1*) Transportation is provided in a rural area, as defined at § 412.62(f), and there is no other available Medicaid participating provider or other provider determined by the State to be qualified except the non-governmental broker.

(*2*) Transportation is so specialized that there is no other available Medicaid participating provider or other provider determined by the State to be qualified except the non-governmental broker.

(*3*) Except for the non-governmental broker, the availability of other Medicaid participating providers or other providers determined by the State to be qualified is insufficient to meet the need for transportation.

(*4*) The broker is a government entity and the individual service is provided by the broker, or is referred to or subcontracted with another government-owned or operated transportation provider generally available in the community, if the following conditions are met:

(*i*) The contract with the broker provides for payment that does not exceed the actual costs calculated as though the broker were a distinct unit, and excludes from these payments any personnel or other costs shared with or allocated from parent or related entities; and the governmental broker maintains an accounting system such that all funds allocated to the Medicaid brokerage program and all costs charged to the brokerage program will be completely separate from any other program;

(*ii*) The broker documents that, with respect to the individual's specific transportation needs, the government provider is the most appropriate and lowest cost alternative; and

(*iii*) The broker documents that the Medicaid program is paying no more for fixed route public transportation than the rate charged to the general public and no more for public paratransit services than the rate charged to other State human services agencies for comparable services.

(C) Transportation providers may not offer or make any payment or other form of remuneration, including any kickback, rebate, cash, gifts, or service in kind to the broker in order to influence referrals or subcontracting for non-emergency medical transportation provided to a Medicaid recipient.

(D) In referring or subcontracting for non-emergency medical transportation with transportation providers, a broker may not withhold necessary non-emergency medical transportation from a Medicaid recipient or provide non-emergency medical transportation that is not the most appropriate and a cost-effective means of transportation for that recipient for the purpose of financial gain, or for any other purpose.

(E) The non-Federal share of all Medicaid payments under the transportation brokerage program must be in compliance with applicable Federal requirements in sections 1902(a)(2) and 1903(w) of the Act, and applicable Federal regulations set forth

at § 433.50 through § 433.74 of this chapter.

* * * * *

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

Dated: April 17, 2008.

**Kerry Weems,**

*Acting Administrator, Centers for Medicare & Medicaid Services.*

Approved: *May 21, 2008.*

**Michael O. Leavitt,**

*Secretary.*

**Editorial Note:** This document was received in the Office of the Federal Register on Wednesday, December 10, 2008.

[FR Doc. E8–29662 Filed 12–15–08; 11:15 am]

**BILLING CODE 4120–01–P**

## DEPARTMENT OF HOMELAND SECURITY

### Transportation Security Administration

### 49 CFR Parts 1520 and 1580

**[Docket No. TSA–2006–26514; Amendment nos. 1520–6, 1580–1]**

**RIN 1652–AA51**

### Rail Transportation Security

**AGENCY:** Transportation Security Administration, DHS.

**ACTION:** Final rule.

**SUMMARY:** The Transportation Security Administration (TSA) extends the December 26, 2008 effective date of one section of the final rule entitled ''Rail Transportation Security,'' published in the **Federal Register** on November 26, 2008, 73 FR 72131, until April 1, 2009. This extension of the effective date is to afford affected freight railroad carriers, rail hazardous materials shippers, and rail hazardous materials receivers additional time to conduct training and implement procedures to come into compliance with the chain of custody and control requirements of the rule.

**DATES:** The effective date of 49 CFR 1580.107 of the final rule published in the **Federal Register** on November 26, 2008, at 73 FR 72131 is delayed until April 1, 2009. The effective date of the amendment to 49 CFR part 1520 and the effective date of all other sections of 49 CFR part 1580 remains December 26, 2008.

**FOR FURTHER INFORMATION CONTACT:** *For questions related to freight rail security:* Scott Gorton, Transportation Sector Network Management, Freight Rail Security, TSA–28, Transportation Security Administration, 601 South 12th Street, Arlington, VA 20598–6028; telephone (571) 227–1251; facsimile (571) 227–1923; e-mail *freightrailsecurity@dhs.gov*.

*For questions related to passenger rail security:* Morvarid Zolghadr, Mass Transit and Passenger Rail Security, TSA–28, Transportation Security Administration, 601 South 12th Street, Arlington, VA 20598–6028; telephone (571) 227–2957; e-mail *passengerrailcomments@dhs.gov*.

*For questions related to SSI:* Andrew E. Colsky, Office of the Special Counselor, SSI Office, TSA–31, Transportation Security Administration, 601 South 12th Street, Arlington, VA 20598–6031; telephone (571) 227–3513; facsimile (571) 227–2945; e-mail *SSI@dhs.gov*.

**SUPPLEMENTARY INFORMATION:** On November 26, 2008, TSA issued its Rail Transportation Security rule. 73 FR 72130. The effective date to comply with all provisions of the final rule was December 26, 2008.

The final rule on rail transportation security included a section to require a secure chain of physical custody for rail cars containing one or more rail security-sensitive materials. *See* 49 CFR 1580.107. On December 11, 2008, the Association of American Railroads and its member freight railroads requested that TSA delay the effective date of this provision. They presented information indicating that the initial 30-day period for compliance did not afford sufficient time for railroad carriers to implement procedures and train their workforce to meet the new regulatory requirement.

TSA recognizes that the affected regulated parties would have significant difficulty in complying with the chain of custody and control requirements in the time specified, and has decided to extend the effective date for compliance with 49 CFR 1580.107 to April 1, 2009.

Issued in Arlington, Virginia, on December 15, 2008.

**John Sammon,**

*Assistant Administrator.*

[FR Doc. E8–30156 Filed 12–18–08; 8:45 am]

**BILLING CODE 9110–05–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 229

**[Docket No. 080407531–8840–02]**

**RIN 0648–AW68**

### Taking of Marine Mammals Incidental to Commercial Fishing Operations; Bottlenose Dolphin Take Reduction Plan

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

**ACTION:** Final rule.

**SUMMARY:** The National Marine Fisheries Service (NMFS) issues this final rule amending the Bottlenose Dolphin Take Reduction Plan's (BDTRP) implementing regulations by extending, for an additional three years, fishing restrictions expiring on May 26, 2009. This action continues, without modification, current nighttime fishing restrictions of medium mesh gillnets operating in the North Carolina portion of the Winter-Mixed Management Unit during the winter. Medium mesh fishing restrictions are extended for an additional three years to ensure continued conservation of the Western North Atlantic coastal bottlenose dolphin stock, should a directed spiny dogfish fishery reemerge in North Carolina.

**DATES:** This final rule is effective January 20, 2009.

**ADDRESSES:** Copies of the proposed rule to amend the BDTRP, the final BDTRP, Environmental Assessment, BDTRT meeting summaries, and background documents can be downloaded from the Take Reduction Plan web site at: *http://www.nmfs.noaa.gov/pr/interactions/trt/bdtrp.htm*.

**FOR FURTHER INFORMATION CONTACT:** Stacey Carlson, NMFS, Southeast Region, 727–824–5312, *Stacey.Carlson@noaa.gov*; or Melissa Andersen, NMFS, Protected Resources, 301–713–2322, *Melissa.Andersen@noaa.gov*. Individuals who use telecommunications devices for the deaf (TDD) may call the Federal Information Relay Service at 1–800–877–8339 between 8 a.m. and 4 p.m. eastern time, Monday through Friday, excluding Federal holidays.

**SUPPLEMENTARY INFORMATION:**

**Background**

In accordance with section 118(f)(7)(F) of the Marine Mammal Protection Act (MMPA), this final rule implements an amendment to the BDTRP (71 FR 24776) published on April 26, 2006. Details regarding the development and justification of this final rule were provided in the preamble of the proposed rule (73 FR 49634; August 22, 2008) and are not repeated here.

**Extension of Medium Mesh Gillnet Fishing Restrictions in North Carolina**

This final rule continues, without modification, current medium mesh nighttime fishing restrictions in North Carolina state waters. Specifically, prohibitions of nighttime medium mesh (greater than 5–inch (12.7 cm) to less than 7–inch (17.8 cm) stretch) gillnets in North Carolina state waters from November 1 through April 30, annually, will continue for an additional three years. These prohibitions are implemented with an expiration date of May 26, 2012. An expiration date is included to ensure the Bottlenose Dolphin Take Reduction Team continues to reexamine the spiny dogfish fishery and determine if these requirements are still necessary and/or sufficient given the dynamic nature of the fishery and its management.

**Comments on the Proposed Rule and Responses**

NMFS received five comment letters on the proposed rule via mail, fax, and the Federal eRulemaking Portal. Comments on the proposed rule were received from The Humane Society of the United States, Ocean Conservancy, Marine Mammal Commission, and two citizens.

In addition to receiving the specific comments detailed below, NMFS also received the following: (1) comments in support of developing an innovative take reduction plan to reduce serious injury and mortality of bottlenose dolphins; (2) concern that the BDTRP should be more protective of bottlenose dolphins; (3) a recommendation to pursue consensus recommendations made by the BDTRT at their June 2007 meeting for gear research related to the Summer Northern North Carolina Management Unit and increasing observer coverage in this Management Unit; and (4) a request that NMFS provide updates in this final rule on progress made towards enhancing and increasing observer coverage. After careful consideration, NMFS concluded these comments were previously considered or did not pertain to the proposed rule to extend the current nighttime medium mesh fishing restrictions in North Carolina state waters for continued conservation of bottlenose dolphins. NMFS continues to make efforts to implement all the BDTRT's consensus recommendations and will provide status updates at the next BDTRT meeting in March 2009.

*Comment 1:* Three commenters recommended NMFS adopt the final rule as proposed.

*Response:* NMFS is finalizing the rule as proposed.

*Comment 2:* Two commenters expressed support for extending the medium mesh gillnet restrictions and believe the fishing restrictions are critical for bottlenose dolphin conservation. Although the commenters are not opposed to extending the restrictions indefinitely, they agree extending the restrictions for three years is important to ensure the BDTRT periodically reviews the status of the spiny dogfish fishery.

*Response:* Extending the medium mesh nighttime gillnet restrictions in North Carolina is necessary to ensure continued conservation of coastal bottlenose dolphins. NMFS also believes establishing a three-year timeframe for the restriction provides the opportunity and assurance for the BDTRT to regularly review the fishing restrictions and spiny dogfish fishery, as well as to evaluate if additional modifications to the BDTRP are warranted due to the dynamic nature of the fishery and its management.

**Changes from Proposed Rule**

This action is finalized unchanged from the proposed rule.

Classification

This final rule was determined not significant for purposes of Executive Order 12866.

As required by section 603 of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), an initial regulatory flexibility analysis (IRFA) was prepared, which is based on the Environmental Assessment, Regulatory Impact Review, and Final Regulatory Flexibility Act Analysis (FRFA) for the BDTRP, dated April 2006. The IRFA described the economic impact the proposed rule, if adopted, would have on small entities. No substantive comments on the IRFA or the economic impacts of the proposed rule were received, and no changes were made to the final rule as a result. A summary of the FRFA follows.

The purpose of this final rule is to reduce serious injuries and mortalities to bottlenose dolphins incidental to commercial fishing operations and ensure serious injuries and mortalities do not exceed PBR levels, as mandated by the MMPA. The specific objectives of this final action are to: (1) meet the BDTRP's short- and long-term objectives by maintaining reductions in serious injuries and moralities of dolphins associated with the medium mesh spiny dogfish fishery in North Carolina state waters; and (2) ensure the BDTRT is provided with continued opportunities to review the status of the dynamic spiny dogfish fishery and recommend revisions to the BDTRP, as necessary. These objectives will be accomplished by continuing reduced soak times in medium mesh gillnet gear in North Carolina via the seasonal, nighttime medium mesh gear prohibitions for an additional three years. The MMPA provides the statutory basis for this rule.

This final rule will not impose any additional reporting or recordkeeping requirements. The compliance requirements of the final rule are as described in this analysis.

A total of 1,321 unique participants were identified as having recorded landings using medium mesh gillnet gear during the 2001 fishing season (November 2000 - October 2001) in North Carolina. Total harvests with this gear were valued at approximately $13.8 million (nominal ex-vessel value), or approximately 18 percent of total fishing revenues by these entities of approximately $77 million (nominal ex-vessel value). The average annual revenue from the harvest of all marine species by these vessels was approximately $58,000.

A business involved in fish harvesting is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of $4.0 million (NAICS code 114111, finfish fishing) for all its affiliated operations worldwide. All medium mesh gillnet commercial fishing operating in the manner and location encompassed by this final action will be affected by the final rule. The available estimate of the average annual revenues by vessels operating in the medium mesh gillnet commercial fisheries in North Carolina provided above ($58,000) is from the 2001 fishing season. Since that time, as a result of the implementation of the Spiny Dogifsh Fishery Management Plan (FMP) under the Magnuson-Stevens Fishery Conservation and Management Act and a subsequent Interstate Fishery Management Plan for Spiny Dogfish, spiny dogfish fishery revenues have decreased. Therefore, NMFS determined that all entities affected by the final rule

are small businesses. Because all entities affected by the final rule are considered small entities, the issue of disproportional impacts between large and small entities as a result of the final action does not arise.

Information on the current profit profile of participants in the North Carolina medium mesh gillnet fishery is not available. Inferences on the effects of the final rule on profitability of the impacted small entities, however, may be drawn from examination of the expected impacts on ex-vessel revenues. In 2001, total costs associated with harvest reductions (lost ex-vessel revenue) for the medium mesh gillnet fisheries in North Carolina during the winter were estimated to be approximately $296,000 for the initial implementation of the prohibition in the BDTRP. This reduction in ex-vessel revenues represented less than 1 percent of total ex-vessel revenues for the entities that used this gear in North Carolina during the winter for the 2001 fishing year. Updated analyses are not available. Spiny dogfish were the primary target of the medium mesh gillnet sector, and the spiny dogfish fishery was essentially eliminated in 2000 through regulations implementing the Spiny Dogfish Fishery Management Plan under the Magnuson-Stevens Fishery Conservation and Management Act and emergency actions by the Atlantic States Marine Fisheries Commission creating a similar Interstate Fishery Management Plan for Spiny Dogfish. Since then, there has not been a large-scale directed fishery for this species in North Carolina. This prevents meaningful quantification of current revenues that might be foregone as a result of the final action, as well as the identification and description of fishing entities that might desire to re-enter the fishery should the fishery reemerge in North Carolina in the future.

It should be emphasized that this final action is not expected to directly affect any current fishing revenues or fishing practices because the medium mesh spiny dogfish gillnet fishery in North Carolina has not operated since the May 26, 2006, implementation of the BDTRP, nor in any substantive manner since 2000 when the FMPs were implemented. Instead, the continuation of the nighttime fishing prohibition would have an effect only if a directed spiny dogfish fishery reemerges in North Carolina because of changes in Federal or Interstate FMP actions. In that case, the final action will reduce potential medium mesh gillnet fishing opportunities by limiting soak times, and will limit the redevelopment and prosecution of a fishery that, prior to the FMPs and BDTRP, contributed a relatively minor share of fishing revenues to the fishery participants.

NMFS considered two alternatives for this final action. The first alternative, the status quo, would continue current restrictions until May 26, 2009, when the medium mesh gillnet prohibitions in North Carolina would expire. This alternative would allow increased soak times associated with the directed spiny dogfish fishery and associated revenues, if FMP actions allow for the reemergence of a directed fishery in North Carolina. However, this alternative would not prevent future incidental mortality and serious injury to dolphins from extended soak time of medium mesh commercial gillnet gear, and therefore, would not meet the objectives of the BDTRP. The second alternative, the final action, continues, without modification, current nighttime medium mesh gillnet restrictions in North Carolina state waters during the winter for an additional three years (until May 26, 2012). This is a consensus recommendation of the Bottlenose Dolphin Take Reduction Team and is expected to achieve the BDTRP's objectives, as mandated by the MMPA, by continuing to reduce serious injuries and mortalities of dolphins incidental to commercial gillnet fishing.

NMFS determined this action is consistent to the maximum extent practicable with the enforceable policies of the approved coastal management program of North Carolina. NMFS provided a consistency determination to North Carolina's Coastal Zone Management Program under section 307 of the Coastal Zone Management Act and enclosed the following reference information: a summary of the proposed action; the final rule implementing the BDTRP (71 FR 24776, April 26, 2006); and the BDTRT's June 2007 meeting summary. The letter was provided to the State on June 20, 2008. North Carolina did not provide comments; therefore, consistency is inferred.

This action contains policies with federalism implications that were sufficient to warrant preparation of a federalism summary impact statement under Executive Order 13132 and a federalism consultation with officials in the state of North Carolina. Accordingly, the Assistant Secretary for Legislative and Intergovernmental Affairs provided notice of the proposed action to the appropriate officials in North Carolina. North Carolina did not respond.

This final rule does not contain collection-of-information requirements subject to the Paperwork Reduction Act.

**List of Subjects in 50 CFR Part 229**

Administrative practice and procedure, Confidential business information, Fisheries, Marine mammals, Reporting and recordkeeping requirements.

Dated: December 15, 2008.

**Samuel D. Rauch III,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

■ For the reasons set out in the preamble, 50 CFR part 229 is amended as follows:

## PART 229—AUTHORIZATION FOR COMMERCIAL FISHERIES UNDER THE MARINE MAMMAL PROTECTION ACT OF 1972

■ 1. The authority citation for part 229 continues to read as follows:

**Authority:** 16 U.S.C. 1361 et seq; § 229.32(f) also issued under 16 U.S.C. 1531 *et seq.*

■ 2. In § 229.35 paragraphs (d)(4)(ii) and (d)(5)(i) are revised to read as follows:

**§ 229.35 Bottlenose Dolphin Take Reduction Plan.**

* * * * *

(d) * * *

(4) * * *

(ii) *Medium mesh gillnets.* From November 1 through April 30 of the following year, in Northern North Carolina State waters, no person may fish with any medium mesh gillnet at night. This provision expires on May 26, 2012.

* * * * *

(5) * * *

(i) *Medium Mesh Gillnets.* From November 1 through April 30 of the following year, in Southern North Carolina State waters, no person may fish with any medium mesh gillnet at night. This provision expires on May 26, 2012.

* * * * *

[FR Doc. E8–30241 Filed 12–19–08; 8:45 am]

BILLING CODE 3510–22–S

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 648

**[Docket No. 071212833-8179-02]**

**RIN 0648–XM22**

## Fisheries of the Northeastern United States; Atlantic Bluefish Fishery; Quota Transfer

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

**ACTION:** Temporary rule; inseason quota transfer.

**SUMMARY:** NMFS announces that the State of Maine is transferring commercial bluefish quota to the State of New York from its 2008 quota. By this action, NMFS adjusts the quotas and announces the revised commercial quota for each state involved.

**DATES:** Effective December 16, 2008 through December 31, 2008.

**FOR FURTHER INFORMATION CONTACT:** Emily Bryant, Fishery Management Specialist, (978) 281–9244, fax (978) 281–9135.

**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 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.

Two or more states, under mutual agreement and with the concurrence of the Administrator, Northeast Region, NMFS (Regional Administrator), can transfer or combine bluefish commercial quota under § 648.160(f). The Regional Administrator is required to consider the criteria set forth in § 648.160(f)(1) in the evaluation of requests for quota transfers or combinations.

Maine has agreed to transfer 45,000 lb (20,412 kg) of its 2008 commercial quota to New York. The Regional Administrator has determined that the criteria set forth in § 648.160(f)(1) have been met. The revised bluefish quotas for calendar year 2008 are: New York, 1,202,057 lb (545,244 kg); and Maine, 6,418 lb (2,911 kg).

### Classification

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

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

Dated: December 16, 2008.

**Emily H. Menashes,**

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

[FR Doc. E8–30205 Filed 12–16–08; 4:15 pm]

**BILLING CODE 3510–22–S**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 679

**[Docket No. 071106673–8011–02]**

**RIN 0648–XM30**

## Fisheries of the Exclusive Economic Zone Off Alaska; Greenland Turbot and Rougheye Rockfish in the Bering Sea and Aleutian Islands Management Area

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

**ACTION:** Temporary rule; apportionment of reserves; request for comments.

**SUMMARY:** NMFS apportions amounts of the non-specified reserve to the initial total allowable catch (ITAC) of Greenland turbot in the Aleutian Islands subarea and rougheye rockfish in the Bering Sea and Aleutian Islands (BSAI) management area. This action is necessary to allow the fisheries to continue operating. It is intended to promote the goals and objectives of the fishery management plan for the BSAI.

**DATES:** Effective December 16, 2008 through 2400 hrs, Alaska local time, December 31, 2008. Comments must be received at the following address no later than 4:30 p.m., Alaska local time, December 31, 2008.

**ADDRESSES:** Send comments to Sue Salveson, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, Attn: Ellen Sebastian. You may submit comments, identified by [RIN], by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal website at *http://www.regulations.gov*.
- Mail: P. O. Box 21668, Juneau, AK 99802.
- Fax: (907) 586–7557.
- Hand delivery to the Federal Building: 709 West 9th Street, Room 420A, Juneau, AK.

All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (e.g., name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe portable document file (pdf) formats only.

**FOR FURTHER INFORMATION CONTACT:** Mary Furuness, 907–586–7228.

**SUPPLEMENTARY INFORMATION:** NMFS manages the groundfish fishery in the BSAI exclusive economic zone according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2008 ITAC of Greenland turbot in the Aleutian Islands subarea was established as 672 metric tons (mt) and rougheye rockfish in the BSAI was established as 187 mt by the 2008 and 2009 harvest specifications for groundfish of the BSAI (73 FR 10160, February 26, 2008). The Regional Administrator, Alaska Region, NMFS, has determined that the ITAC for Greenland turbot in the Aleutian Islands subarea and rougheye rockfish in the BSAI needs to be supplemented from the non-specified reserve in order to continue fishing operations.

Therefore, in accordance with § 679.20(b)(3), NMFS apportions from the non-specified reserve of groundfish 118 mt to the Greenland turbot ITAC in the Aleutian Islands subarea and 15 mt of rougheye rockfish ITAC in the BSAI. These apportionments are consistent with § 679.20(b)(1)(i) and do not result in overfishing of a target species because the revised ITACs are equal to or less than the specifications of the acceptable biological catch in the 2008 and 2009 final harvest specifications for groundfish in the BSAI (73 FR 10160, February 26, 2008).

The harvest specification for Greenland turbot and rougheye rockfish included in the harvest specifications for groundfish in the BSAI (73 FR 10160, February 26, 2008) for the 2008 ITAC are revised as follows: 790 mt for Greenland turbot in the Aleutian Islands subarea and 202 mt for rougheye rockfish in the BSAI.

**Classification**

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, (AA) finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) and § 679.20(b)(3)(iii)(A) as such a requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the apportionment of the non-specified reserves of groundfish to the Greenland turbot fishery in the Aleutian Islands subarea and rougheye rockfish in the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of December 4, 2008.

The AA also finds good cause to waive the 30–day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

Under § 679.20(b)(3)(iii), interested persons are invited to submit written comments on this action (see **ADDRESSES**) until December 31, 2008.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

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

Dated: December 16, 2008.

**Emily H. Menashes,**

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

[FR Doc. E8–30202 Filed 12–16–08; 4:15 pm]

**BILLING CODE 3510–22–S**

# Proposed Rules

Federal Register
Vol. 73, No. 245
Friday, December 19, 2008

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

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

### 6 CFR Part 5

**[Docket No. DHS–2008–0173]**

## Privacy Act of 1974: Implementation of Exemptions, DHS/CBP—014 Regulatory Audit Archive System

**AGENCY:** Privacy Office, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Homeland Security (DHS) is giving concurrent notice of a revised and updated system of records pursuant to the Privacy Act of 1974 for the U.S. Customs and Border Protection Regulatory Audit Archive System (RAAS) system of records and this proposed rulemaking. In this proposed rulemaking, the Department proposes to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

**DATES:** Comments must be received on or before January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0173, by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Department of Homeland Security, Washington DC 20528.

*Instructions:* All submissions received must include the agency name and docket number for this notice. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

*Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: Laurence E. Castelli (202–325–0280), Chief, Privacy Act Policy and Procedures Branch, U.S. Customs and Border Protection, Office of International Trade, Regulations & Rulings, Mint Annex, 799 Ninth Street, NW., Washington, DC 20001–4501. For privacy issues contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

*Background:* Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS)/United States Customs and Border Protection (CBP) have relied on preexisting Privacy Act systems of records notices for the collection and maintenance of records that concern records on regulatory audits of customs brokers and other persons engaged in international trade, who are the subject of audits or within the scope of an audit.

As part of its efforts to streamline and consolidate its record systems, DHS is updating and reissuing a DHS/CBP system of records under the Privacy Act (5 U.S.C. 552a) that deals with regulatory audits of customs brokers and other persons engaged in international trade. These audits are part of CBP's continuing oversight of Customs Brokers, who are licensed by CBP, pursuant to 19 U.S.C. 1641, to act as agents for importers in the entry of merchandise and payment of duties and fees. This SORN also notes the expansion of CBP's regulatory audit authority to other persons engaged in international trade.

In this notice of proposed rulemaking, DHS now is proposing to exempt DHS/CBP—014 Regulatory Audit Archive System (RAAS), in part, from certain provisions of the Privacy Act.

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates personally identifiable information. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. Individuals may request their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description of the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency recordkeeping practices transparent, to notify individuals regarding the uses to which personally identifiable information is put, and to assist individuals in finding such files within the agency.

The Privacy Act allows Government agencies to exempt certain records from the access and amendment provisions. If an agency claims an exemption, however, it must issue a Notice of Proposed Rulemaking to make clear to the public the reasons why a particular exemption is claimed.

DHS is claiming exemptions from certain requirements of the Privacy Act for DHS/CBP–014 Regulatory Audit Archive System (RAAS). Some information in DHS/CBP–014 Regulatory Audit Archive System (RAAS) system of records relates to official DHS national security, law enforcement, immigration, and intelligence activities. These exemptions are needed to protect information relating to DHS activities from disclosure to subjects or others related to these activities. Specifically, the exemptions are required to preclude subjects of these activities from frustrating these processes; to avoid disclosure of activity techniques; to protect the identities and physical safety of confidential informants and law enforcement personnel; to ensure DHS's ability to obtain information from third parties and other sources; to protect the privacy of third parties; and to safeguard classified information. Disclosure of information to the subject of the inquiry could also permit the subject to avoid detection or apprehension.

The exemptions proposed here are standard law enforcement and national security exemptions exercised by a large number of Federal law enforcement and intelligence agencies. In appropriate

circumstances, where compliance would not appear to interfere with or adversely affect the law enforcement purposes of this system and the overall law enforcement process, the applicable exemptions may be waived on a case by case basis.

A notice of system of records for DHS/CBP–014 Regulatory Audit Archive System (RAAS) is also published in this issue of the **Federal Register**.

**List of Subjects in 6 CFR Part 5**

Freedom of information; Privacy.

For the reasons stated in the preamble, DHS proposes to amend Chapter I of Title 6, Code of Federal Regulations, as follows:

## PART 5—DISCLOSURE OF RECORDS AND INFORMATION

1. The authority citation for Part 5 continues to read as follows:

**Authority:** Public Law 107–296, 116 Stat. 2135, 6 U.S.C. 101 *et seq.*; 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

2. Add at the end of Appendix C to Part 5, Exemption of Record Systems under the Privacy Act, the following new paragraph ''14'':

**Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act**

* * * * *

14. The Department of Homeland Security/United States Customs and Border Protection—014 Regulatory Audit Archive System (RAAS) system of records consists of electronic and paper records and will be used by DHS and its components. DHS/CBP–014 Regulatory Audit Archive System (RAAS) is a repository of information held by DHS in connection with its several and varied missions and functions, including, but not limited to: the enforcement of civil and criminal laws; investigations, inquiries, and proceedings there under; and national security and intelligence activities. DHS/CBP–014 Regulatory Audit Archive System (RAAS) contains information that is collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable information collected by other Federal, State, local, tribal, foreign, or international government agencies. Pursuant to 5 U.S.C. 552a(k)(2) of the Privacy Act, this system is exempt from the following provisions of the Privacy Act, subject to the limitations set forth in those subsections: 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f). Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of the investigation, and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

(b) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation, to the existence of the investigation, and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an impossible administrative burden by requiring investigations to be continuously reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of Federal law, the accuracy of information obtained or introduced occasionally may be unclear or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(d) From subsections (e)(4)(G), (H), and (I) (Agency Requirements), and (f) (Agency Rules) because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29875 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

### 6 CFR Part 5

**[Docket No. DHS–2008–0190]**

## Privacy Act of 1974: Implementation of Exemptions; DHS/CBP–011 TECS

**AGENCY:** Privacy Office, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Homeland Security (DHS) is giving concurrent notice of a revised and updated system of records pursuant to the Privacy Act of 1974 for the U.S. Customs and Border Protection—011 TECS system of records and this proposed rulemaking. In this proposed rulemaking, the Department proposes to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

**DATES:** Comments must be received on or before January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0190, by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Department of Homeland Security, Washington, DC 20528.

*Instructions:* All submissions received must include the agency name and docket number for this notice. All comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.

*Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: Laurence E. Castelli (202–325–0280), Chief, Privacy Act Policy and Procedures Branch, U.S. Customs and Border Protection, Office of International Trade, Regulations & Rulings, Mint Annex, 799 Ninth Street, NW., Washington, DC 20001–4501. For privacy issues contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

*Background:* Pursuant to the savings clause in the Homeland Security Act of

2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS) and U.S. Customs and Border Protection (CBP) have relied on preexisting Privacy Act systems of records notices for the collection and maintenance of records that concern the Treasury Enforcement Communications System (TECS).

As part of its efforts to streamline and consolidate its record systems, DHS is updating and reissuing a DHS/CBP system of records under the Privacy Act (5 U.S.C. 552a) that deals with CBP's priority mission of preventing terrorists and terrorist weapons from entering the country while facilitating legitimate travel and trade.

In this notice of proposed rulemaking, DHS now is proposing to exempt TECS, in part, from certain provisions of the Privacy Act.

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates personally identifiable information. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. Individuals may request their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description of the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency recordkeeping practices transparent, to notify individuals regarding the uses to which personally identifiable information is put, and to assist individuals in finding such files within the agency.

The Privacy Act allows Government agencies to exempt certain records from the access and amendment provisions. If an agency claims an exemption, however, it must issue a Notice of Proposed Rulemaking to make clear to the public the reasons why a particular exemption is claimed.

DHS is claiming exemptions from certain requirements of the Privacy Act for DHS/CBP–011 TECS. Some information in DHS/CBP–011 TECS relates to official DHS national security, law enforcement, immigration, and intelligence activities. These exemptions are needed to protect information relating to DHS activities from disclosure to subjects or others related to these activities. Specifically, the exemptions are required to preclude subjects of these activities from frustrating these processes; to avoid disclosure of activity techniques; to protect the identities and physical safety of confidential informants and law enforcement personnel; to ensure DHS's ability to obtain information from third parties and other sources; and to protect the privacy of third parties. Disclosure of information to the subject of the inquiry could also permit the subject to avoid detection or apprehension.

The exemptions proposed here are standard law enforcement and national security exemptions exercised by a large number of Federal law enforcement and intelligence agencies. In appropriate circumstances, where compliance would not appear to interfere with or adversely affect the law enforcement purposes of this system and the overall law enforcement process, the applicable exemptions may be waived on a case by case basis.

A notice of system of records for DHS/CBP–011 TECS is also published in this issue of the **Federal Register**.

**List of Subjects in 6 CFR Part 5**

Freedom of information; Privacy.

For the reasons stated in the preamble, DHS proposes to amend Chapter I of Title 6, Code of Federal Regulations, as follows:

## PART 5—DISCLOSURE OF RECORDS AND INFORMATION

1. The authority citation for Part 5 continues to read as follows:

**Authority:** Public Law 107–296, 116 Stat. 2135, 6 U.S.C. 101 *et seq.*; 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

2. Add at the end of Appendix C to Part 5, Exemption of Record Systems under the Privacy Act, the following new paragraph ''14'':

**Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act**

* * * * *

14. The Department of Homeland Security/U.S. Customs and Border Protection—011 TECS system of records consists of electronic and paper records and will be used by DHS, DHS Components, and other Federal agencies. DHS/CBP–011 TECS is a repository of information held by DHS in connection with its several and varied missions and functions, including, but not limited to: The enforcement of civil and criminal laws; investigations, inquiries, and proceedings thereunder; and national security and intelligence activities. DHS/CBP–011 TECS contains information that is collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable information collected by other Federal, State, local, tribal, foreign, or international government agencies. Pursuant to exemption 5 U.S.C. 552a(j)(2) of the Privacy Act, portions of this system are exempt from 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5) and (e)(8); (f), and (g). Pursuant to 5 U.S.C. 552a(k)(2) of the Privacy Act, this system is exempt from the following provisions of the Privacy Act, subject to the limitations set forth in those subsections: 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f). Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) and (4) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of the investigation, and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

(b) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation, to the existence of the investigation, and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an impossible administrative burden by requiring investigations to be continuously reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to national security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of Federal law, the accuracy of information obtained or introduced occasionally may be unclear or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(d) From subsection (e)(2) (Collection of Information from Individuals) because

requiring that information be collected from the subject of an investigation or subject of interest would alert the subject to the nature or existence of an investigation, thereby interfering with the related investigation and law enforcement activities or national security matter.

(e) From subsection (e)(3) (Notice to Subjects) because providing such detailed information would impede law enforcement in that it could compromise investigations by: Revealing the existence of an otherwise confidential investigation and thereby provide an opportunity for the subject of an investigation to conceal evidence, alter patterns of behavior, or take other actions that could thwart investigative efforts; reveal the identity of witnesses in investigations, thereby providing an opportunity for the subjects of the investigations or others to harass, intimidate, or otherwise interfere with the collection of evidence or other information from such witnesses; or reveal the identity of confidential informants, which would negatively affect the informant's usefulness in any ongoing or future investigations and discourage members of the public from cooperating as confidential informants in any future investigations.

(f) From subsections (e)(4)(G), (H), and (I) (Agency Requirements), and (f) (Agency Rules) because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

(g) From subsection (e)(5) (Collection of Information) because in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. Compliance with (e)(5) would preclude DHS agents from using their investigative training and exercise of good judgment to both conduct and report on investigations.

(h) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with DHS' ability to obtain, serve, and issue subpoenas, warrants, and other law enforcement mechanisms that may be filed under seal, and could result in disclosure of investigative techniques, procedures, and evidence.

(i) From subsection (g) to the extent that the system is exempt from other specific subsections of the Privacy Act relating to individuals' rights to access and amend their records contained in the system. Therefore DHS is not required to establish rules or procedures pursuant to which individuals may seek a civil remedy for the agency's: Refusal to amend a record; refusal to comply with a request for access to records; failure to maintain accurate, relevant timely and complete records; or failure to otherwise comply with an individual's right to access or amend records.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29879 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

### 6 CFR Part 5

**[Docket No. DHS–2008–0157]**

## Privacy Act of 1974: Implementation of Exemptions; DHS/CBP–012 Closed Circuit Television System

**AGENCY:** Privacy Office, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Homeland Security (DHS) is giving concurrent notice of a revised and updated system of records pursuant to the Privacy Act of 1974 for the U.S. Customs and Border Protection Closed Circuit Television System system of records and this proposed rulemaking. In this proposed rulemaking, the Department proposes to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

**DATES:** Comments must be received on or before January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0157, by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Department of Homeland Security, Washington, DC 20528.

*Instructions:* All submissions received must include the agency name and docket number for this notice. All comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.

*Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: Laurence E. Castelli (202–325–0280), Chief, Privacy Act Policy and Procedures Branch, U.S. Customs and Border Protection, Office of International Trade, Regulations & Rulings, Mint Annex, 799 Ninth Street, NW., Washington, DC 20001–4501. For privacy issues contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

*Background:* Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS)/U.S. Customs and Border Protection (CBP) have relied on preexisting Privacy Act systems of records notices for the collection and maintenance of records that concern the DHS/CBP—012 Closed Circuit Television System.

As part of its efforts to streamline and consolidate its record systems, DHS is updating and reissuing a DHS/CBP system of records notice under the Privacy Act (5 U.S.C. 552a) that concerns people involved in incidents or disturbances related to customs or inspection while attempting to enter the U.S. This record system will allow DHS/CBP to videotape persons being escorted into, as well as inside a port of entry. The collection and maintenance of this information will assist DHS/CBP in recording individuals who are part of an incident or disturbance during a secondary inspection or individuals who received a secondary inspection due to an incident or disturbance.

In this notice of proposed rulemaking, DHS now is proposing to exempt Television System, in part, from certain provisions of the Privacy Act.

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates personally identifiable information. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. Individuals may request their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description of the type and character of

each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency recordkeeping practices transparent, to notify individuals regarding the uses to which personally identifiable information is put, and to assist individuals in finding such files within the agency.

The Privacy Act allows Government agencies to exempt certain records from the access and amendment provisions. If an agency claims an exemption, however, it must issue a Notice of Proposed Rulemaking to make clear to the public the reasons why a particular exemption is claimed.

DHS is claiming exemptions from certain requirements of the Privacy Act for DHS/CBP—012 Closed Circuit Television System. Some information in Television System relates to official DHS national security, law enforcement, immigration, and intelligence activities. These exemptions are needed to protect information relating to DHS activities from disclosure to subjects or others related to these activities. Specifically, the exemptions are required to preclude subjects of these activities from frustrating these processes; to avoid disclosure of activity techniques; to protect the identities and physical safety of confidential informants and law enforcement personnel; to ensure DHS's ability to obtain information from third parties and other sources; to protect the privacy of third parties; and to safeguard classified information. Disclosure of information to the subject of the inquiry could also permit the subject to avoid detection or apprehension.

The exemptions proposed here are standard law enforcement and national security exemptions exercised by a large number of Federal law enforcement and intelligence agencies. In appropriate circumstances, where compliance would not appear to interfere with or adversely affect the law enforcement purposes of this system and the overall law enforcement process, the applicable exemptions may be waived on a case by case basis.

A notice of system of records for DHS/CBP–012 Closed Circuit Television System is also published in this issue of the **Federal Register**.

**List of Subjects in 6 CFR Part 5**

Freedom of information; Privacy.

For the reasons stated in the preamble, DHS proposes to amend Chapter I of Title 6, Code of Federal Regulations, as follows:

## PART 5—DISCLOSURE OF RECORDS AND INFORMATION

1. The authority citation for Part 5 continues to read as follows:

**Authority:** Public Law 107–296, 116 Stat. 2135, 6 U.S.C. 101 *et seq.*; 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

2. Add at the end of Appendix C to Part 5, Exemption of Record Systems under the Privacy Act, the following new paragraph ''14'':

**Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act**

* * * * *

14. The Department of Homeland Security/U.S. Customs and Border Protection–012 Closed Circuit Television System system of records consists of electronic and paper records and will be used by DHS and its components. The Closed Circuit Television System is a repository of information held by DHS in connection with its several and varied missions and functions, including, but not limited to: the enforcement of civil and criminal laws; investigations, inquiries, and proceedings there under; and national security and intelligence activities. DHS/CBP–012 Closed Circuit Television System contains information that is collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable information collected by other Federal, State, local, tribal, foreign, or international government agencies. Pursuant to exemption 5 U.S.C. 552a(j)(2) of the Privacy Act, portions of this system are exempt from 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5) and (e)(8); (f), and (g). Pursuant to 5 U.S.C. 552a(k)(2) of the Privacy Act, this system is exempt from the following provisions of the Privacy Act, subject to the limitations set forth in those subsections: 5 U.S.C. 552a (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f). Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) and (4) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of the investigation, and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

(b) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation, to the existence of the investigation, and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an impossible administrative burden by requiring investigations to be continuously reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of Federal law, the accuracy of information obtained or introduced occasionally may be unclear or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(d) From subsection (e)(2) (Collection of Information from Individuals) because requiring that information be collected from the subject of an investigation would alert the subject to the nature or existence of an investigation, thereby interfering with the related investigation and law enforcement activities.

(e) From subsection (e)(3) (Notice to Subjects) because providing such detailed information would impede law enforcement in that it could compromise investigations by: revealing the existence of an otherwise confidential investigation and thereby provide an opportunity for the subject of an investigation to conceal evidence, alter patterns of behavior, or take other actions that could thwart investigative efforts; reveal the identity of witnesses in investigations, thereby providing an opportunity for the subjects of the investigations or others to harass, intimidate, or otherwise interfere with the collection of evidence or other information from such witnesses; or reveal the identity of confidential informants, which would negatively affect the informant's usefulness in any ongoing or future investigations and discourage members of the public from cooperating as confidential informants in any future investigations.

(f) From subsections (e)(4)(G), (H), and (I) (Agency Requirements), and (f) (Agency Rules) because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses,

and potential witnesses, and confidential informants.

(g) From subsection (e)(5) (Collection of Information) because in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. Compliance with (e)(5) would preclude DHS agents from using their investigative training and exercise of good judgment to both conduct and report on investigations.

(h) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with DHS' ability to obtain, serve, and issue subpoenas, warrants, and other law enforcement mechanisms that may be filed under seal, and could result in disclosure of investigative techniques, procedures, and evidence.

(i) From subsection (g) to the extent that the system is exempt from other specific subsections of the Privacy Act relating to individuals' rights to access and amend their records contained in the system. Therefore DHS is not required to establish rules or procedures pursuant to which individuals may seek a civil remedy for the agency's: refusal to amend a record; refusal to comply with a request for access to records; failure to maintain accurate, relevant timely and complete records; or failure to otherwise comply with an individual's right to access or amend records.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29877 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of Security

### 6 CFR Part 5

**[Docket No. DHS–2008–0172]**

## Privacy Act of 1974: Implementation of Exemptions; DHS/CBP—010 Persons Engaged in International Trade in Customs and Border Protection Licensed/Regulated Activities

**AGENCY:** Privacy Office, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Homeland Security (DHS) is giving concurrent notice of a revised and updated system of records pursuant to the Privacy Act of 1974 for the U.S. Customs and Border Protection Persons Engaged in International Trade in Customs and Border Protection—010 Licensed/Regulated Activities system of records and this proposed rulemaking. In this proposed rulemaking, the Department proposes to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

**DATES:** Comments must be received on or before January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0172, by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Department of Homeland Security, Washington, DC 20528.

*Instructions:* All submissions received must include the agency name and docket number for this notice. All comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.

*Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: Laurence E. Castelli (202–325–0280), Chief, Privacy Act Policy and Procedures Branch, U.S. Customs and Border Protection, Office of International Trade, Regulations & Rulings, Mint Annex, 799 Ninth Street, NW., Washington, DC 20001–4501. For privacy issues contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

*Background:* Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS)/U.S. Customs and Border Protection (CBP) have relied on preexisting Privacy Act systems of records notices for the collection and maintenance of records pertaining to persons engaged in international trade in CBP licensed/regulated activities.

As part of its efforts to streamline and consolidate its record systems, DHS is establishing a component system of records under the Privacy Act (5 U.S.C. 552a) for DHS/CBP that deals with persons engaged in international trade in CBP licensed/regulated activities. This record system is titled, U.S. Customs and Border Protection Persons Engaged in International Trade in CBP Licensed/Regulated Activities. This system will be used by DHS/CBP to collect and maintain records on persons engaged in international trade in CBP licensed/regulated activities.

In this notice of proposed rulemaking, DHS now is proposing to exempt Persons Engaged in International Trade in CBP Licensed/Regulated Activities, in part, from certain provisions of the Privacy Act.

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates personally identifiable information. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. Individuals may request their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description of the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency recordkeeping practices transparent, to notify individuals regarding the uses to which personally identifiable information is put, and to assist individuals in finding such files within the agency.

The Privacy Act allows Government agencies to exempt certain records from the access and amendment provisions. If an agency claims an exemption, however, it must issue a Notice of Proposed Rulemaking to make clear to the public the reasons why a particular exemption is claimed.

DHS is claiming exemptions from certain requirements of the Privacy Act for Persons Engaged in International Trade in CBP Licensed/Regulated Activities. Some information in Persons Engaged in International Trade in CBP Licensed/Regulated Activities relates to official DHS national security, law enforcement, immigration, and intelligence activities. These exemptions are needed to protect information relating to DHS activities from disclosure to subjects or others related to these activities. Specifically, the exemptions are required to preclude subjects of these activities from frustrating these processes; to avoid disclosure of activity techniques; to protect the identities and physical safety of confidential informants and law enforcement personnel; to ensure DHS's

ability to obtain information from third parties and other sources; and to protect the privacy of third parties; to safeguard classified information. Disclosure of information to the subject of the inquiry could also permit the subject to avoid detection or apprehension.

The exemptions proposed here are standard law enforcement and national security exemptions exercised by a large number of Federal law enforcement and intelligence agencies. In appropriate circumstances, where compliance would not appear to interfere with or adversely affect the law enforcement purposes of this system and the overall law enforcement process, the applicable exemptions may be waived on a case by case basis.

A notice of system of records for Persons Engaged in International Trade in CBP Licensed/Regulated Activities is also published in this issue of the **Federal Register**.

**List of Subjects in 6 CFR Part 5**

Freedom of information; Privacy.

For the reasons stated in the preamble, DHS proposes to amend Chapter I of Title 6, Code of Federal Regulations, as follows:

## PART 5—DISCLOSURE OF RECORDS AND INFORMATION

1. The authority citation for Part 5 continues to read as follows:

**Authority:** Public Law 107–296, 116 Stat. 2135, 6 U.S.C. 101 *et seq.*; 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

2. Add at the end of Appendix C to Part 5, Exemption of Record Systems under the Privacy Act, the following new paragraph ''14'':

**Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act**

* * * * *

14. The Department of Homeland Security/U.S. Customs and Border Protection—010 Persons Engaged in International Trade in CBP Licensed/Regulated Activities system of records consists of electronic and paper records and will be used by DHS and its components. Persons Engaged in International Trade in CBP Licensed/Regulated Activities is a repository of information held by DHS in connection with its several and varied missions and functions, including, but not limited to: the enforcement of civil and criminal laws; investigations, inquiries, and proceedings there under; and national security and intelligence activities. Persons Engaged in International Trade in CBP Licensed/Regulated Activities contains information that is collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable information collected by other Federal, State, local, tribal, foreign, or international government agencies. Pursuant to exemption 5 U.S.C. 552a(j)(2) of the Privacy Act, portions of this system are exempt from 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5) and (e)(8); (f), and (g). Pursuant to 5 U.S.C. 552a(k)(2) of the Privacy Act, this system is exempt from the following provisions of the Privacy Act, subject to the limitations set forth in those subsections: 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f). Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) and (4) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of the investigation, and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

(b) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation, to the existence of the investigation, and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an impossible administrative burden by requiring investigations to be continuously reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to national security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of Federal law, the accuracy of information obtained or introduced occasionally may be unclear or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(d) From subsection (e)(2) (Collection of Information from Individuals) because requiring that information be collected from the subject of an investigation would alert the subject to the nature or existence of an investigation, thereby interfering with the related investigation and law enforcement activities.

(e) From subsection (e)(3) (Notice to Subjects) because providing such detailed information would impede law enforcement in that it could compromise investigations by: revealing the existence of an otherwise confidential investigation and thereby provide an opportunity for the subject of an investigation to conceal evidence, alter patterns of behavior, or take other actions that could thwart investigative efforts; reveal the identity of witnesses in investigations, thereby providing an opportunity for the subjects of the investigations or others to harass, intimidate, or otherwise interfere with the collection of evidence or other information from such witnesses; or reveal the identity of confidential informants, which would negatively affect the informant's usefulness in any ongoing or future investigations and discourage members of the public from cooperating as confidential informants in any future investigations.

(f) From subsections (e)(4)(G), (H), and (I) (Agency Requirements), and (f) (Agency Rules) because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

(g) From subsection (e)(5) (Collection of Information) because in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. Compliance with (e)(5) would preclude DHS agents from using their investigative training and exercise of good judgment to both conduct and report on investigations.

(h) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with DHS' ability to obtain, serve, and issue subpoenas, warrants, and other law enforcement mechanisms that may be filed under seal, and could result in disclosure of investigative techniques, procedures, and evidence.

(i) From subsection (g) to the extent that the system is exempt from other specific subsections of the Privacy Act relating to individuals' rights to access and amend their records contained in the system. Therefore DHS is not required to establish rules or procedures pursuant to which individuals may seek a civil remedy for the agency's refusal to amend a record; refusal to comply with a request for access to records; failure to maintain accurate, relevant timely and complete records; or failure to otherwise comply with an individual's right to access or amend records.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29878 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of Security

### 6 CFR Part 5

**[Docket No. DHS–2008–0176]**

## Privacy Act of 1974: Implementation of Exemptions; DHS/USSS–003 Non-Criminal Investigation Information System

**AGENCY:** Department of Homeland Security.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Homeland Security (DHS) is giving concurrent notice of a revised and updated system of records pursuant to the Privacy Act of 1974 for the DHS United States Secret Service—003 Non-Criminal Investigation Information System system of records and this proposed rulemaking. In this proposed rulemaking, the Department proposes to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

**DATES:** Comments must be received on or before January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0176, by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Department of Homeland Security, Washington, DC 20528.

*Instructions:* All submissions received must include the agency name and docket number for this notice. All comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.

*Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** For general questions and privacy issues, please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

*Background:* Pursuant to the savings clause in the Homeland Security Act of 2002, the Department of Homeland Security (DHS) and United States Secret Service (USSS) have relied on preexisting Privacy Act systems of records notices for the collection and maintenance of records that concern DHS/USSS–003 Non-Criminal Investigation Information System records.

As part of its efforts to streamline and consolidate its Privacy Act record systems, DHS/USSS is updating and reissuing a DHS/USSS system of records under the Privacy Act (5 U.S.C. 552a) for USSS records that concern individuals involved in non-criminal statutory investigations and/or requirements. Information related investigations into employee activities is retired into DHS/All 020 Internal Affairs published in the **Federal Register** on November 14, 2008 73 FR 67529; information related to claims against USSS is retired into DHS/All–013 Claims published in the **Federal Register** on October 28, 2008 at 73 FR 63987; and information related to employment and security clearance suitability are retired in DHS/OS1 Office of Security Files, published September 12, 2006 71 FR 53700. This will ensure that all organizational parts of USSS follow the same privacy rules for collecting and handling records non-criminal USSS investigation records. In this notice of proposed rulemaking, DHS now is proposing to exempt DHS/USSS–003 Non-Criminal Investigation Information System, in part, from certain provisions of the Privacy Act.

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates personally identifiable information. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. Individuals may request their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description of the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency recordkeeping practices transparent, to notify individuals regarding the uses to which personally identifiable information is put, and to assist individuals in finding such files within the agency.

The Privacy Act allows Government agencies to exempt certain records from the access and amendment provisions. If an agency claims an exemption, however, it must issue a Notice of Proposed Rulemaking to make clear to the public the reasons why a particular exemption is claimed.

DHS is claiming exemptions from certain requirements of the Privacy Act for DHS/USSS–003 Non-Criminal Investigation Information System. Some information in Non-Criminal Investigation Information System relates to law enforcement, training, and protective services to the President of the United States or other individuals pursuant to Section 3056 and 3056A of Title 18. These exemptions are needed to protect information relating to DHS activities from disclosure to subjects or others related to these activities. Specifically, the exemptions are required to preclude subjects of these activities from frustrating these processes; to avoid disclosure of activity techniques; to protect the identities and physical safety of confidential informants and law enforcement personnel; to ensure DHS' ability to obtain information from third parties and other sources; to protect the privacy of third parties; to protect testing materials; and to safeguard records in connection with providing protective services to the President of the United States or other individuals pursuant to Section 3056 and 3056A of Title 18. Disclosure of information to the subject of the inquiry could also permit the subject to avoid detection or apprehension.

The exemptions proposed here are standard law enforcement and national security exemptions exercised by a large number of Federal law enforcement and intelligence agencies. In appropriate circumstances, where compliance would not appear to interfere with or adversely affect the law enforcement purposes of this system and the overall law enforcement process, the applicable exemptions may be waived on a case by case basis.

A notice of system of records for DHS/USSS–003 Non-Criminal Investigation Information System is also published in this issue of the **Federal Register**.

**List of Subjects in 6 CFR Part 5**

Freedom of information; Privacy.

For the reasons stated in the preamble, DHS proposes to amend Chapter I of Title 6, Code of Federal Regulations, as follows:

## PART 5—DISCLOSURE OF RECORDS AND INFORMATION

1. The authority citation for Part 5 continues to read as follows:

**Authority:** 6 U.S.C. 101 *et seq.*; Public Law 107–296, 116 Stat. 2135; 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

2. Add at the end of Appendix C to Part 5, the following new paragraph ''14'':

**Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act**

* * * * *

14. The Department of Homeland Security DHS/USSS–003 Non-Criminal Investigation Information System system of records consists of electronic and paper records and will be used by DHS and its components. DHS/USSS–003 Non-Criminal Investigation Information System is a repository of information held by DHS in connection with its several and varied missions and functions, including, but not limited to: The enforcement of civil and criminal laws; investigations, inquiries, and proceedings thereunder; protection of the President of the United States or other individuals pursuant to Section 3056 and 3056A of Title 18; and protection of testing materials. DHS/USSS–003 Non-Criminal Investigation Information System contains information that is collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable information collected by other Federal, State, local, tribal, foreign, or international government agencies. Pursuant to exemption 5 U.S.C. 552a(j)(2) of the Privacy Act, portions of this system are exempt from 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5) and (e)(8); (f), and (g). Pursuant to 5 U.S.C. 552a(k)(2), (3), (5), and (6) this system is exempt from the following provisions of the Privacy Act, subject to the limitations set forth in those subsections: 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f). Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) and (4) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of the investigation, and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

(b) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation, to the existence of the investigation, and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an impossible administrative burden by requiring investigations to be continuously reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of Federal law, the accuracy of information obtained or introduced occasionally may be unclear or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(d) From subsection (e)(2) (Collection of Information from Individuals) because requiring that information be collected from the subject of an investigation would alert the subject to the nature or existence of an investigation, thereby interfering with the related investigation and law enforcement activities.

(e) From subsection (e)(3) (Notice to Subjects) because providing such detailed information would impede law enforcement in that it could compromise investigations by: Revealing the existence of an otherwise confidential investigation and thereby provide an opportunity for the subject of an investigation to conceal evidence, alter patterns of behavior, or take other actions that could thwart investigative efforts; reveal the identity of witnesses in investigations, thereby providing an opportunity for the subjects of the investigations or others to harass, intimidate, or otherwise interfere with the collection of evidence or other information from such witnesses; or reveal the identity of confidential informants, which would negatively affect the informant's usefulness in any ongoing or future investigations and discourage members of the public from cooperating as confidential informants in any future investigations.

(f) From subsections (e)(4)(G), (H), and (I) (Agency Requirements), and (f) (Agency Rules) because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

(g) From subsection (e)(5) (Collection of Information) because in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. Compliance with (e)(5) would preclude DHS agents from using their investigative training, and exercise of good judgment to both conduct and report on investigations.

(h) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with DHS' ability to obtain, serve, and issue subpoenas, warrants, and other law enforcement mechanisms that may be filed under seal, and could result in disclosure of investigative techniques, procedures, and evidence.

(i) From subsection (g) to the extent that the system is exempt from other specific subsections of the Privacy Act relating to individuals' rights to access and amend their records contained in the system. Therefore DHS is not required to establish rules or procedures pursuant to which individuals may seek a civil remedy for the agency's: refusal to amend a record; refusal to comply with a request for access to records; failure to maintain accurate, relevant timely and complete records; or failure to otherwise comply with an individual's right to access or amend records.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29880 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

### 6 CFR Part 5

**[Docket No. DHS–2008–0175]**

## Privacy Act of 1974: Implementation of Exemptions; DHS/USSS—001 Criminal Investigation Information System

**AGENCY:** Privacy Office, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Homeland Security (DHS) is giving concurrent notice of a revised and updated system of records pursuant to the Privacy Act of 1974 for the DHS/United States Secret Service—001 Criminal

Investigation Information System system of records and this proposed rulemaking. In this proposed rulemaking, the Department proposes to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

**DATES:** Comments must be received on or before January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0175, by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Department of Homeland Security, Washington, DC 20528.

*Instructions:* All submissions received must include the agency name and docket number for this notice. All comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.

*Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** For general questions and privacy issues, please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

*Background:* Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS) and United States Secret Service (USSS) have relied on preexisting Privacy Act systems of records notices for the collection and maintenance of records that concern DHS/USSS—001 Criminal Investigation Information System records.

As part of its efforts to streamline and consolidate its Privacy Act record systems, DHS/USSS is updating and reissuing a USSS.003 Criminal Investigation Information System under the Privacy Act (5 U.S.C. 552a) as DHS/USSS—001 Criminal Investigation Information System system records. This will ensure that all organizational parts of USSS follow the same privacy rules for collecting and handling criminal investigation information system records.

In this notice of proposed rulemaking, DHS is now proposing to exempt Criminal Investigation Information System, in part, from certain provisions of the Privacy Act.

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates personally identifiable information. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. Individuals may request their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description of the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency recordkeeping practices transparent, to notify individuals regarding the uses to which personally identifiable information is put, and to assist individuals in finding such files within the agency.

The Privacy Act allows government agencies to exempt certain records from the access and amendment provisions. If an agency claims an exemption, however, it must issue a Notice of Proposed Rulemaking to make clear to the public the reasons why a particular exemption is claimed.

DHS is claiming exemptions from certain requirements of the Privacy Act for Criminal Investigation Information System. Some information in Criminal Investigation Information System relates to official DHS national security, law enforcement, immigration, intelligence activities, and protective services to the President of the United States or other individuals pursuant to Section 3056 of Title 18. These exemptions are needed to protect information relating to DHS activities from disclosure to subjects or others related to these activities. Specifically, the exemptions are required to preclude subjects of these activities from frustrating these processes; to avoid disclosure of activity techniques; to protect the identities and physical safety of confidential informants and law enforcement personnel; to ensure DHS's ability to obtain information from third parties and other sources; to protect the privacy of third parties; to safeguard classified information; and to safeguard records in connection with providing protective services to the President of the United States or other individuals pursuant to Section 3056 of Title 18. Disclosure of information to the subject of the inquiry could also permit the subject to avoid detection or apprehension.

The exemptions proposed here are standard law enforcement and national security exemptions exercised by a large number of Federal law enforcement and intelligence agencies. In appropriate circumstances, where compliance would not appear to interfere with or adversely affect the law enforcement purposes of this system and the overall law enforcement process, the applicable exemptions may be waived on a case-by-case basis.

A notice of system of records for Criminal Investigation Information System is also published in this issue of the **Federal Register**.

**List of Subjects in 6 CFR Part 5**

Freedom of information; Privacy.

For the reasons stated in the preamble, DHS proposes to amend Chapter I of Title 6, Code of Federal Regulations, as follows:

## PART 5—DISCLOSURE OF RECORDS AND INFORMATION

1. The authority citation for Part 5 continues to read as follows:

**Authority:** Public Law 107–296, 116 Stat. 2135, 6 U.S.C. 101 *et seq.*; 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

2. Add at the end of Appendix C to Part 5, Exemption of Record Systems under the Privacy Act, the following new paragraph ''14'':

**Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act**

* * * * *

14. The Department of Homeland Security/United States Secret Service—001 Criminal Investigation Information System system of records consists of electronic and paper records and will be used by DHS and its components. DHS/USSS—011 Criminal Investigation Information System is a repository of information held by DHS in connection with its several and varied missions and functions, including, but not limited to: The enforcement of civil and criminal laws; investigations, inquiries, and proceedings thereunder; national security and intelligence activities; protection of the President of the United States or other individuals pursuant to Section 3056 Title 18. DHS/USSS—001 Criminal Investigation Information System contains information that is collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable information collected by other Federal, State, local, tribal, foreign, or

international government agencies. Pursuant to exemption 5 U.S.C. 552a(j)(2) of the Privacy Act, portions of this system are exempt from 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5) and (e)(8); (f), and (g). Pursuant to 5 U.S.C. 552a(k)(1),(k)(2), and (k)(3) of the Privacy Act, this system is exempt from the following provisions of the Privacy Act, subject to the limitations set forth in those subsections: 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (I), and (f). Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) and (4) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of the investigation, and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

(b) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation, to the existence of the investigation, and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an impossible administrative burden by requiring investigations to be continuously reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of Federal law, the accuracy of information obtained or introduced occasionally may be unclear or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(d) From subsection (e)(2) (Collection of Information from Individuals) because requiring that information be collected from the subject of an investigation would alert the subject to the nature or existence of an investigation, thereby interfering with the related investigation and law enforcement activities.

(e) From subsection (e)(3) (Notice to Subjects) because providing such detailed information would impede law enforcement in that it could compromise investigations by: Revealing the existence of an otherwise confidential investigation and thereby provide an opportunity for the subject of an investigation to conceal evidence, alter patterns of behavior, or take other actions that could thwart investigative efforts; reveal the identity of witnesses in investigations, thereby providing an opportunity for the subjects of the investigations or others to harass, intimidate, or otherwise interfere with the collection of evidence or other information from such witnesses; or reveal the identity of confidential informants, which would negatively affect the informant's usefulness in any ongoing or future investigations and discourage members of the public from cooperating as confidential informants in any future investigations.

(f) From subsections (e)(4)(G), (H), and (I) (Agency Requirements), and (f) (Agency Rules) because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

(g) From subsection (e)(5) (Collection of Information) because in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. Compliance with (e)(5) would preclude DHS agents from using their investigative training and exercise of good judgment to both conduct and report on investigations.

(h) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with DHS' ability to obtain, serve, and issue subpoenas, warrants, and other law enforcement mechanisms that may be filed under seal, and could result in disclosure of investigative techniques, procedures, and evidence.

(i) From subsection (g) to the extent that the system is exempt from other specific subsections of the Privacy Act relating to individuals' rights to access and amend their records contained in the system. Therefore DHS is not required to establish rules or procedures pursuant to which individuals may seek a civil remedy for the agency's: Refusal to amend a record; refusal to comply with a request for access to records; failure to maintain accurate, relevant timely and complete records; or failure to otherwise comply with an individual's right to access or amend records.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29881 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of Security

### 6 CFR Part 5

**[Docket No. DHS–2008–0170]**

## Privacy Act of 1974: Implementation of Exemptions; U.S. Customs and Border Protection—013 Seized Assets and Case Tracking System

**AGENCY:** Privacy Office, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Homeland Security (DHS) is giving concurrent notice of a revised and updated system of records pursuant to the Privacy Act of 1974 for the U.S. Customs and Border Protection—013 Seized Assets and Case Tracking System (SEACATS) system of records and this proposed rulemaking. In this proposed rulemaking, the Department proposes to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

**DATES:** Comments must be received on or before January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0170, by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Department of Homeland Security, Washington, DC 20528.

*Instructions:* All submissions received must include the agency name and docket number for this notice. All comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.

*Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** For general questions and privacy issues, please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer,

Privacy Office, Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

*Background:* Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS)/U.S. Customs and Border Protection (CBP) have relied on preexisting Privacy Act systems of records notices for the collection and maintenance of records pertaining to seizures and violators.

As part of its efforts to streamline and consolidate its record systems, DHS is establishing a component system of records under the Privacy Act (5 U.S.C. 552a) for DHS/CBP that deals with seizures made, and persons found violating laws and regulations enforced, by DHS/CBP. This record system will allow DHS/CBP to collect and maintain records regarding or related to seizures and violators.

In this notice of proposed rulemaking, DHS now is proposing to exempt DHS/CBP—013 Seized Assets and Case Tracking System (SEACATS), in part, from certain provisions of the Privacy Act.

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates personally identifiable information. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. Individuals may request their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description of the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency recordkeeping practices transparent, to notify individuals regarding the uses to which personally identifiable information is put, and to assist individuals in finding such files within the agency.

The Privacy Act allows Government agencies to exempt certain records from the access and amendment provisions. If an agency claims an exemption, however, it must issue a Notice of Proposed Rulemaking to make clear to the public the reasons why a particular exemption is claimed.

DHS is claiming exemptions from certain requirements of the Privacy Act for the DHS/CBP—013 SEACATS. Some information in DHS/CBP—013 SEACATS relates to official DHS national security, law enforcement, customs, immigration and intelligence activities. These exemptions are needed to protect information relating to DHS activities from disclosure to subjects or others related to these activities. Specifically, the exemptions are required to preclude subjects of these activities from frustrating these processes; to avoid disclosure of activity techniques; to protect the identities and physical safety of confidential informants and law enforcement personnel; to ensure DHS's ability to obtain information from third parties and other sources; and to protect the privacy of third parties. Disclosure of information to the subject of the inquiry could also permit the subject to avoid detection or apprehension.

The exemptions proposed here are standard law enforcement and national security exemptions exercised by a large number of Federal law enforcement and intelligence agencies. In appropriate circumstances, where compliance would not appear to interfere with or adversely affect the law enforcement purposes of this system and the overall law enforcement process, the applicable exemptions may be waived on a case-by-case basis.

A notice of system of records for Seized Assets and Case Tracking System (SEACATS) is also published in this issue of the **Federal Register**.

**List of Subjects in 6 CFR Part 5**

Freedom of information; Privacy.

For the reasons stated in the preamble, DHS proposes to amend Chapter I of Title 6, Code of Federal Regulations, as follows:

## PART 5—DISCLOSURE OF RECORDS AND INFORMATION

1. The authority citation for Part 5 continues to read as follows:

**Authority:** Public Law 107–296, 116 Stat. 2135, 6 U.S.C. 101 *et seq.*; 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

2. Add at the end of Appendix C to Part 5, Exemption of Record Systems under the Privacy Act, the following new paragraph ''14'':

**Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act**

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14. The Department of Homeland Security/United States Customs and Border Protection—013 Seized Assets and Case Tracking System (SEACATS) system of records consists of electronic and paper records and will be used by DHS and its components. DHS/CBP—013 Seized Assets and Case Tracking System (SEACATS) is a repository of information held by DHS in connection with its several and varied missions and functions, including, but not limited to: The enforcement of civil and criminal laws; investigations, inquiries, and proceedings thereunder; and national security and intelligence activities. Seized Assets and Case Tracking System (SEACATS) contains information that is collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable information collected by other Federal, State, local, tribal, foreign, or international government agencies. Pursuant to exemption 5 U.S.C. 552a(j)(2) of the Privacy Act, portions of this system are exempt from 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5) and (e)(8); (f), and (g). Pursuant to 5 U.S.C. 552a(k)(2) of the Privacy Act, this system is exempt from the following provisions of the Privacy Act, subject to the limitations set forth in those subsections: 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (I), and (f). Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) and (4) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of the investigation, and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

(b) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation, to the existence of the investigation, and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an impossible administrative burden by requiring investigations to be continuously reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to national security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of Federal law, the accuracy of information obtained or introduced occasionally may be unclear or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(d) From subsection (e)(2) (Collection of Information from Individuals) because requiring that information be collected from the subject of an investigation would alert the subject to the nature or existence of an investigation, thereby interfering with the related investigation and law enforcement activities.

(e) From subsection (e)(3) (Notice to Subjects) because providing such detailed information would impede law enforcement in that it could compromise investigations by: Revealing the existence of an otherwise confidential investigation and thereby provide an opportunity for the subject of an investigation to conceal evidence, alter patterns of behavior, or take other actions that could thwart investigative efforts; reveal the identity of witnesses in investigations, thereby providing an opportunity for the subjects of the investigations or others to harass, intimidate, or otherwise interfere with the collection of evidence or other information from such witnesses; or reveal the identity of confidential informants, which would negatively affect the informant's usefulness in any ongoing or future investigations and discourage members of the public from cooperating as confidential informants in any future investigations.

(f) From subsections (e)(4)(G), (H), and (I) (Agency Requirements), and (f) (Agency Rules) because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

(g) From subsection (e)(5) (Collection of Information) because in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. Compliance with (e)(5) would preclude DHS agents from using their investigative training and exercise of good judgment to both conduct and report on investigations.

(h) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with DHS' ability to obtain, serve, and issue subpoenas, warrants, and other law enforcement mechanisms that may be filed under seal, and could result in disclosure of investigative techniques, procedures, and evidence.

(i) From subsection (g) to the extent that the system is exempt from other specific subsections of the Privacy Act relating to individuals' rights to access and amend their records contained in the system. Therefore DHS is not required to establish rules or procedures pursuant to which individuals may seek a civil remedy for the agency's: Refusal to amend a record; refusal to comply with a request for access to records; failure to maintain accurate, relevant timely and complete records; or failure to otherwise comply with an individual's right to access or amend records.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29876 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

### 6 CFR Part 5

**[Docket No DHS–2008–0195]**

## Privacy Act of 1974: Implementation of Exemptions; U.S. Customs and Border Protection—015 Automated Commercial System

**AGENCY:** Privacy Office, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Homeland Security is amending its regulations to exempt portions of a system of records from certain provisions of the Privacy Act. Specifically, the Department proposes to exempt portions of the CBP Automated Commercial System (ACS) from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

**DATES:** The public is invited to submit comments by January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0195 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: Laurence E. Castelli (202–325–0280), Chief, Privacy Act Policy and Procedures Branch, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 1300 Pennsylvania Ave., NW., Washington, DC 20229. For privacy issues please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

### Background

The Department of Homeland Security (DHS), elsewhere in this edition of the **Federal Register**, published a Privacy Act system of records notice describing records in the Automated Commercial System (ACS).

To help prevent terrorist weapons from being transported to the United States, vessel carriers bringing cargo to the United States are required to transmit certain information to Customs and Border Protection (CBP) about the cargo they are transporting prior to lading that cargo at foreign ports of entry. CBP is issuing an interim final rule that requires both importers and carriers to submit additional information pertaining to cargo to CBP before the cargo is brought into the United States by vessel. This information must be submitted to CBP by way of a CBP-approved electronic data interchange system. The required information is necessary to improve CBP's ability to identify high-risk shipments so as to prevent smuggling and ensure cargo safety and security, as required by section 203 of the Security and Accountability for Every (SAFE) Port Act of 2006 and section 343(a) of the Trade Act of 2002, as amended by the Maritime Transportation Security Act of 2002.

The proposed rule was known to the trade as both the ''Importer Security Filing proposal'' and the ''10 + 2 proposal.'' The name ''10 + 2'' is shorthand for the number of advance data elements CBP was proposing to collect. Carriers would be generally required to submit two additional data elements—a vessel stow plan and container status messages regarding certain events relating to containers loaded on vessels destined to the United States—to the elements they are already required to electronically transmit in advance (the ''2'' of ''10 + 2''); and importers, as defined in the proposed regulations, would be required to submit ten data elements—an Importer Security Filing containing ten data elements (the ''10'' of ''10 + 2'').

The Automated Commercial System (ACS) is the comprehensive system used

by U.S. Customs and Border Protection to track, control, and process all commercial goods imported into the United States. ACS is a sophisticated and integrated large-scale business-oriented system which employs multiple modules to perform discrete aspects of its functionality: including receiving data transmissions from a variety of parties involved in international commercial transactions, and providing CBP with the capability to track both the transport transactions and the financial transactions associated with the movement of merchandise through international commerce. Through the use of Electronic Data Interchange (EDI), ACS facilitates merchandise processing, significantly cuts costs, and reduces paperwork requirements for both Customs and the importing community.

ACS has two principal methods for electronic data interchange, the Automated Broker Interface (ABI) and the Automated Manifest System (AMS). Under the ''10 + 2'' program, importers who submit the Importer Security Filing (ISF), will use either ABI or Vessel AMS to provide their information to CBP. ACS, upon receipt of the ISF, will transfer the data to the Automated Targeting System (ATS) for screening and targeting purposes. Once screened the ISF data will be returned with embedded targeting links to ACS to be maintained in accordance with the ACS stated retention policy.

No exemption shall be asserted with respect to information maintained in the system as it relates to data submitted by or on behalf of a person who travels to visit the United States, nor shall an exemption be asserted with respect to the resulting determination (authorized to travel, not authorized to travel, pending).

This system may contain records or information pertaining to the accounting of disclosures made from ACS to other law enforcement agencies (Federal, State, local, foreign, international, or tribal) in accordance with the published routine uses. For the accounting of these disclosures only, in accordance with 5 U.S.C. 552a(j)(2) and (k)(2), DHS will claim the original exemptions for these records or information from subsection (c)(3), (e)(8), and (g) of the Privacy Act of 1974, as amended, as necessary and appropriate to protect such information. Moreover, DHS will add this exemption to Appendix C to 6 CFR part 5, DHS Systems of Records Exempt from the Privacy Act. Such exempt records or information may be law enforcement or national security investigation records, law enforcement activity and encounter records, or terrorist screening records.

DHS needs these exemptions in order to protect information relating to law enforcement investigations from disclosure to subjects of investigations and others who could interfere with investigatory and law enforcement activities. Specifically, the exemptions are required to: Preclude subjects of investigations from frustrating the investigative process; avoid disclosure of investigative techniques; protect the identities and physical safety of confidential informants and of law enforcement personnel; ensure DHS's and other federal agencies' ability to obtain information from third parties and other sources; protect the privacy of third parties; and safeguard sensitive information.

Nonetheless, DHS will examine each request on a case-by-case basis, and, after conferring with the appropriate component or agency, may waive applicable exemptions in appropriate circumstances and where it would not appear to interfere with or adversely affect the law enforcement or national security investigation.

Again, DHS will not assert any exemption with respect to information maintained in the system that is collected from a person and submitted by that person's air or vessel carrier, if that person, or his or her agent, seeks access or amendment of such information.

**List of Subjects in 6 CFR Part 5**

Freedom of information, Privacy.

For the reasons stated in the preamble, DHS proposes to amend Chapter I of Title 6, Code of Federal Regulations, as follows:

## PART 5—DISCLOSURE OF RECORDS AND INFORMATION

1. The authority citation for Part 5 continues to read as follows:

**Authority:** Public Law 107–296, 116 Stat. 2135, 6 U.S.C. 101 *et seq.*; 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552.

2. At the end of Appendix C to Part 5, add the following new paragraph ''14'':

**Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act**

* * * * *

14. DHS/CBP–015, Automated Commercial System (ACS). A portion of the following system of records is exempt from 5 U.S.C. 552a(c)(3), (e)(8), and (g) pursuant to 5 U.S.C. 552a(j)(2) and (k)(2). Further, no exemption shall be asserted with respect to information maintained in the system as it relates to data submitted by or on behalf of a person who travels to visit the United States and crosses the border, nor shall an exemption be asserted with respect to the resulting determination (approval or denial). After conferring with the appropriate component or agency, DHS may waive applicable exemptions in appropriate circumstances and where it would not appear to interfere with or adversely affect the law enforcement purposes of the systems from which the information is recompiled or in which it is contained. Exemptions from the above particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, when information in this system of records may impede a law enforcement or national security investigation:

(a) From subsection (c)(3) (Accounting for Disclosure) because making available to a record subject the accounting of disclosures from records concerning him or her would specifically reveal any investigative interest in the individual. Revealing this information could reasonably be expected to compromise ongoing efforts to investigate a violation of U.S. law, including investigations of a known or suspected terrorist, by notifying the record subject that he or she is under investigation. This information could also permit the record subject to take measures to impede the investigation, e.g., destroy evidence, intimidate potential witnesses, or flee the area to avoid or impede the investigation.

(b) From subsection (e)(8) (Notice on Individuals) because to require individual notice of disclosure of information due to compulsory legal process would pose an impossible administrative burden on DHS and other agencies and could alert the subjects of counterterrorism or law enforcement investigations to the fact of those investigations when not previously known.

(c) From subsection (g) (Civil Remedies) to the extent that the system is exempt from other specific subsections of the Privacy Act.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29839 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

### 6 CFR Part 5

**[Docket No. DHS–2008–0171]**

### Privacy Act of 1974: Implementation of Exemptions; DHS/CBP–009 Nonimmigrant Inspection System

**AGENCY:** Privacy Office, Department of Homeland Security.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Homeland Security is amending its regulations to exempt portions of a system of records from certain provisions of the Privacy Act. Specifically, the Department

proposes to exempt portions of the Nonimmigrant Inspection System from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

**DATES:** Written comments must be submitted on or before January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0171 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: Laurence E. Castelli (202–325–0280), Chief, Privacy Act Policy and Procedures Branch, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, Mint Annex, 1300 Pennsylvania Ave., NW., Washington, DC 20229. For privacy issues please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

*Background:* The Department of Homeland Security (DHS), elsewhere in this edition of the **Federal Register**, published a Privacy Act system of records notice describing records in the Nonimmigrant Inspection System (NIIS). Pursuant to 6 U.S.C. 552(a)(1) DHS and Customs and Border Protection (CBP) have maintained the Nonimmigrant Information System (NIIS) in conformance with the terms of the previous NIIS SORN, 68 FR 5048.

As part of its efforts to streamline and consolidate its record systems, DHS is updating and reissuing a DHS/CBP system of records under the Privacy Act (5 U.S.C. 552a) to reflect CBP's current and future practices regarding the processing of foreign nationals entering the U.S. CBP inspects all persons applying for admission to the U.S. As part of this inspection process, CBP establishes the identity, nationality, and admissibility of persons crossing the border and may create a border crossing record, which would be covered by DHS/CBP–007 Border Crossing Information System of Records Notice (73 FR 43457 published on July 25, 2008), or additional CBP records, which would be covered by the TECS System of Records Notice (re-published concurrently with this notice) during this process. Similarly, CBP has authority to keep records of departures from the U.S.

In addition to information collected from the alien during the inspection process, CBP primarily uses two immigration forms to collect information from nonimmigrant aliens as they arrive in the U.S.: The I–94, Arrival/Departure Record and, for aliens applying for admission under the visa waiver program, the I–94W Nonimmigrant Visa Waiver Arrival/Departure Form. Separately, Canadian nationals, who travel to the U.S. as tourists or for business, and Mexican nationals, who possess a nonresident alien Mexican Border Crossing Card, are not required to complete an I–94 upon arrival, but their information will be maintained in this system. Additionally, DHS/CBP has been implementing an Electronic System for Travel Authorization (ESTA) to permit nationals of VWP countries to submit their biographic and admissibility information online in advance of their travel to the U.S. Applicants under this program will have access to their accounts so that they may check the status of their ESTA and make limited amendments. ESTA is covered by privacy documentation including a SORN published on June 10, 2008, 73 FR 32720.

No exemption shall be asserted with respect to information maintained in the system that is collected from a person's travel documents or submitted by a government computer system in support of a proffered travel document, if that person, or his or her agent, seeks access or amendment of such information.

This system, however, may contain records or information pertaining to the accounting of disclosures made from NIIS to other law enforcement agencies (Federal, State, Local, Foreign, International or Tribal) in accordance with the published routine uses and 5 U.S.C. 552a (b)(7). For the accounting of these disclosures only, in accordance with 5 U.S.C. 552a (j)(2), and (k)(2), DHS will claim the original exemptions for these records or information from subsection (c)(3), (e)(8), and (g) of the Privacy Act of 1974, as amended, as necessary and appropriate to protect such information.

DHS needs these exemptions in order to protect information relating to law enforcement investigations from disclosure to subjects of investigations and others who could interfere with investigatory and law enforcement activities. Specifically, the exemptions are required to: Preclude subjects of investigations from frustrating the investigative process; avoid disclosure of investigative techniques; protect the identities and physical safety of confidential informants and of law enforcement personnel; ensure DHS's and other federal agencies' ability to obtain information from third parties and other sources; protect the privacy of third parties; and safeguard sensitive information.

Nonetheless, DHS will examine each request on a case-by-case basis, and, after conferring with the appropriate component or agency, may waive applicable exemptions in appropriate circumstances and where it would not appear to interfere with or adversely affect the law enforcement purposes of the systems from which the information is recompiled or in which it is contained.

Again, DHS will not assert any exemption with respect to information maintained in the system that is collected from a person and submitted by that person's air or vessel carrier, if that person, or his or her agent, seeks access or amendment of such information.

**List of Subjects in 6 CFR Part 5**

Privacy, Freedom of information.

For the reasons stated in the preamble, DHS proposes to amend Chapter I of Title 6, Code of Federal Regulations, as follows:

## PART 5—DISCLOSURE OF RECORDS AND INFORMATION

1. The authority citation for Part 5 continues to read as follows:

**Authority:** Public Law 107–296, 116 Stat. 2135, 6 U.S.C. 101 *et seq.*; 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552.

2. At the end of Appendix C to Part 5, add the following new paragraph ''14'':

**Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act**

* * * * *

14. DHS/CBP–009, Nonimmigrant Inspection System (NIIS). This system may contain records or information pertaining to the accounting of disclosures made from NIIS to other law enforcement and counterterrorism agencies (Federal, State, Local, Foreign, International or Tribal) in accordance with the published routine uses. For the accounting of these disclosures only, in accordance with 5 U.S.C. 552a (j)(2), and (k)(2), DHS will claim the original exemptions for these records or information from subsection (c)(3), (e)(8), and (g) of the Privacy Act of 1974, as amended, as necessary and appropriate to protect such information. Further, no exemption shall be asserted with respect to biographical or travel information submitted by, and collected from, a person's travel documents or

submitted from a government computer system to support or to validate those travel documents. After conferring with the appropriate component or agency, DHS may waive applicable exemptions in appropriate circumstances and where it would not appear to interfere with or adversely affect the law enforcement purposes of the systems from which the information is recompiled or in which it is contained. Exemptions from the above particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, when information in this system of records is recompiled or is created from information contained in other systems of records subject to exemptions for the following reasons:

(a) From subsection (c)(3) (Accounting for Disclosure) because making available to a record subject the accounting of disclosures from records concerning him or her would specifically reveal any investigative interest in the individual. Revealing this information could reasonably be expected to compromise ongoing efforts to investigate a violation of U.S. law, including investigations of a known or suspected terrorist, by notifying the record subject that he or she is under investigation. This information could also permit the record subject to take measures to impede the investigation, e.g., destroy evidence, intimidate potential witnesses, or flee the area to avoid or impede the investigation.

(b) From subsection (e)(8) (Notice on Individuals) because to require individual notice of disclosure of information due to compulsory legal process would pose an impossible administrative burden on DHS and other agencies and could alert the subjects of counterterrorism or law enforcement investigations to the fact of those investigations when not previously known.

(c) From subsection (g) (Civil Remedies) to the extent that the system is exempt from other specific subsections of the Privacy Act.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29843 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of Security

### 6 CFR Part 5

**[Docket No. DHS–2008–0177]**

## Privacy Act of 1974: Implementation of Exemptions; DHS/USSS—004 Protection Information System

**AGENCY:** Department of Homeland Security.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Homeland Security (DHS) is giving concurrent notice of a revised and updated system of records pursuant to the Privacy Act of 1974 for the United States Secret Service Protection Information System system of records and this proposed rulemaking. In this proposed rulemaking, the Department proposes to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

**DATES:** Comments must be received on or before January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0177, by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Department of Homeland Security, Washington, DC 20528.

*Instructions:* All submissions received must include the agency name and docket number for this notice. All comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.

*Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** For general questions and privacy issues, please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

*Background:* Pursuant to the savings clause in the Homeland Security Act of 2002, the Department of Homeland Security (DHS) and United States Secret Service (USSS) have relied on preexisting Privacy Act systems of records notices for the collection and maintenance of records that concern DHS/USSS protection records.

As part of its efforts to streamline and consolidate its Privacy Act record systems, DHS/USSS is updating and reissuing a DHS/USSS system of records under the Privacy Act (5 U.S.C. 552a) for DHS/USSS Protection Information System records. This will ensure that all organizational parts of USSS follow the same privacy rules for collecting and handling records regarding the protections of USSS protectees.

In this notice of proposed rulemaking, DHS is now proposing to exempt Protection Information System, in part, from certain provisions of the Privacy Act.

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates personally identifiable information. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. Individuals may request their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description of the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency recordkeeping practices transparent, to notify individuals regarding the uses to which personally identifiable information is put, and to assist individuals in finding such files within the agency.

The Privacy Act allows Government agencies to exempt certain records from the access and amendment provisions. If an agency claims an exemption, however, it must issue a Notice of Proposed Rulemaking to make clear to the public the reasons why a particular exemption is claimed.

DHS is claiming exemptions from certain requirements of the Privacy Act for Protection Information System. Some information in Protection Information System relates to official DHS national security, law enforcement, immigration, intelligence activities, and protective services to the President of the United States or other individuals pursuant to Section 3056 and 3056A of Title 18. These exemptions are needed to protect information relating to DHS activities from disclosure to subjects or others related to these activities. Specifically, the exemptions are required to preclude subjects of these activities from frustrating these processes; to avoid disclosure of activity techniques; to protect the identities and physical safety of confidential informants and law enforcement personnel; to ensure DHS's ability to obtain information from third parties and other sources; to protect the privacy of third parties; to safeguard classified information; and to safeguard records in connection with providing protective services to the President of the United States or other individuals pursuant to

Section 3056 of Title 18. Disclosure of information to the subject of the inquiry could also permit the subject to avoid detection or apprehension.

The exemptions proposed here are standard law enforcement and national security exemptions exercised by a large number of Federal law enforcement and intelligence agencies. In appropriate circumstances, where compliance would not appear to interfere with or adversely affect the law enforcement purposes of this system and the overall law enforcement process, the applicable exemptions may be waived on a case-by-case basis.

A notice of system of records for Protection Information System is also published in this issue of the **Federal Register**.

**List of Subjects in 6 CFR Part 5**

Freedom of information; Privacy.

For the reasons stated in the preamble, DHS proposes to amend Chapter I of Title 6, Code of Federal Regulations, as follows:

## PART 5—DISCLOSURE OF RECORDS AND INFORMATION

1. The authority citation for Part 5 continues to read as follows:

**Authority:** Public Law 107–296, 116 Stat. 2135, 6 U.S.C. 101 *et seq.*; 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

2. Add at the end of Appendix C to Part 5, Exemption of Record Systems under the Privacy Act, the following new paragraph ''14'':

**Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act**

* * * * *

14. The Department of Homeland Security/United States Secret Service-004 Protection Information System system of records consists of electronic and paper records and will be used by DHS and its components. Protection Information System is a repository of information held by DHS in connection with its several and varied missions and functions, including, but not limited to: the enforcement of civil and criminal laws; investigations, inquiries, and proceedings there under; national security and intelligence activities; protection of the President of the United States or other individuals pursuant to Section 3056 Title 18. Protection Information System contains information that is collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable information collected by other Federal, State, local, tribal, foreign, or international government agencies. Pursuant to exemption 5 U.S.C. 552a(j)(2) of the Privacy Act, portions of this system are exempt from 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5) and (e)(8); (f), and (g). Pursuant to 5 U.S.C. 552a(k)(1), (k)(2), and (k)(3) of the Privacy Act, this system is exempt from the following provisions of the Privacy Act, subject to the limitations set forth in those subsections: 5 U.S.C. 552a (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (I), and (f). Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) and (4) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of the investigation, and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

(b) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation, to the existence of the investigation, and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an impossible administrative burden by requiring investigations to be continuously reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of Federal law, the accuracy of information obtained or introduced occasionally may be unclear or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(d) From subsection (e)(2) (Collection of Information from Individuals) because requiring that information be collected from the subject of an investigation would alert the subject to the nature or existence of an investigation, thereby interfering with the related investigation and law enforcement activities.

(e) From subsection (e)(3) (Notice to Subjects) because providing such detailed information would impede law enforcement in that it could compromise investigations by: revealing the existence of an otherwise confidential investigation and thereby provide an opportunity for the subject of an investigation to conceal evidence, alter patterns of behavior, or take other actions that could thwart investigative efforts; reveal the identity of witnesses in investigations, thereby providing an opportunity for the subjects of the investigations or others to harass, intimidate, or otherwise interfere with the collection of evidence or other information from such witnesses; or reveal the identity of confidential informants, which would negatively affect the informant's usefulness in any ongoing or future investigations and discourage members of the public from cooperating as confidential informants in any future investigations.

(f) From subsections (e)(4)(G), (H), and (I) (Agency Requirements), and (f) (Agency Rules) because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

(g) From subsection (e)(5) (Collection of Information) because in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. Compliance with (e)(5) would preclude DHS agents from using their investigative training and exercise of good judgment to both conduct and report on investigations.

(h) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with DHS' ability to obtain, serve, and issue subpoenas, warrants, and other law enforcement mechanisms that may be filed under seal, and could result in disclosure of investigative techniques, procedures, and evidence.

(i) From subsection (g) to the extent that the system is exempt from other specific subsections of the Privacy Act relating to individuals' rights to access and amend their records contained in the system. Therefore DHS is not required to establish rules or procedures pursuant to which individuals may seek a civil remedy for the agency's: refusal to amend a record; refusal to comply with a request for access to records; failure to maintain accurate, relevant timely and complete records; or failure to otherwise comply with an individual's right to access or amend records.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29841 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of Security

### 6 CFR Part 5

**[Docket No. DHS–2008–0116]**

## Privacy Act of 1974: Implementation of Exemptions; DHS/USCG–028 Family Advocacy Program

**AGENCY:** Privacy Office, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Homeland Security (DHS) is giving concurrent notice of a revised and updated system of records pursuant to the Privacy Act of 1974 for the Department of Homeland Security to administer the DHS/USCG–028 Family Advocacy Program system of records and this proposed rulemaking. In this proposed rulemaking, the Department proposes to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

**DATES:** Comments must be received on or before January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0116, by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Department of Homeland Security, Washington, DC 20528.

*Instructions:* All submissions received must include the agency name and docket number for this notice. All comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.

*Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: David Roberts (202–475–3521), United States Coast Guard Privacy Officer, United States Coast Guard. For privacy issues please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

*Background:* Pursuant to the savings clause in the Homeland Security Act of 2002, the Department of Homeland Security (DHS) United States Coast Guard (USCG) have relied on preexisting Privacy Act systems of records notices for the collection and maintenance of records that concern the Department of Homeland Security to administer the DHS/USCG–028 United States Coast Guard Family Advocacy Program.

As part of its efforts to streamline and consolidate its record systems, DHS is updating and reissuing a DHS/USCG system of records under the Privacy Act (5 U.S.C. 552a) that deals with USCG Family Advocacy Program. The collection and maintenance of this information will assist DHS/USCG in meeting its obligation to administer the USCG Family Advocacy Program.

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates personally identifiable information. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. Individuals may request their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description of the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency recordkeeping practices transparent, to notify individuals regarding the uses to which personally identifiable information is put, and to assist individuals in finding such files within the agency.

The Privacy Act allows Government agencies to exempt certain records from the access and amendment provisions. If an agency claims an exemption, however, it must issue a Notice of Proposed Rulemaking to make clear to the public the reasons why a particular exemption is claimed.

DHS is claiming exemptions from certain requirements of the Privacy Act for DHS/USCG–028 Family Advocacy Case Records. Some information in DHS/USCG–028 Family Advocacy Case Records relates to law enforcement. These exemptions are needed to protect information relating to DHS activities from disclosure to subjects or others related to these activities. Specifically, the exemptions are required to preclude subjects of these activities from frustrating these processes; to avoid disclosure of activity techniques; to protect the identities and physical safety of confidential informants and law enforcement personnel; to ensure DHS's ability to obtain information from third parties and other sources; and to protect the privacy of third parties. Disclosure of information to the subject of the inquiry could also permit the subject to avoid detection or apprehension.

The exemptions proposed here are standard law enforcement and national security exemptions exercised by a large number of Federal law enforcement and intelligence agencies. In appropriate circumstances, where compliance would not appear to interfere with or adversely affect the law enforcement purposes of this system and the overall law enforcement process, the applicable exemptions may be waived on a case by case basis.

A notice of system of records for DHS/USCG–028 Family Advocacy Program is also published in this issue of the **Federal Register**.

**List of Subjects in 6 CFR Part 5**

Freedom of information; Privacy.

For the reasons stated in the preamble, DHS proposes to amend Chapter I of Title 6, Code of Federal Regulations, as follows:

## PART 5—DISCLOSURE OF RECORDS AND INFORMATION

1. The authority citation for Part 5 continues to read as follows:

**Authority:** 6 U.S.C. 101 *et seq.*; Public Law 107–296, 116 Stat. 2135; 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

2. Add at the end of Appendix C to Part 5, the following new paragraph ''14'':

### Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act

* * * * *

14. The Department of Homeland Security/United States Coast Guard—028 Family Advocacy Case Records system of records consists of electronic and paper records and will be used by DHS and its components. DHS/USCG–028 Family Advocacy Case Records is a repository of information held by DHS in connection with its several and varied missions and functions, including, but not limited to: The enforcement of civil and criminal laws; investigations, inquiries, and proceedings thereunder. DHS/USCG–028 Family Advocacy Case Records contains information that is collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable information collected by other Federal, State, local, tribal, foreign, or international government agencies.

Pursuant to 5 U.S.C. 552a(k)(2) this system is exempt from the following provisions of the Privacy Act, subject to the limitations set forth in those subsections: 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f). Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of the investigation, and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

(b) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation, to the existence of the investigation, and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an impossible administrative burden by requiring investigations to be continuously reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of Federal law, the accuracy of information obtained or introduced occasionally may be unclear or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(d) From subsections (e)(4)(G), (H), and (I) (Agency Requirements), and (f) (Agency Rules) because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29842 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

### 9 CFR Part 2

**[Docket No. APHIS–2006–0159]**

### Handling of Animals; Contingency Plans

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Proposed rule; extension of comment period.

**SUMMARY:** We are extending the comment period for our proposed rule that would amend the Animal Welfare Act regulations to add requirements for contingency planning and training of personnel by research facilities and by dealers, exhibitors, intermediate handlers, and carriers. This action will allow interested persons additional time to prepare and submit comments.

**DATES:** We will consider all comments that we receive on or before February 20, 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-2006-0159* 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–2006–0159, 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–2006–0159.

*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. Jodie Kulpa-Eddy, Staff Veterinarian, Animal Care, APHIS, 4700 River Road Unit 84, Riverdale, MD 20737; (301) 734–7833.

**SUPPLEMENTARY INFORMATION:** On October 23, 2008, we published in the **Federal Register** (73 FR 63085–63090, Docket No. APHIS–2006–0159) a proposal to amend the Animal Welfare Act regulations to add requirements for contingency planning and training of personnel by research facilities and by dealers, exhibitors, intermediate handlers, and carriers.

Comments on the proposed rule were required to be received on or before December 22, 2008. We are extending the comment period on Docket No. APHIS–2006–0159 for an additional 60 days. This action will allow interested persons additional time to prepare and submit comments.

**Authority:** 7 U.S.C. 2131–2159; 7 CFR 2.22, 2.80, and 371.7.

Done in Washington, DC, this 16th day of December 2008.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. E8–30220 Filed 12–18–08; 8:45 am]

**BILLING CODE 3410–34–P**

## FEDERAL RESERVE SYSTEM

**[Docket No. R–1340]**

### 12 CFR Part 226

### Regulation Z; Truth in Lending

**AGENCY:** Board of Governors of the Federal Reserve System.

**ACTION:** Proposed rule; extension of comment period.

**SUMMARY:** On December 10, 2008, the Board published a proposal to amend Regulation Z that would conform the regulation to reflect recent amendments to the Truth in Lending Act (73 FR 74989). The Board is extending the public comment period on the proposal.

**DATES:** Comments must be received on or before February 9, 2009.

**ADDRESSES:** You may submit comments on the proposed amendments to Regulation Z, identified by Docket No. R–1340, by any of the following methods:

- *Agency Web site: http://www.federalreserve.gov.* Follow the instructions for submitting comments at

*http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*

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

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

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

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

All public comments will be made available on the Board's Web site at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room MP–500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

**FOR FURTHER INFORMATION CONTACT:** Jamie Z. Goodson or Nikita M. Pastor, Attorneys; Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, Washington, DC 20551, at (202) 452–2412 or (202) 452–3667. For users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263–4869.

**SUPPLEMENTARY INFORMATION:** On December 10, 2008, the Board published a proposal to amend Regulation Z to implement the provisions of the Mortgage Disclosure Improvement Act of 2008 (the MDIA), which amends the Truth in Lending Act. The Board's proposed rule would revise Regulation Z's requirements for the timing and content of disclosures for closed-end mortgage transactions secured by a consumer's dwelling. The notice of proposed rulemaking stated that the public comment period would close on January 23, 2009. The Board is now extending the public comment period until February 9, 2009, consistent with the requirements of the Paperwork Reduction Act, which requires a 60-day comment period.

**Jennifer J. Johnson,**

*Secretary of the Board.*

[FR Doc. E8–30084 Filed 12–18–08; 8:45 am]

**BILLING CODE 6210–01–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2007–0074; Directorate Identifier 2007–NM–151–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; McDonnell Douglas Model MD–90–30 Airplanes

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

**ACTION:** Supplemental notice of proposed rulemaking (NPRM); reopening of comment period.

**SUMMARY:** We are revising an earlier proposed airworthiness directive (AD) for certain McDonnell Douglas Model MD–90–30 airplanes. The original NPRM would have required replacement of the wire harness of the auxiliary hydraulic pump with a new wire harness, and routing the new wire harness outside of the tire burst area. The original NPRM resulted from fuel system reviews conducted by the manufacturer, as well as reports of shorted wires in the right wheel well and evidence of arcing on the power cables of the auxiliary hydraulic pump. This action revises the original NPRM by proposing to require modifying the auxiliary hydraulic power system (including doing all applicable related investigative and corrective actions). We are proposing this supplemental NPRM to prevent shorted wires or electrical arcing at the auxiliary hydraulic pump, which could result in a fire in the wheel well. We are also proposing this supplemental NPRM to reduce the potential of an ignition source adjacent to the fuel tanks, which, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane.

**DATES:** We must receive comments on this supplemental NPRM by January 13, 2009.

**ADDRESSES:** You may send comments by any of the following methods:

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

• *Fax:* 202–493–2251.

• *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

• *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact Boeing Commercial Airplanes, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024); telephone 206–544–9990; fax 206–766–5682; e-mail *DDCS@boeing.com*; Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

### Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

**FOR FURTHER INFORMATION CONTACT:** Ken Sujishi, Aerospace Engineer, Cabin Safety/Mechanical and Environmental Systems Branch, ANM–150L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; telephone (562) 627–5353; fax (562) 627–5210.

**SUPPLEMENTARY INFORMATION:**

### Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2007–0074; Directorate Identifier 2007–NM–151–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

**Discussion**

We issued a notice of proposed rulemaking (NPRM) (the ''original NPRM'') to amend 14 CFR part 39 to include an airworthiness directive (AD) that would apply to certain McDonnell Douglas Model MD–90–30 airplanes. That original NPRM was published in the **Federal Register** on October 23, 2007 (72 FR 59969). That original NPRM proposed to require replacement of the wire harness of the auxiliary hydraulic pump with a new wire harness, and routing the new wire harness outside of the tire burst area.

**Actions Since Original NPRM Was Issued**

Since we issued the original NPRM, we have reviewed Boeing Alert Service Bulletin MD90–29A021, Revision 1, dated August 29, 2008. We referred to Boeing Alert Service Bulletin MD90–29A021, dated May 15, 2007, as the appropriate source of service information for doing the replacement and routing of auxiliary hydraulic pump wire harnesses specified in the original NPRM. Revision 1 of the alert service bulletin describes different procedures for modifying the auxiliary hydraulic power system (including doing all applicable related investigative and corrective actions). Revision 1 of the alert service bulletin describes procedures for doing the following actions, depending on the group and configuration identified in the alert service bulletin:

- Installing auxiliary hydraulic pump wire harness support brackets.
- Replacing and routing auxiliary hydraulic pump wire harnesses.
- Installing clamps.
- Installing a wire harness assembly support bracket in the right wheel well if necessary.
- Doing related investigative and corrective actions. Related investigative and corrective actions include doing a general visual inspection of the wire harness protective sleeving dimensions, and changing wire harness sleeving if necessary.

We have revised paragraphs (c) and (f) of this supplemental NPRM to refer to Boeing Alert Service Bulletin MD90–29A021, Revision 1, dated August 29, 2008.

**Comments**

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

**Request To Revise Compliance Time**

Japan Airlines requests that we revise the compliance time specified in the original NPRM of ''within 18 months'' to a compliance time that is ''18 months or more.'' Japan Airlines states that parts would not be available until June 8, 2008, and that a longer compliance would support its maintenance schedule.

We do not agree to revise the compliance time. Boeing confirmed that necessary parts will be available within the proposed compliance time. In developing an appropriate compliance time for this action, we considered the urgency associated with the subject unsafe condition, the availability of required parts, and the practical aspect of accomplishing the required actions within a period of time that corresponds to the normal scheduled maintenance for most affected operators. Operators may request an alternative method of compliance in accordance with the procedures specified in paragraph (g) of the supplemental NPRM. We have not changed the supplemental NPRM in this regard.

**Revision to Costs of Compliance**

We have revised the ''Costs of Compliance'' paragraph of this supplemental NPRM to reflect the revised work hours and parts cost specified in Boeing Alert Service Bulletin MD90–29A021, Revision 1, dated August 29, 2008.

**FAA's Determination and Proposed Requirements of the Supplemental NPRM**

We are proposing this supplemental NPRM because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design. Certain changes described above expand the scope of the original NPRM. As a result, we have determined that it is necessary to reopen the comment period to provide additional opportunity for the public to comment on this supplemental NPRM.

**Costs of Compliance**

There are about 110 airplanes of the affected design in the worldwide fleet. This proposed AD would affect about 16 airplanes of U.S. registry. The proposed actions would take between 3 and 7 work hours per airplane, depending on the configuration, at an average labor rate of $80 per work hour. Required parts would cost up to $5,343 per airplane. Based on these figures, the estimated cost of the proposed AD for U.S. operators is up to $94,448, or $5,903 per airplane.

**Authority for This Rulemaking**

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

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

**Regulatory Findings**

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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

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

**List of Subjects in 14 CFR Part 39**

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

**The Proposed Amendment**

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

**§ 39.13 [Amended]**

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

**McDonnell Douglas:** Docket No. FAA–2007–0074; Directorate Identifier 2007–NM–151–AD.

**Comments Due Date**

(a) We must receive comments by January 13, 2009.

**Affected ADs**

(b) None.

**Applicability**

(c) This AD applies to McDonnell Douglas Model MD–90–30 airplanes, certificated in any category; as identified in Boeing Alert Service Bulletin MD90–29A021, Revision 1, dated August 29, 2008.

**Unsafe Condition**

(d) This AD results from fuel system reviews conducted by the manufacturer, as well as reports of shorted wires in the right wheel well and evidence of arcing on the power cables of the auxiliary hydraulic pump. We are issuing this AD to prevent shorted wires or electrical arcing at the auxiliary hydraulic pump, which could result in a fire in the wheel well. We are also issuing this AD to reduce the potential of an ignition source adjacent to the fuel tanks, which, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane.

**Compliance**

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

**Modification**

(f) Within 18 months after the effective date of this AD, modify the auxiliary hydraulic power system and do all applicable related investigative and corrective actions by accomplishing all applicable actions specified in the Accomplishment Instructions of Boeing Alert Service Bulletin MD90–29A021, Revision 1, dated August 29, 2008. Do all applicable related investigative and corrective actions before further flight.

**Alternative Methods of Compliance (AMOCs)**

(g)(1) The Manager, Los Angeles Aircraft Certification Office, FAA, ATTN: Ken Sujishi, Aerospace Engineer, Cabin Safety/Mechanical and Environmental Systems Branch, ANM–150L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; telephone (562) 627–5353; fax (562) 627–5210; has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

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

Issued in Renton, Washington, on December 12, 2008.

**Michael J. Kaszycki,**

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

[FR Doc. E8–30258 Filed 12–18–08; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 15 CFR Part 922

**[Docket No. 0810241396–81397–01]**

**RIN 0648–AX34**

## Changes to the Florida Keys National Marine Sanctuary Regulations; Technical Corrections and Minor Substantive Changes

**AGENCY:** Office of National Marine Sanctuaries (ONMS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

**ACTION:** Proposed rule; request for public comments.

**SUMMARY:** NOAA proposes to amend the regulations implementing the Florida Keys National Marine Sanctuary to make technical corrections and modifications to clarify intent to several areas in the regulations. As part of these modifications, NOAA proposes to amend the definition of coral to specifically include the common sea fan, Gorgonia ventalina and Venus sea fan, Gorgonia flabellum, which are both important sanctuary resources and are currently managed under the category ''live rock;'' specify that ''touching'' coral is an injury and therefore, a prohibited activity in the FKNMS; amend the safe distance between vessels and ''divers down'' flags to be 100 yards instead of 100 feet; clarify that the prohibitions listed for Sanctuary Preservation Areas and Ecological Reserves also apply in Research-only Areas; and Correct several citations that are currently out of date.

**DATES:** Comments on this proposed rule may be made until January 20, 2009.

**ADDRESSES:** Comments may be submitted by any of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Submit electronic comments via the Federal e-Rulemaking Portal.
- *Mail:* David A. Score, Superintendent, Florida Keys National Marine Sanctuary, 33 East Quay Road, Key West, FL 33040.
- *Instructions:* All comments received are a part of the public record and will be generally posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information. NOAA will accept anonymous comments (enter N/A in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, Wordperfect, or Adobe PDF file formats only.

**FOR FURTHER INFORMATION CONTACT:** David A. Score, Superintendent, Florida Keys National Marine Sanctuary, 33 East Quay Road, Key West, FL 33040.

**SUPPLEMENTARY INFORMATION:**

**Electronic Access**

This **Federal Register** document is also accessible via the Internet at *http://www.access.gpo.gov/su-docs/aces/aces_1_40.html.*

**I. Background**

In recognition of its important ecological role as a rich and unique marine environment with seagrass meadows, mangrove islands, and extensive living coral reefs, Congress designated the Florida Keys National Marine Sanctuary (FKINMS or Sanctuary) in 1990 (Pub. L. 101–605). Through this designation, Congress directed NOAA and the State of Florida to jointly develop a comprehensive program to reduce the risk of damage to these living marine resources, reduce the pollution in the waters of the Florida Keys, and to protect and restore the water quality, coral reefs, and other living marine resources of the Florida Keys. As such, NOAA and the State of Florida worked together to create the management plan for the FKNMS. The FKNMS regulations implementing the designation were published on June 12, 1997 (62 FR 32154) and became effective on July 1, 1997.

In the 18 years since designation, several regulatory issues have arisen that were not clearly addressed when the FKNMS regulations were adopted. In addition, there have been several changes to the Florida state laws during the same period and several technical errors identified in the current FKNMS regulations. NOAA is thus proposing to update the FKNMS regulations to make technical corrections, minor substantive clarifications, and codification of existing regulatory interpretation to address these issues and provide consistency with state law.

## II. Summary of the Proposed Revisions

*A. Changes to Section 922.162 and Section 922.163, Modification of Existing Regulations on Corals and Prohibited Activities*

1. Definition of Coral (§ 922.162(a))

The FKNMS regulations to protect corals and live rock include a list of activities that are prohibited, and include a definition of ''coral'' and ''live rock'' to which these protections extend. NOAA is concerned that the common sea fan, Gorgonia ventalina, and Venus sea fan, Gorgoniaflabellum, are not currently listed as coral species in the definition of coral. Although these species of Gorgonia are actually coral, to date, they have been managed under the category of live rock because live rock, defined as any living marine organism or an assemblage thereof attached to a hard substrate, including dead coral or rock, is not limited to identified species. NOAA proposes to make a provision to explicitly include Gorgonia ventalina and Gorgoniafiabellum in the list of protected corals in the FKNIMS regulations and to make the list of corals non-exclusive in case additional coral species are identified in the future.

In addition, the subclass for black corals was incorrectly listed in the original regulations as Hexacorallia. The correct subclass designation is Ceriantipatharia. The definition of coral would be corrected to identify black corals as part of the subclass Ceriantipatharia.

2. Touching Coral (§ 922.163(a)(2))

The act of touching coral or live rock is an injury to the resource and has been historically interpreted as such by the FKNMS staff, charter dive and snorkeling operations, and enforcement personnel. When corals are touched or handled, the organisms are injured, and could suffer mortality. However, touching is not specifically listed in the injury prohibition in the FKNMS regulations. NOAA proposes to clarify and codify the interpretation of injury to coral and live rock by adding ''touching'' to the list of prohibited activities in the FKNMS. NOAA believes that by clarifying that touching coral and live rock causes injury aids in sanctuary education and outreach efforts to inform the public that this activity is harmful to the coral, and will help public compliance with the prohibition.

*B. Other Proposed Modifications and Technical Corrections to Section 922.163*

1. Permit Live Rock Aquaculture (§ 922.163(a)(2)(i))

Section 922.1 63(a)(2)(i) currently cites 50 CFR part 638 for authority to permit certain types of live rock aquaculture under the Magnuson-Stevens Act (MSA). However, that part of the CFR no longer exists. The authority to permit certain types of live rock aquaculture under the MSA is now located at 50 CFR part 622. Therefore, we propose to make a correction to our regulatory citations to reflect this change.

2. Dive Areas (§ 922.163(a)(5)(iii)(C))

NOAA regulations regarding dive area restrictions are inconsistent with regulations that both the State of Florida (Chapter 27 of the 2003 Florida Statutes: 327.331 Divers; definitions; divers-down flag required; obstruction to navigation of certain waters; penalty) and the U.S. Coast Guard (USCG: Rule 27e—Vessel Engaged in Diving Operations) use to specify the safe distance between vessels and ''divers down'' flags. The State of Florida and the USCG regulations both indicate that the safe distance between vessels and ''divers down'' flags is 100 yards. In contrast, the FKNMS regulations currently indicate that the safe distance between vessels and ''divers down'' flags is 100 feet. In order to be consistent with the regulations issued by the State of Florida and the USCG, we propose to change our regulations from ''100 feet'' in 922.163(a)(5)(iii)(C) to ''100 yards.'' Improved consistency allows for better public education and compliance. The change to regulations improves safety and reduces conflict between divers and vessel operations.

3. Marine Life Rule (§ 922.163(a)(12))

NOAA proposes a few technical corrections related to Florida's Marine Life Rule (MLR). NOAA proposes to edit the language at § 922.163(a)(12) to update Florida Marine Life Rule citation as 68B–42, F.A.C. NOAA also proposes to delete Appendix VIII to Subpart P of Part 922 to eliminate the excerpts of the MLR from the FKNMS regulations and simply reference the MLR citation in the regulation.

4. Updating CFR References (§ 922.163)

Sections 922.163(c) and 922.168 are no longer applicable because persons conducting any pre-existing otherwise prohibited activities pursuant to a valid authorization in the Sanctuary area were given 90 days from the designation of the Sanctuary (July 1, 1997) to notify the Director and request certification of the activity. Therefore, these provisions are no longer needed because the certification period expired over ten years ago. Therefore, NOAA proposes to delete these sections from the FKNMS regulations, and to renumber the remaining sections accordingly. Because section 922.168 is referenced in other sections of the FKNMS regulations, we also propose to delete the references to that section. Finally, NOAA proposes to amend the language to the newly redesignated section 922.163(c) to reflect the appropriate citation for authorization of current activities which is § 922.49.

*C. Special-Use (Research-Only) Areas (§ 922.1 64(e)(1))*

Research-only areas are a type of Special-use Area defined in the FKNMS regulations at § 922.1 64(e)(1)(iii). Except for passage without interruption or for law enforcement purposes, access to research-only areas is restricted to scientific research or educational use specifically authorized by and conducted in accordance with the scope, purpose, terms and conditions of a sanctuary permit. In addition, even if access is allowed by permit, only the activities described in the permit may be conducted because all other activities within the research-only area are prohibited. However, the prohibition against conducting activities in research-only areas is not stated clearly in the FKNMS regulations and, therefore, NOAA proposes to amend § 922.164(d) and add a new paragraph (e)(5) to the section to specify that the prohibited activities listed for Sanctuary Preservation Areas (SPAs) and Ecological Reserves (ERs) as listed at § 922.164(d) also apply in Research-only Areas. This change would provide better notice to the public and to permittees who receive access to conduct activities in Research-only Areas, and would facilitate voluntary compliance as well as enforcement of sanctuary regulations.

## III. Classification

*A. National Environmental Policy Act*

The technical corrections and minor substantive changes to the FKNMS regulations do not have significant environmental impacts and are categorically excluded for the need to prepare an environmental assessment pursuant to the National Environmental Policy Act (NAO 2 16–6 Section 6.03c.3(i)).

*B. Executive Order 12866: Regulatory Impact*

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

*C. Executive Order 13132: Federalism Assessment*

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

*D. Paperwork Reduction Act*

This rule does not contain any new or revisions to the existing information collection requirement that was approved by 0MB (0MB Control Number 0648–0141) under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

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 PRA, unless that collection of information displays a currently valid 0MB Control Number.

*E. Regulatory Flexibility Act*

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

The factual basis for this certification is as follows:

- Making the technical corrections to correct citations and obsolete sections of the regulations as proposed by this rule would not substantively change the effect or impact from the current regulations;
- Amending the definition of coral to specifically include the common sea fan and Venus sea fan also do not impact small entities because these species are already currently managed as sanctuary resources under the category ''live rock;''
- Clarifying and codifying that ''touching'' coral is an injury and therefore, a prohibited activity in the FKNMS does not change the practices of small business operators, such as dive or snorkel charter boats, because they already interpret the regulation as such and currently inform tourists that touching coral or live rock while diving or snorkeling injures the organisms;
- Amending the safe distance between vessels and ''divers down'' flags to be 100 yards instead of 100 feet provides consistency with regulations already in place by the U.S. Coast Guard and the State of Florida and will therefore not change the current operations of small business operators; and
- Specifying that the prohibitions listed for Sanctuary Preservation Areas and Ecological Reserves also apply in Research-only Areas also does not affect small businesses because entering Research-only Areas is already prohibited unless a permit is obtained from the Sanctuary. The amendment is intended to clarify and promote enforcement of specific activity violations.

## IV. Request for Comments

NOAA requests comments on this proposed rule to make technical corrections and amendments to the FKNMS regulations.

Dated: December 11, 2008.

**John H. Dunnigan,**

*Assistant Administrator for Ocean Services and Coastal Zone Management.*

**List of Subjects in 15 CFR Part 922**

Administrative practice and procedure, Coastal zone, Fish, Fisheries, Historic preservation, Intergovernmental relations, Marine resources, Monuments and memorials, Natural resources, Wildlife, Wildlife refuges, Wildlife management areas, Sanctuary preservation areas, Ecological reserves, Areas to be avoided, State of Florida, U.S. Coast Guard.

For the reasons above, the National Oceanic and Atmospheric Administration proposes to amend title 15, part 922 of the Code of Federal Regulations as follows:

## PART 922—NATIONAL MARINE SANCTUARY PROGRAM REGULATIONS

1. The authority citation for part 922 continues to read as follows:

**Authority:** 15 U.S.C. 1431 *et seq.*

2. Amend § 922.162(a) by revising the definition for ''Coral'' to read as follows:

**§ 922.162 Definitions.**

(a) * * *

*Coral* means but is not limited to the corals of the Class Hydrozoa (stinging and hydrocorals); Class Anthozoa, Subclass Hexacorallia, Order Scieractinia (stony corals); Class Anthozoa, Subclass Ceriantipatharia, Order Antipatharia (black corals); and Class Anthozoa, Subclass Ocotocorallia, Order Gorgonacea, species Gorgonia ventalina and Gorgonia flabellum (sea fans).

* * * * *

3. In § 922.163 revise paragraphs (a)(2)(i), (a)(5)(iii)(C), and (a)(12), remove paragraph (c), redesignate paragraphs (d) through (h) as (c) through (g), and revise the newly redesignated paragraph (c) to read as follows:

**§ 922.163 Prohibited activities—Sanctuary-wide.**

(a) * * *

(2) * * *

(i) Moving, removing, taking, harvesting, damaging, disturbing, touching, breaking, cutting, or otherwise injuring, or possessing (regardless of where taken from) any living or dead coral, or coral formation, or attempting any of these activities, except as permitted under 50 CFR part 622.

* * * * *

(5) * * *

(iii) * * *

(C) Within 100 yards of the red and white ''divers down'' flag (or the blue and white ''alpha'' flag in Federal waters);

* * * * *

(12) Harvest or possession of marine life species. Harvesting, possessing, or landing any marine life species, or part thereof, within the Sanctuary, except in accordance with rules 68B–42 of the Florida Administrative Code, and such rules shall apply mutatis mutandis (with necessary editorial changes) to all Federal and State waters within the Sanctuary.

* * * * *

(c) Notwithstanding the prohibitions in this section and in § 922.164, and any access and use restrictions imposed pursuant thereto, a person may conduct an activity specifically authorized by any valid Federal, State, or local lease, permit, license, approval, or other authorization issued after the effective date of these regulations, provided that the applicant complies with § 922.49, the Director notifies the applicant and authorizing agency that he or she does not object to issuance of the authorization, and the applicant complies with any terms and conditions the Director deems reasonably necessary to protect Sanctuary resources and qualities. Amendments, renewals and extensions of authorizations in existence on the effective date of these regulations constitute authorizations issued after the effective date of these regulations.

* * * * *

4. In § 922.164, revise paragraph (d)(l) and add paragraph (e)(5) to read as follows:

**§ 922.164 Additional activity regulations by Sanctuary area.**

* * * * *

(d) Ecological Reserves, Sanctuary Preservation Areas, and Special Use (Research only) Areas. (1) The following activities are prohibited within the Ecological Reserves described in Appendix IV to this subpart, within the Sanctuary Preservation Areas described in Appendix V to this subpart, and within the Special Use (Research only Areas) described in Appendix VI to this subpart:

* * * * *

(e) * * * (5) In addition to paragraph (e)(3) of this section no person shall conduct activities listed in paragraph (d) of this section in ''Research-only Areas.''

* * * * *

**§ 922.168 [Removed and reserved]**

5. Remove and reserve § 922.168.

**Appendix VIII to Subpart P of Part 922 [Removed]**

6. Remove Appendix VIII to Subpart P of Part 922—Marine Life Rule [As Excerpted from Chapter 46–42 of the Florida Administrative Code].

[FR Doc. E8–29832 Filed 12–18–08; 8:45 am]

**BILLING CODE 3510–NK–M**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### 18 CFR Part 40

**[Docket No. RM08–16–000; Notice of Proposed Rulemaking]**

### Electric Reliability Organization Interpretations of Specific Requirements of Frequency Response and Bias and Voltage and Reactive Control Reliability Standards

December 15, 2008.

**AGENCY:** Federal Energy Regulatory Commission.

**ACTION:** Notice of proposed rulemaking; extension of time for filing comments.

**SUMMARY:** On November 20, 2008, the Commission issued a Notice of Proposed Rulemaking (NOPR) proposing to accept North American Electric Reliability Corporation's (NERC) interpretation of certain specific requirements of one Commission-approved Reliability Standard, BAL–003–0, Frequency Response and Bias; and to remand NERC's proposed interpretation of VAR–001–1, Voltage and Reactive Control, for reconsideration. (73 FR 71971). This document extends the time for filing comments in response to the Commission's NOPR.

**DATES:** *Effective Date:* The date for comments on the NOPR in this proceeding is extended to January 7, 2009.

**FOR FURTHER INFORMATION CONTACT:** Richard M. Wartchow (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8744.

**SUPPLEMENTARY INFORMATION:**

**Notice of Extension of Time**

On November 20, 2008, the Commission issued a Notice of Proposed Rulemaking (NOPR) in the above-referenced proceeding. The document was published in the **Federal Register** on November 26, 2008.[1] The NOPR requested comments to be submitted 30 days following publication in the **Federal Register**, which date would fall on December 29, 2008.[2] To provide interested persons additional time to consider the technical issues raised in the NOPR, and in light of the press of other business, including the intervening holiday period, the Commission, acting *sua sponte,* hereby extends the time to prepare and file comments on the NOPR.

Upon consideration, notice is hereby given that an extension of time for filing comments in response to the NOPR is granted until and including January 7, 2009.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–30235 Filed 12–18–08; 8:45 am]

**BILLING CODE 6717–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 300

**[EPA–HQ–SFUND–1987–0002; FRL–8753–3]**

### National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice of Intent for Partial Deletion of portions of the Griffiss Air Force Base Superfund Site from the National Priorities List.

**SUMMARY:** The United States Environmental Protection Agency (EPA) Region 2 Office announces its intent to delete specific properties of the former Griffiss Air Force Base (GAFB) site located in Rome, New York, from the National Priorities List (NPL) and requests public comment on this proposed action. The NPL constitutes Appendix B to the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 CFR part 300, which EPA promulgated pursuant to Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) as amended. The entire GAFB Site, approximately 3,552 acres, includes 32 areas of concern located on property currently or formerly owned by the United States Department of Defense. EPA and the State of New York, through the New York State Department of Environmental Conservation (NYSDEC), have determined that for the specified areas identified in this Notice of Intent for Partial Deletion (NOIPD), all appropriate response actions pursuant to CERCLA have been implemented and, aside from monitoring, operations, maintenance, and Five-Year Reviews, no further response actions, pursuant to CERCLA, are appropriate. Moreover, EPA and NYSDEC have determined that the specified properties at the GAFB Site (i.e., the soil and groundwater beneath) either pose no significant threat to public health or the environment or all appropriate response actions have been implemented, and therefore this NOIPD may proceed. The NOIPD is only for those properties specified herein and does not include other properties located at the GAFB Site.

**DATES:** Comments must be received by January 20, 2009.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–HQ–SFUND–1987–0002, by one of the following methods:

*Web site: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

*E-mail: pocze.doug@epa.gov.*

*Fax:* To the attention of Douglas M. Pocze at (212) 637–3256.

*Mail:* To the attention of Douglas M. Pocze, Remedial Project Manager, Emergency and Remedial Response Division, U.S. Environmental Protection Agency, Region 2, 290 Broadway, 18th Floor, New York, NY 10007–1866.

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[1] *Electric Reliability Organization Interpretations of Specific Requirements of Frequency Response and Bias and Voltage and Reactive Control Reliability Standards,* NOPR, Docket No. RM08–16–000, 73 FR 71971 (Nov. 26, 2008), 125 FERC ¶ 61,204 (2008).

[2] Accounting for the effect of the Executive Order, Closing of Executive Departments and Agencies of the Federal Government on Friday, December 26, 2008 (Dec. 12, 2008).

*Hand Delivery:* Superfund Records Center, 290 Broadway, 18th Floor, New York, NY 10007–1866 (telephone: 212–637–4308). Such deliveries are only accepted during the Docket's normal hours of operation (Monday to Friday from 9 a.m. to 5 p.m.). Special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA–HQ–SFUND–1987–0002. EPA's policy is that all comments received will be included in the 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 CBI or otherwise protected through *http://www.regulations.gov* or via 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 comments. If you send comments to EPA via e-mail, your e-mail address will be included as part of the comment that is placed in the Docket and made available on the Web site. If you submit electronic comments, EPA recommends that you include your name and other contact information in the body of your comments and with any disks or CD–ROMs that you submit. If EPA cannot read your comments because of technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comments. Electronic files should avoid the use of special characters and any form of encryption and should be free of any defects or viruses.

*Docket:* All documents in the Docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available Docket materials can be viewed electronically at *http://www.regulations.gov* or obtained in hard copy at: U.S. Environmental Protection Agency, Region 2, Superfund Records Center, 290 Broadway, 18th Floor, New York, NY 10007–1866, Phone: 212–637–4308, *Hours:* Monday to Friday from 9 a.m. to 5 p.m.; and Griffiss Business and Technology Park, Information Repository/Administrative File, 153 Brooks Road, Rome, NY 13441, (315) 356–0810.

*Hours:* Please call to determine hours of operation and whether an appointment is needed.

**FOR FURTHER INFORMATION CONTACT:** Mr. Douglas M. Pocze, Remedial Project Manager, by mail at Emergency and Remedial Response Division, U.S. Environmental Protection Agency, Region 2, 290 Broadway, 18th floor, New York, NY 10007–1866; Telephone (212) 637–4432, (or) fax at (212) 637–3256, (or) E-mail: *pocze.doug@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

**Table of Contents**



## I. Introduction

The EPA, Region 2, announces its intent to delete properties at the GAFB Site, located in Rome, NY, from the NPL, and requests comments on this action. This proposal for partial deletion pertains to soil and groundwater at specified areas of the GAFB. The parcel areas listed below either in their entirety or in portion are proposed for deletion and should be reviewed with the Partial Deletion map provided (See Figure 1).

| | Acres |
|---|---|
| 1. Property A1A—Airfield | 1324.45 |
| 2. Building 750—Former Air Force Special Investigations | 4.07 |
| 3. Central Heating Plant | 17.78 |
| 4. Parcel F1 | 61.40 |
| 5. Parcel F2 | 88.37 |
| 6. Electrical Power Substation | 3.20 |
| 7. Parcel F3A | 75.99 |
| 8. Parcel F3B | 14.04 |
| 9. Parcel F4A | 107.59 |
| 10. Parcel F4C | 56.96 |
| 11. Parcel F6A | 52.20 |
| 12. Parcel F7NR | 52.09 |
| 13. Parcel F7R | 223.75 |
| 14. Parcel F8 Housing | 69.22 |
| 15. Parcel F9A | 135.25 |
| 16. Parcel F9B | 64.99 |
| 17. Parcel F10A | 11.05 |
| 18. Parcel F10B | 275.82 |
| 19. Parcel F11A Housing | 152.56 |
| 20. Parcel F11C | 4.24 |
| 21. Parcel F11D | 45.23 |
| 22. Parcel F12A | 41.82 |
| 23. MGC—Mohawk Glen Club | 15.13 |

The NPL is set forth at Appendix B of 40 CFR part 300, which is an appendix to the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), which EPA promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended. EPA maintains the NPL as those sites that appear to present a significant risk to public health, welfare, or the environment. Sites on the NPL may be the subject of remedial actions financed by the Hazardous Substance Superfund (Fund). This partial deletion of certain properties at the GAFB is proposed in accordance with 40 CFR 300.425(e) and is consistent with the Notice of Policy Change: Partial Deletion of Sites Listed on the National Priorities List. 60 FR 55466 (Nov. 1, 1995). As described in § 300.425(e)(3) of the NCP, a portion of a site deleted from the NPL remains eligible for Fund-financed remedial action if future conditions warrant such actions.

The property proposed for deletion can also be reviewed via the Air Force's (AF's) Web site *http://www.griffiss.com.* Property coordinates for these parcels are identified in Figure 1 and are also defined in the corresponding transfer documents for each parcel. Transfer documents (e.g., deeds) and supporting documentation can be viewed either at the repositories or via the Web site.

To effectively manage the GAFB cleanup and property transfers, the base has been subdivided into management areas. These management areas or parcels were evaluated for various environmental concerns. The AF sets priorities for cleanup in each parcel based on the reuse priorities of the Local Reuse Authority (LRA). Environmental cleanup was expedited in some areas so that the property could be transferred from the AF to the LRA. The areas where cleanup was expedited and where the property was transferred are considered as candidates for deletion.

While reviewing the properties for deletion, EPA has based its recommendation for partial deletion upon the Records of Decision (RODs), Findings of Suitability to Transfer (FOST) and/or Findings of Suitability for Early Transfer (FOSET) and the Five-Year Review. In areas where the RODs were issued and the remedy was implemented (e.g., the institutional controls in the form of deed restrictions have been incorporated into a deed), EPA evaluated the area for consideration in this NOIPD.

As part of the NPL partial deletion process, EPA will accept public comments concerning this proposed NOID related to portions of the GAFB for thirty (30) days after publication of this notice in the **Federal Register**.

Section II further explains the criteria for deleting sites from the NPL. Section III discusses procedures that EPA is using for this action, and Section IV discusses the GAFB Site and demonstrates how it meets the partial

deletion criteria. Properties and parcels that meet the criteria for demonstrating that the releases of hazardous substances pose no significant threat to human health or the environment, and therefore no remedial measures are needed, are indicated in Section IV as containing no CERCLA sites within its boundaries. Properties and parcels that meet the criteria that all appropriate response actions have been implemented are also indicated in Section IV as having some removal or remediation of contamination, and most include land and groundwater use restrictions in the property deed as required in the ROD.

**II. NPL Deletion Criteria**

The NCP establishes the criteria that EPA uses to delete sites from the NPL. In accordance with 40 CFR 300.425(e), sites may be deleted from the NPL where no further response is appropriate. In making this determination, EPA, in consultation with the State of New York, must establish whether any of the following criteria have been met:

i. Responsible parties or other persons have implemented all appropriate response actions required; or

ii. All appropriate Fund-financed responses under CERCLA have been implemented and no further cleanup by responsible parties is appropriate; or

iii. The remedial investigation has shown that the release of hazardous substances poses no significant threat to public health or the environment and, therefore, taking of remedial measures is not appropriate.

Pursuant to CERCLA section 121(c) and the NCP, EPA conducts Five-Year Reviews to ensure the continued protectiveness of remedial actions where hazardous substances, pollutants, or contaminants remain at a site above levels that allow for unlimited use and unrestricted exposure. EPA conducts such Five-Year Reviews even if a site is deleted from the NPL. EPA may initiate further action to ensure continued protectiveness at a deleted site if new information becomes available that indicates it is appropriate. Whenever there is a significant release from a site deleted from the NPL, the deleted site may be restored to the NPL without application of the hazard ranking system.

**III. Deletion Procedures**

The following procedures were used for the intended deletion of the specified properties at the GAFB Site:

(1) EPA has recommended the partial deletion and has prepared the relevant documents.

(2) EPA consulted with the State before developing this NOIPD.

(3) EPA has provided the State 30 working days for review of this notice prior to publication of it today.

(4) In accordance with the criteria discussed above, EPA has determined that no further response is appropriate.

(5) The State of New York through the NYSDEC concurs with this partial deletion.

(6) Concurrent with this national NOIPD, a notice has been published in a newspaper of record and has been distributed to appropriate federal, State, and local officials and other interested parties. These notices announce a thirty (30) day public comment period on the partial deletion package, which commences on the date of publication of this notice in the **Federal Register** and a newspaper of record.

(7) EPA has made all relevant documents available at the information repositories listed previously.

If comments are received within the 30-day comment period on this document, EPA will evaluate and respond accordingly to the comments before making a final decision to delete the parcels. If necessary, EPA will prepare a Responsiveness Summary to address any significant public comments received. After the public comment period, if EPA determines it is still appropriate to delete the soil and groundwater portions of the 23 parcels at the GAFB Superfund Site, the Regional Administrator will publish a final Notice of Partial Deletion in the **Federal Register**. Public notices, public submissions, and copies of the Responsiveness Summary, if prepared, will be made available to interested parties and included in the site information repositories listed above.

Deletion of a portion of a site from the NPL does not itself create, alter, or revoke any individual's rights or obligations. Deletion of a portion of a site from the NPL does not in any way alter EPA's right to take enforcement actions, as appropriate. The NPL is designed primarily for informational purposes and to assist EPA management. Section 300.425(e)(3) of the NCP states that the deletion of a site from the NPL does not preclude eligibility for future response actions, should future conditions warrant such actions.

**IV. Basis for Intended Site Deletion**

*A. Background*

The GAFB NPL Site is comprised of 3,552 acres and is considered ''fence-line'' to ''fence-line''. The mission of the former GAFB varied over the years. In 1942, the base was activated as the Rome Air Depot with the mission of storage, maintenance, and shipment of material for the U.S. Army Air Corps. Upon creation of the AF, the depot was renamed Griffiss Air Force Base in 1947, and, three years later, it became an electronics center with a mission of accomplishing applied research, development, and testing of electronic air-ground systems. Later, the 49th Air Squadron was added, and in June of 1958, the Ground Electronics Engineering Installations Agency was established to engineer and install ground communications equipment throughout the world. On July 1, 1970, the 416th Bombardment Wing of the Strategic Air Command (SAC) was activated with the mission of maintenance and implementation of both refueling operations and long-range bombardment capability. GAFB was designated for realignment under the Base Realignment and Closure Act in 1993 and 1995, resulting in deactivation of all AF flying missions. Today, federal agencies such as the Air Force Research Laboratory Information Directorate, the Northeast Air Defense Sector, and the Defense Finance and Accounting Services remain in operation at GAFB.

Since 1942 when construction of the base began, various hazardous and toxic substances were used and hazardous wastes were generated, stored, or disposed at GAFB. Numerous studies and investigations under the U.S. Department of Defense Installation Restoration Program (IRP) have been performed to locate, assess and quantify the past toxic and hazardous storage, disposal, and spill sites. These investigations include: records searches; interviews with base personnel; field inspections; compilation of waste inventory; evaluation of disposal practices; an assessment to determine the nature and extent of site contamination; Problem Confirmation and Quantification studies; soil and groundwater analysis; a base-wide health assessment; base specific hydrology investigations; and various site specific investigations. Based upon such studies and information, GAFB was included on the NPL on July 15, 1987 and on August 20, 1990, the AF entered into a Federal Facility Agreement (FFA) with EPA and NYSDEC under Section 120 of CERCLA. Under the terms of the FFA, the AF was required to submit various reports to NYSDEC and EPA for review and comment. These reports address response activities required under CERCLA and included: the identification of Areas of environmental

Concern (AOCs); a scope of work for Remedial Investigation (RI); a work plan for the RI, including a sampling and analysis plan and a quality assurance plan; a baseline risk assessment; a community relations plan; and an RI report. On December 20, 1996, the AF submitted a draft-final RI report for regulatory review covering 31 AOCs located throughout the base.

Although a draft-final RI was submitted, environmental studies at GAFB did not stop there. Other studies such as the Areas of Interest study (AOI) evaluated over 300 possible environmental factors, many of which had not been formally evaluated under previous studies. The AOI study first collected all available information which was then reviewed by the AF, NYSDEC, and EPA. Based upon the review, sites were either recommended for no further action or for further sampling. Based upon the subsequent sampling, those sites either became no further action sites, were addressed with removal actions with confirmatory sampling, or were elevated to AOCs which then proceeded through the more comprehensive CERCLA cleanup process. The AF has completed its RI for the only AOI site that was elevated in this manner, AOC 9, and is currently reviewing possible alternatives for cleanup.

Some sites (e.g., the AOC Landfills) proceeded to presumptive remedies following the RI. Presumptive remedies are preferred technologies for common categories of sites based upon historical patterns of remedy selection and EPA's scientific and engineering evaluations of performance data on technology implementation. These sites were evaluated by the AF, NYSDEC, and EPA and, where determined to be appropriate presumptive remedy candidates based upon site sampling data and EPA's Presumptive Remedy Guidance for Military Landfills (dated April 29, 1996), and were proposed to the public. Following the public comment period where any comments specific to each landfill site were addressed, these remedies were approved and subsequently implemented. However, these presumptive remedy sites (i.e., the landfills) are not proposed for deletion at this time.

In addition to the AOCs, nine source removal sites as listed within the FFA have undergone cleanup with EPA and NYSDEC oversight. When the cleanup activities at these sites are completed, these sites will be closed with regulatory approval of a final remedy documented in a ROD.

Throughout this NOIPD, the term ''CERCLA site'' is used to mean the AOCs described generally above which have been investigated and, as necessary, addressed under the FFA.

*B. Records of Decision, Remedial Actions and Five-Year Reviews*

To date 26 remedies have been selected for various locations throughout the base. When accounting for all environmental factors which will necessitate some form of future regulatory approval, 13 of these sites still remain open. In managing the on-going activities, the AF has divided the base into various parcels. The periodic Five-Year Reviews which evaluate the protectiveness of each remedy as required by law also provides a summary of each parcel and its associated environmental activities. EPA and NYSDEC reviewed the most recent Five-Year Review document and provided their concurrence on September 15, 2005. Therefore, that document also was relied upon in the development of this NOIPD. Based upon that Five-Year Review document, the remedies as selected in the various RODs, and other documentation, this NOIPD was prepared with the understanding that only the parcel areas which meet the criteria of Section 300.425(e)(1) can be proposed for deletion, namely all appropriate response actions have been implemented or previous investigations have shown that remedial actions are not appropriate to protect human health or the environment. The parcels listed below meet this criteria and a summary of the parcel's environmental factors have been provided. Additional parcel information can be found on Figure 1 of this NOIPD and in the deeds via the Web site (*http://www.griffiss.com*).

*Parcel A1A—The Airfield.* This parcel was deeded to Oneida County via a Public Benefit Conveyance (PBC). It was comprised of 1,337.72 acres and contained two sites addressed under CERCLA. However, of the two sites located in the parcel, Six Mile Creek (approximately 13.27 acres) will remain on the NPL. Therefore, the area of the parcel that is proposed for deletion (approximately 1324.45 acres) contains just one CERCLA site within its boundaries. The following is a summary of the CERCLA site proposed for deletion:

*Fire Demonstration Area.* The Fire Demonstration Area is located north of Building 100. The site was used by the AF for fire demonstrations from 1987 to 1992. In 1994, an RI was initiated to characterize the full extent of contamination and determine potential threats to human health and the environment. Based upon sampling and analysis and a risk assessment, no further action in the form of land use restrictions was proposed by the AF as a remedy. After the public comment period, EPA with the concurrence of the NYSDEC approved a ROD on September 30, 1999, requiring institutional controls in the form of land use restrictions. The ROD required the site be restricted to industrial reuse, groundwater restrictions be implemented, and the AF to perform Five-Year reviews to ensure the remedy is protective of human health and the environment. The recorded deed contains the land and groundwater use restrictions required in the ROD.

*Building 750—Former Air Force Special Investigations.* This 4.07 acre parcel was deeded to the LRA via an Economic Development Conveyance (EDC) agreement. Prior to the property being deeded, a FOST was submitted by the AF and reviewed by EPA and NYSDEC. All comments were addressed. The parcel contains no CERCLA sites within its boundaries.

*Central Heating Plant.* This 17.78 acre parcel was deeded to the LRA via an EDC. Prior to the property being deeded, a FOST was submitted by the AF and reviewed by EPA and NYSDEC. All comments were addressed. A petroleum spill which is not regulated by CERCLA exists within the boundary (Spill #8903144); however, this area was remediated, and the AF is awaiting final closure approval from NYSDEC Spills Program. The parcel contains no CERCLA sites within its boundaries.

*Parcel F1.* This 64.90 acre parcel was deeded to the LRA via an EDC. However, because the property contained CERCLA sites undergoing cleanup, a Finding of Suitability for Early Transfer (FOSET) was required. A FOSET allows property to be transferred prior to cleanup with EPA and the Governor's approval, provided appropriate restrictions are in-place and the AF provides an assurance to complete cleanup the property. The transfer of this parcel received the Governor's concurrence on February 8, 1999, and was approved by EPA on April 2, 1999. As part of the assurances provided, the AF was required to address the CERCLA sites within the parcel. However, only those CERCLA sites which have remedies operating properly and successfully or which require no further action can be considered for deletion. The parcel contains four CERCLA sites within its boundaries (See Figure 1). Of the four sites located in the parcel, one site known as the Coal Yard Storage Area (approximately 3.50 acres) will remain on the NPL. Therefore, the area of the parcel that is proposed for deletion (approximately 61.40 acres) contains

three CERCLA sites within the proposed partial NPL deletion area. The following is a summary of only the CERCLA sites in areas of Parcel F1 proposed for deletion:

*Building 20.* The Building 20 site, located in Parcel F1, was used as a locomotive roundhouse to service diesel locomotives. During operation, lubricants, diesel parts, and hydraulic fluids were stored, used, and at times spilled in the area. An initial soil investigation was performed in 1985, and soil was removed at the northwest corner of Building 20. However, during the investigation an oily liquid was encountered. Subsequent soil and groundwater investigations continued and additional soil and liquid contamination was removed. In 1994, an RI was initiated to characterize the full extent of contamination and determine potential threats to human health and the environment. In 1998, an interim remedial action was performed to remove contaminated soil beneath the floor near the northwest corner of the building. Based upon sampling and analysis, previous removal actions, and a risk assessment, the AF developed a plan for public comment proposing institutional controls. EPA with the concurrence of the NYSDEC approved a ROD on September 27, 2001, requiring institutional controls in the form of land use restrictions. The ROD required the site area be restricted to commercial/industrial reuse, groundwater restrictions be implemented and the AF to perform Five-Year Reviews to ensure the remedy is protective of human health and the environment. The recorded deed does contain the institutional controls/land and groundwater use restrictions required in the ROD.

*T–9 Storage Area.* The T–9 Storage Area (T–9), also located in Parcel F1, was reportedly an open lot used to store heavy equipment, herbicides, and petroleum based paving products. At one time, Building 9, which no longer exists, was used as a motor pool facility. In the mid 1980s, soil and groundwater studies were conducted which detected contaminants of concern above background and guidance values, and, as a result, in 1994, an RI was performed to evaluate the potential threats to human health and the environment. In 1998, an interim response action was performed at the T–9 Storage Area at three locations. These locations were identified based on soil contamination data from previous investigations including the RI. Based upon sampling and analysis, previous removal actions, and a risk assessment, no further action in the form of land use restrictions was proposed by the AF as a remedy. After the public comment period, EPA with the concurrence of the NYSDEC approved a ROD on September 27, 2001, requiring institutional controls in the form of land use restrictions. The ROD required that the site be restricted to commercial/industrial reuse, groundwater restrictions be implemented, and the AF to perform Five-Year Reviews to ensure the remedy is protective of human health and the environment. The recorded deed does contain the land and groundwater use restrictions required in the ROD.

*Lot 69—Former Haz Waste Storage Yard.* Lot 69 is located in the south central industrialized portion of the former Griffiss AFB base. The site contains a Vehicle Maintenance Facility, including Buildings 11 and 15, and an asphalt-covered vehicle parking and storage area. From 1965 to 1982, this site was used as an unrestricted interim drum storage area for containers of liquid and solid hazardous wastes generated on the base. In 1994, an RI was initiated to characterize the full extent of contamination and determine potential threats to human health and the environment. Based upon sampling and analysis and a risk assessment, the AF developed a plan for public comment proposing institutional controls. EPA with the concurrence of the NYSDEC approved a ROD on March 17, 2005, requiring institutional controls in the form of land use restrictions. The ROD required the site area be restricted to commercial/industrial reuse, groundwater restrictions be implemented, and the AF to perform Five-Year Reviews to ensure the remedy is protective of human health and the environment. The recorded deed does contain the institutional controls/land and groundwater use restrictions required in the ROD.

*Parcel F2.* This 93.11 acre parcel was deeded to the LRA via an EDC. However, because the property contained CERCLA sites undergoing cleanup, a FOSET was required. This early transfer received the Governor's concurrence on February 23, 2000, and was approved by EPA on May 10, 2000. As part of the assurances provided, the AF was required to address the CERCLA sites within the parcel. However, only those CERCLA sites which have implemented remedies operating properly and successfully or which require no further action can be considered for deletion. Subsequent to the transfer of the property, the AF completed all the required actions at one of the two sites located in parcel F2. The Building 775 site, comprised of 4.75 acres, is not proposed for deletion and will remain on the NPL. As a result, 88.37 acres of the Parcel F2's 93.11 acres are proposed for deletion, and it is within these 88.37 acres that the other CERCLA site which has been remediated is located. A summary of the CERCLA site is provided as follows:

*Building 112.* The Building 112 site, located in the central industrial area of the base, serves as the High Power Laboratory. The CERCLA site was comprised of four areas: A drywell; a rooftop transformer spill; the loading dock area; and the polychlorinated biphenyl (PCB) dump area. Beginning in the early 1980s, various studies were conducted in the Building 112 area. In 1994, soil sampling, groundwater sampling, and a risk assessment were performed as part of the RI investigation. In conjunction with the RI, the AF performed excavation of several areas containing elevated levels of PCBs. Based upon the RI and the removal of the PCB contaminated material, the AF developed a plan for public comment proposing no further action with land use restrictions. EPA, with the concurrence of the NYSDEC, approved the ROD on September 27, 2001, requiring institutional controls in the form of land use restrictions. The ROD required the site be restricted to commercial/industrial reuse, soil relocation restrictions, groundwater restrictions be implemented, and the AF to perform Five-Year Reviews to ensure the remedy is protective of human health and the environment. The recorded deed contains the land and groundwater use restrictions required in the ROD.

*Parcel Electrical Power Substation.* This parcel is comprised of 3.2 acres and contains one site addressed under CERCLA. The parcel was deeded to LRA via an EDC. Prior to the property being deeded, a FOST was submitted by the AF and reviewed by EPA and NYSDEC. All comments were addressed. A summary of the CERCLA site proposed for deletion is provided as follows:

*Electric Power Substation (EPS).* The EPS is located in the south-central portion of the base along the southern margin of the industrial complex. Since the start of operations at Griffiss AFB in the 1940s, the EPS has served as an electrical unit to relay power to various facilities throughout the base. Prior to conversion, some of the transformers contained polychlorinated biphenyl (PCB) dielectric fluids. Dielectric fluids have reportedly been drained from the transformers directly onto the ground surface over an extended period of time. A transformer rupture reportedly occurred in 1987 at Transformer No. 1, during which PCB fluids were released on the east side. In 1994, soil sampling, groundwater sampling, and a risk assessment were performed as part of an RI.

In conjunction with the RI, the AF performed excavation of several areas containing elevated levels of PCBs. In 1998, the AF conducted a removal action by excavating soil and disposing the PCB contaminated soil off-site. Based upon the RI and the removal actions, the AF developed a plan for public comment proposing no further action with land use restrictions. EPA with the concurrence of the NYSDEC, approved the ROD on March 17, 2005, requiring institutional controls in the form of land use restrictions. The ROD required the site be restricted to commercial/industrial reuse, soil relocation restrictions, groundwater restrictions be implemented, and the AF to perform Five-Year Reviews to ensure the remedy is protective of human health and the environment. The recorded deed contains the land and groundwater use restrictions required in the ROD.

*Parcel F3A.* This 87.90 acre parcel was deeded to the LRA via an EDC. Prior to the property being deeded, a FOST was submitted by the AF and reviewed by EPA and NYSDEC. All comments were addressed. Of the 87.90 acres, only 75.99 acres are proposed for deletion. Within these 75.99 acres, there

are three CERCLA sites; however, the RODs for these sites were issued and the remedies implemented prior to the property being transferred. Therefore, the transfer was not considered an early transfer. Within the remaining 11.91 acres there are three sites known as Drywell 211, Washrack 222, and Building 255 Drywell which are individual area parcels and shall remain on the NPL (See Figure 1). A summary of the CERCLA sites is provided as follows:

*Building 214.* Building 214 is located in the west-central portion of the base. Adjacent to Building 214 are several other industrial buildings that form the area on base known as ''Tin City.'' Building 214 was a former vehicle maintenance shop, and solvents and petroleum were reported to have been released in a gravel-covered parking area adjacent to the building. In addition, an Underground Storage Tank (UST) was reported to have overflowed during past operations, and two drywells were reported to have existed at the southeast and southwest corners of the building. Beginning in the mid 1980s, various studies were conducted in this area, and thereafter soil sampling, groundwater sampling, and a risk assessment were performed as part of the RI in 1993. Based upon the RI, the AF developed a plan for public comment proposing no further action with land use restrictions. EPA, with the concurrence of the NYSDEC, approved the ROD on September 30, 1999, requiring institutional controls in the form of land use restrictions. The ROD required the site be restricted to commercial/industrial reuse, groundwater restrictions be implemented, and the AF to perform Five-Year Reviews to ensure the remedy is protective of human health and the environment. Following the approval of the ROD, groundwater monitoring continued, and based upon this monitoring EPA approved an Explanation of Significant Difference (ESD) on September 26, 2003, which found that the constituents sampled as part of a groundwater long-term monitoring program were below acceptable standards. The recorded deed contains land and groundwater use restrictions required in the ROD.

*Building 219.* The Building 219 site is located in the west-central portion of the base. This building and several other buildings form the Tin City area. The building was used as an Electric Power Production Shop, and based upon previous history a drywell existed south of the building. Liquid waste spills, neutralized battery acids, ethylene glycol, and shop wash-water may have been disposed in the drywell during the 1970s while the building was in operation. In 1994, an RI was performed to determine the nature and extent of contamination. Based upon the RI and a risk assessment, the AF developed a plan for public comment proposing no further action with land use restrictions. EPA, with the concurrence of the NYSDEC, approved the ROD on September 30, 1999, requiring institutional controls in the form of land use restrictions. The ROD required the site be restricted to commercial/industrial reuse, groundwater restrictions be implemented, and the AF to perform Five-Year Reviews to ensure the remedy is protective of human health and the environment. Following the approval of the ROD, groundwater monitoring continued, and based upon this monitoring EPA approved an ESD on September 26, 2003, which found that the constituents sampled as part of a groundwater long-term monitoring program did not exceed acceptable standards. The recorded deed contains land and groundwater use restrictions required in the ROD.

*Building 222.* The Building 222 site, located in the west-central portion of the base, is also part of the Tin City area. The building was used as a truck maintenance facility and entomology laboratory, and based upon previous history a battery acid disposal pit existed inside the building. The pit had an opening approximately 2 square feet in the floor and was covered with a steel grate. From 1940 until 1984, neutralized battery acids were discharged into the pit. In 1994, an RI was performed to determine the nature and extent of contamination. In 1998, and interim response action was performed to remove contaminated soil beneath the floor in the area of the battery acid disposal pit. Based upon the RI and the risk assessment, the AF developed a plan for public comment proposing no further action with land use restrictions. EPA, with the concurrence of the NYSDEC, approved the ROD on September 27, 2001, requiring institutional controls in the form of land use restrictions. The ROD required the site be restricted to commercial/industrial reuse, groundwater restrictions be implemented, and the AF to perform Five-Year Reviews to ensure the remedy is protective of human health and the environment. Following the approval of the ROD, groundwater monitoring continued, and based upon this monitoring EPA approved an ESD on September 26, 2003, which found that the constituents sampled as part of a groundwater long-term monitoring program did not exceed acceptable standards. The recorded deed contains land and groundwater use restrictions required in the ROD.

*Parcel F3B.* This 14.04 acre parcel was deeded to the LRA via an EDC. Prior to the property being deeded, a FOST was submitted by the AF and reviewed by EPA and NYSDEC. All comments were addressed. The parcel contains no CERCLA sites within its boundaries.

*Parcel F4A.* This 107.59 acre parcel was deeded to the LRA via an EDC. Prior to the property being deeded, a FOST was submitted by the AF and reviewed by EPA and NYSDEC. All comments were addressed. The parcel contains no CERCLA sites within its boundaries.

*Parcel F4C.* This 56.96 acre parcel was deeded to the LRA via an EDC. Prior to the property being deeded, a FOST was submitted by the AF and reviewed by EPA and NYSDEC. All comments were addressed. The parcel contains no CERCLA sites within its boundaries.

*Parcel F6A.* This 55.40 acre parcel was deeded to the LRA via an EDC. Prior to the property being deeded, a FOST was submitted by the AF and reviewed by EPA and NYSDEC. All comments were addressed. Of the 55.40 acres only 52.20 acres are proposed for deletion. There are no CERCLA sites within these acres. The one remaining site known as Building 301 Drywell is an individual area and will remain on the NPL (See Figure 1).

*Parcel F7NR.* This 52.09 acre parcel was deeded to the LRA via an EDC. Prior to the property being deeded, a FOST was submitted by the AF and reviewed by EPA and NYSDEC. All comments were addressed. The parcel contains no CERCLA sites within its boundaries.

*Parcel F7R.* This 223.75 acre parcel was deeded to Oneida County via a deed reversion clause. Prior to the property being deeded, a FOST was submitted by the AF and reviewed by EPA and NYSDEC. All comments were addressed. The parcel contains no CERCLA sites within its boundaries.

*Parcel F8—Housing.* This 69.22 acre parcel was offered to the LRA, but it decided not to take ownership of the property. The FOST, however, was submitted and reviewed by EPA and NYSDEC. All comments were addressed and the property was disposed by Government Services Agency via a public auction. The parcel contains no CERCLA sites within its boundaries.

*Parcel F9A.* This 135.25 acre parcel was deeded to the LRA via an EDC. Prior to the property being deeded, a FOST was submitted by the AF and reviewed by EPA and NYSDEC. All comments were addressed. The parcel contains no CERCLA sites within its boundaries.

*Parcel F9B.* This 64.99 acre parcel was deeded to the LRA via an EDC. Prior to the property being deeded, a FOST was submitted by the AF and reviewed by EPA and NYSDEC. All comments were addressed. The parcel contains no CERCLA sites within its boundaries.

*Parcel F10A.* This 11.05 acre parcel was deeded to the LRA via an EDC. Prior to the property being deeded, a FOST was submitted by the AF and reviewed by EPA and NYSDEC. All comments were addressed. The parcel contains no CERCLA sites within its boundaries.

*Parcel 10B.* This 281.44 acre parcel was deeded to the LRA via an EDC, and of these acres, 275.82 acres are proposed for deletion. Prior to the property being deeded, a FOST was submitted by the AF and reviewed by EPA and NYSDEC.

All comments were addressed. Four CERCLA sites are located within the parcel. Three of these sites known as Drywell 842, Drywell 846, and AOC 9 are individual areas and will remain on the NPL. Therefore, the parcel contains just one CERCLA site within its boundaries that is proposed for deletion (See Figure 1). A summary of the CERCLA site is provided as follows:

*Suspected Fire Training Area.* The Suspected Fire Training Area was located on the eastern boundary of the base. It was investigated as part of an RI in 1994. Based upon the RI, a ROD was proposed to the public for No Further Action. After the public comment period, EPA with the concurrence of the NYSDEC, approved the ROD on September 30, 1999. No reuse restrictions are required for the area.

*Parcel F11A Housing.* This 152.56 acre parcel was deeded to the LRA via an EDC. Prior to the property being deeded, a FOST was submitted by the AF and reviewed by EPA and NYSDEC. All comments were addressed. The parcel contains no CERCLA sites within its boundaries.

*Parcel F11C.* This 4.24 acre parcel was deeded to the LRA via an EDC. Prior to the property being deeded, a FOST was submitted by the AF and reviewed by EPA and NYSDEC. All comments were addressed. The parcel contains no CERCLA sites within its boundaries.

*Parcel F11D.* This 45.23 acre parcel was deeded to the LRA via an EDC. Prior to the property being deeded, a FOST was submitted by the AF and reviewed by EPA and NYSDEC. All comments were addressed. The parcel contains no CERCLA sites within its boundaries.

*Parcel F12A.* This 45.83 acre parcel was deeded to the LRA via an EDC. Prior to the property being deeded, a FOST was submitted by the AF and reviewed by EPA and NYSDEC. All comments were addressed. A small portion of parcel F12A (4.01 acres) contains groundwater contamination. This area of contamination is currently being addressed and will not be deleted from the NPL. Therefore, 41.82 acres of the parcel which are proposed for deletion contain no CERCLA sites within its boundaries (See Figure 1).

*MGC—Mohawk Glen Club.* This 15.13 acre parcel which was originally the Officer's Club was deeded to Oneida County via a deed reversion clause. Prior to the property being deeded, a FOST was submitted by the AF and reviewed by EPA and NYSDEC. All comments were addressed. The parcel contains no CERCLA sites within its boundaries.

*C. Community Involvement*

The AF published its first Community Relations Plan in May 1991 and created a Restoration Advisory Board (RAB) to facilitate participation of and input from the public throughout the CERCLA cleanup process. The RAB acts as a focal point for the exchange of information between the AF and the local community, and it enables the early communication of information, concerns, and needs between them. In addition, each decision document at the Site has been made available for public comment, discussed at public meetings, and placed in the information repository before the decision document is finalized.

*D. Deletion Action Determination*

EPA, with the concurrence of the State of New York dated August 7, 2008, has determined that all appropriate responses under CERCLA have been completed and that no further response actions under CERCLA, other than O&M and Five-Year Reviews, are necessary or that an investigation has shown a release poses no significant threat to public health or the environment and, therefore, no response action is appropriate. Therefore, EPA is deleting the properties and parcels described above from the NPL. While EPA does not believe that any future response actions in the areas identified above will be needed, if future conditions warrant such action, the proposed deletion area of GAFB remains eligible for future response actions. Furthermore, this partial deletion does not alter the status of the remaining areas of GAFB which are not proposed for deletion and remain on the NPL. Likewise, this deletion does not alter the status of any other cleanup activities occurring under other federal and state programs (e.g., many of the parcels proposed for deletion include cleanup under New York State authorities such as the New York State Spills Program which addresses releases of petroleum products to the environment).

**List of Subjects in 40 CFR Part 300**

Environmental protection, Air pollution control, Chemicals, Hazardous waste, Hazardous substances, Intergovernmental relations, Natural resources, Oil pollution, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

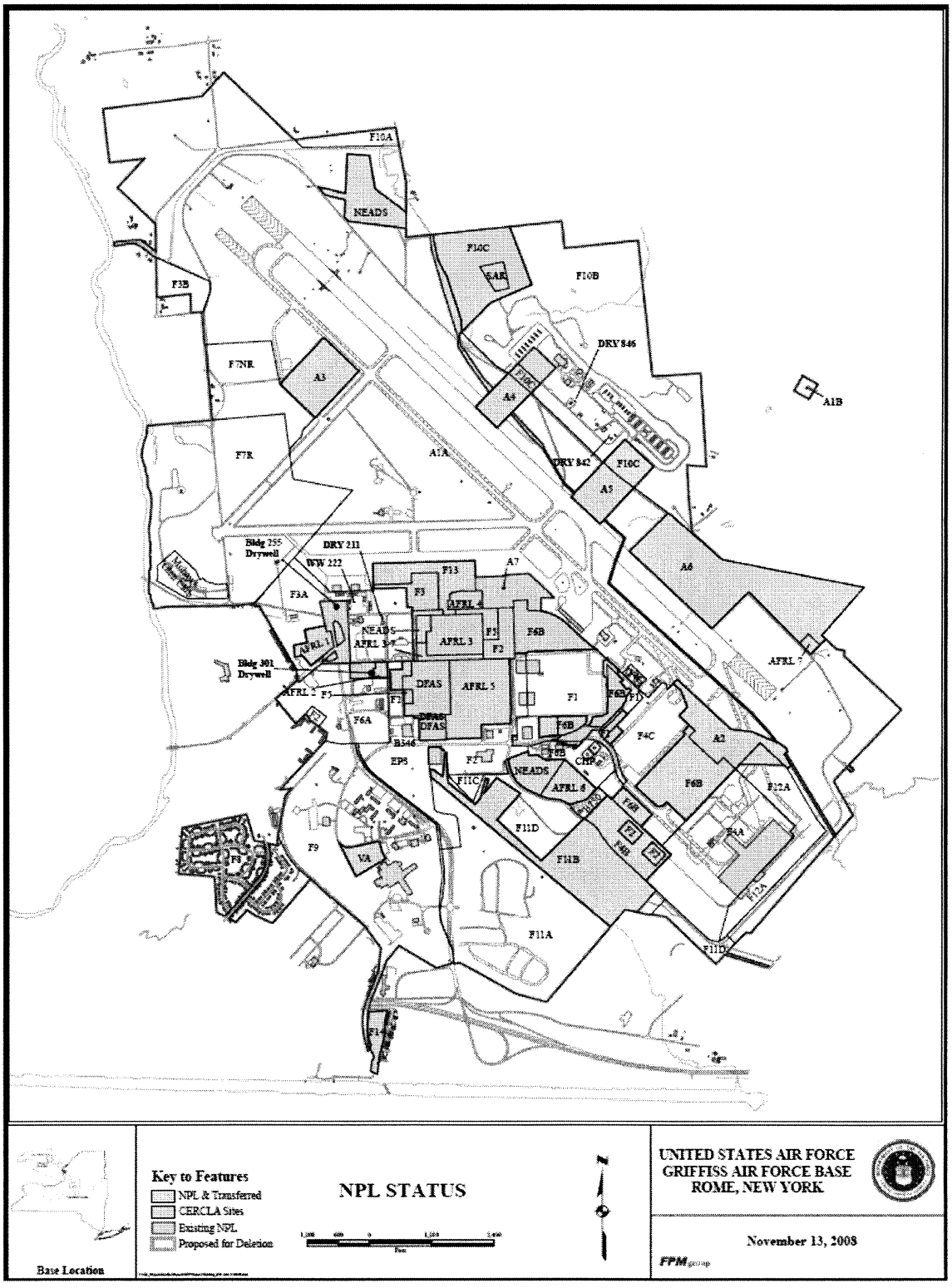
**Authority:** 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601–9657; E.O. 12777, 56 FR 54757, 3 CFR 1991 Comp., p. 351; and E.O.12580, 52 FR 2923, 3 CFR 1987 Comp., p. 193.

Dated: November 28, 2008.

**Alan J. Steinberg,**

*Regional Administrator—Region 2.*

**BILLING CODE 6560–50–P**




[FR Doc. E8–29961 Filed 12–18–08; 8:45 am]

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**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

**[FWS–R8–ES–2008–0006; 92210–1117–0000 B4]**

**RIN 1018–AV23**

## Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for the Quino Checkerspot Butterfly (Euphydryas editha quino)

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

**ACTION:** Proposed rule; reopening of comment period, notice of availability of draft economic analysis, and amended required determinations.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the comment period on our January 17, 2008, proposed revised designation of critical habitat for the Quino checkerspot butterfly under the Endangered Species Act of 1973, as amended (Act). We also announce the availability of the draft economic analysis (DEA), a revision to proposed critical habitat Unit 2, and an amended required determinations section of the proposal. We are reopening the comment period to allow all interested parties an opportunity to comment simultaneously on the proposed revision of critical habitat (including the changes to proposed critical habitat Unit 2), the associated DEA, and the amended required determinations section. If you submitted comments previously, then you do not need to resubmit them because they are included in the public record for this rulemaking and we will fully consider them in preparation of our final determination.

**DATES:** We will accept comments received on or before January 20, 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: RIN 1018–AV23; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all comments on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the ''Public Comments'' section below for more information).

**FOR FURTHER INFORMATION CONTACT:** Jim Bartel, Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Suite 101, Carlsbad, CA 92011; telephone 760/431–9440; facsimile 760/431–5901. 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 will accept written comments and information during this reopened comment period on our proposed revision to critical habitat for the Quino checkerspot butterfly published in the **Federal Register** on January 17, 2008 (73 FR 3328), as revised by this notice, the DEA of the proposed revised designation, and the amended required determinations provided in this document. We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

(1) The reasons why we should or should not designate habitat as critical habitat under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether there are threats to the subspecies from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation such that the designation of critical habitat is not prudent.

(2) Specific information on:

- The amount and distribution of Quino checkerspot butterfly habitat,
- Locations within the geographical area occupied at the time of listing that contain features essential to the conservation of the subspecies that we should include in the designation and why, and
- Locations not within the geographical area occupied at the time of listing that are essential to the conservation of the subspecies and why.

(3) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed revised critical habitat.

(4) Probable economic, national security, or other impacts of designating particular areas as critical habitat. We are particularly interested in any impacts on small entities, and the benefits of including or excluding areas that exhibit these impacts.

(5) The potential exclusion of non-Federal lands covered by the City of Chula Vista Subarea Plan (under the San Diego County Multiple Species Conservation Program) from final revised critical habitat, and whether such exclusion is appropriate and why.

(6) The potential exclusion of non-Federal lands covered by the Western Riverside County Multiple Species Habitat Conservation Plan (MSHCP) from final revised critical habitat, and whether such exclusion is appropriate and why. (Please note that although Tribal lands and Metropolitan Water District of Southern California (MWDSC) lands are located within the geographic boundary/area covered by the MSHCP, they are not a part of the MSHCP).

(7) Inclusion of all proposed MWDSC lands in the final critical habitat designation, and whether inclusion is appropriate and why. Through a mapping error we included MWDSC lands in Figure 2 of the proposed revised rule (73 FR 3328, January 17, 2008) that depicted areas considered for exclusion from critical habitat. Our intent was not to group these non-Federal lands with other lands considered for exclusion. We did not specify in the proposed revised rule that MWDSC would not be excluded from the final critical habitat designation. As noted in question 6 above, MWDSC is not a signatory to the MSHCP even though their non-Federal lands occur within the MSHCP plan area.

(8) Whether we should include or exclude Tribal lands of the Cahuilla Band of Mission Indians (preferred name ''Cahuilla Band of Indians'') and Ramona Band of Cahuilla Mission Indians of California (preferred name ''Ramona Band of Cahuilla Indians'') in Riverside County, and Campo Band of Diegueno Mission Indians (preferred name ''Campo Band of Kumeyaay Indians'') in San Diego County from final revised critical habitat and why. Economic impacts to the Cahuilla Band of Indians and the Campo Band of Kumeyaay Indians are analyzed in this DEA. During the first public comment period for proposed revisions to critical habitat that opened January 17, 2008, and closed March 17, 2008, we received a letter from the Ramona Band of Cahuilla Indians informing us that land proposed for critical habitat included tribally-owned fee lands of the Ramona Band of Cahuilla Indians. These tribally owned fee lands were classified as privately owned in Table 2 of the proposed revisions to critical habitat, therefore economic impacts to the Ramona Band of Cahuilla Indians are not analyzed in the DEA. However,

economic impacts to the Ramona Band of Cahuilla Indians will be analyzed in the final EA, and will be taken into consideration for possible exclusion from the final revised critical habitat.

(9) Whether there are areas we previously designated, but did not include in our proposed revision to critical habitat, that should be designated as critical habitat.

(10) Information on the extent to which any Federal, State, and local environmental protection measures we reference in the DEA were adopted largely as a result of the subspecies' listing.

(11) Information on whether the DEA identifies all Federal, State, and local costs and benefits attributable to the proposed revision of critical habitat, and information on any costs or benefits that we may have overlooked.

(12) Information on whether the DEA makes appropriate assumptions regarding current practices and any regulatory changes that likely may occur if we designate revised critical habitat.

(13) Information on whether the DEA correctly assesses the effect on regional costs associated with any land use controls that may result from the revised designation of critical habitat.

(14) Information on areas that the revised critical habitat designation could potentially impact to a disproportionate degree.

(15) Information on whether the DEA identifies all costs that could result from the proposed revised designation.

(16) Information on any quantifiable economic benefits of the revised designation.

(17) Whether the benefits of excluding any particular area outweigh the benefits of including that area under section 4(b)(2) of the Act.

(18) Economic data on the incremental costs of designating a particular area as revised critical habitat.

(19) Whether we could improve or modify our approach to designating critical habitat to provide for greater public participation and understanding, or assist us in accommodating public concerns and comments.

(20) Any foreseeable impacts on energy supplies, distribution, and use resulting from the proposed designation and, in particular, any impacts on electricity production, and the benefits of including or excluding areas that exhibit these impacts.

If you submitted comments or information on the proposed revised rule (73 FR 3328) during the initial comment period from January 17, 2008, to March 17, 2008, please do not resubmit them. These comments are included in the public record for this rulemaking and we will fully consider them in the preparation of our final determination. Our final determination concerning revised critical habitat will take into consideration all written comments and any additional information we receive during both comment periods. On the basis of public comments, we may, during the development of our final determination, find that areas within those proposed do not meet the definition of critical habitat, that some modifications to the described boundaries are appropriate, or that areas are appropriate for exclusion under section 4(b)(2) of the Act.

You may submit your comments and materials concerning the proposed revised rule or DEA 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 revised 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, Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

You may obtain copies of the original proposed revision of critical habitat and the DEA on the Internet at *http://www.regulations.gov*, or by mail from the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

## Background

For more information on previous Federal actions concerning the Quino checkerspot butterfly, refer to the proposed revised designation of critical habitat published in the **Federal Register** on January 17, 2008 (73 FR 3328). In March 2005, the Homebuilders Association of Northern California, *et al.*, filed suit against us challenging the merits of the final critical habitat designations for several species, including the Quino checkerspot butterfly. In March 2006, a settlement was reached that required us to re-evaluate five final critical habitat designations, including critical habitat designated for the Quino checkerspot butterfly. The settlement (as modified by subsequent court-approved amendments) stipulated that any proposed revisions to the Quino checkerspot butterfly critical habitat designation would be submitted for publication to the **Federal Register** on or before January 8, 2008, and the final critical habitat determination would be submitted on or before June 6, 2009.

Section 3 of the Act defines critical habitat as the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species and that may require special management considerations or protection, and specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting areas designated as critical habitat must consult with us on the effects of their proposed actions, under section 7(a)(2) of the Act.

Under section 4(b)(2) of the Act, we may exclude an area from critical habitat if we determine that the benefits of such exclusion outweigh the benefits of including that particular area as critical habitat, unless failure to designate that specific area as critical habitat will result in the extinction of the species. In making a decision to exclude areas, we consider the economic impact, impact on national security, or any other relevant impact of the designation.

## Draft Economic Analysis

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific and commercial data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. We have prepared a draft economic analysis of our January 17, 2008 (73 FR 3328), proposed revised rule to designate critical habitat for the Quino checkerspot butterfly.

The intent of the DEA is to identify and analyze the potential economic impacts associated with the proposed

revised critical habitat designation for the Quino checkerspot butterfly. Additionally, the economic analysis looks retrospectively at costs incurred since the January 16, 1997 (62 FR 2313), listing of the Quino checkerspot butterfly as endangered. The DEA quantifies the economic impacts of all potential conservation efforts for the Quino checkerspot butterfly; some of these costs will likely be incurred regardless of whether we designate revised critical habitat. The economic impact of the proposed revised critical habitat designation is analyzed by comparing scenarios both ''with critical habitat'' and ''without critical habitat.'' The ''without critical habitat'' scenario represents the baseline for the analysis, considering protections already in place for the species (for example, under the Federal listing and other Federal, State, and local regulations). The baseline, therefore, represents the costs incurred regardless of whether critical habitat is designated. The ''with critical habitat'' scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts are those not expected to occur absent the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat above and beyond the baseline costs; these are the costs we may consider in the final designation of critical habitat. The analysis looks retrospectively at baseline impacts incurred since the species was listed, and forecasts both baseline and incremental impacts likely to occur if we finalize the proposed revised critical habitat.

The current DEA estimates the foreseeable economic impacts of the proposed revised critical habitat designation. The economic analysis identifies potential incremental costs as a result of the proposed revised critical habitat designation; these are those costs attributed to critical habitat over and above those baseline costs coextensive with listing. The DEA describes economic impacts of Quino checkerspot butterfly conservation efforts associated with the following categories of activity: (1) Residential development; (2) Tribal activities; (3) habitat management; and (4) non-residential development.

Baseline economic impacts are those impacts that result from listing and other conservation efforts for the Quino checkerspot butterfly. Conservation efforts related to development activities constitute the majority of total baseline costs (approximately 97 percent) in areas of proposed revised critical habitat. Impacts to Tribal activities and habitat management compose the remaining 3 percent of impacts. Total future baseline impacts are estimated to be $967 to $973 million ($52.08 to $52.48 million annualized) in present value terms using a 3 percent discount rate, and $686 to $691 million ($55.34 to $55.74 million annualized) in present value terms using a 7 percent discount rate over the next 23 years (2008 to 2030) in areas proposed as revised critical habitat.

Almost all incremental impacts attributed to the proposed revised critical habitat designation are expected to be related to development (approximately 61 to 86 percent) and Tribal activities (approximately 38 to 14 percent). The DEA estimates total potential incremental economic impacts in areas proposed as revised critical habitat over the next 23 years (2008 to 2030) to be $18.4 million to $70.7 million ($1.09 million to $4.17 million annualized) in present value terms using a 3 percent discount rate, and $13.1 million to $50.4 million ($1.09 to $4.18 million annualized) in present value terms using a 7 percent discount rate.

The DEA considers both economic efficiency and distributional effects. In the case of habitat conservation, efficiency effects generally reflect the ''opportunity costs'' associated with the commitment of resources to comply with habitat protection measures (e.g., lost economic opportunities associated with restrictions on land use). The DEA also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on government agencies, private businesses, and individuals. The DEA measures lost economic efficiency associated with residential and commercial development and public projects and activities, such as economic impacts on water management and transportation projects, Federal lands, small entities, and the energy industry. Decision-makers can use this information to assess whether the effects of the revised designation might unduly burden a particular group or economic sector.

As we stated earlier, we are soliciting data and comments from the public on the DEA, as well as on all aspects of the proposed revised critical habitat rule and our amended required determinations. The final revised rule may differ from the proposed revised rule based on new information we receive during the public comment periods. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as critical habitat, provided the exclusion will not result in the extinction of the subspecies.

*Additional Areas Currently Considered for Exclusion Under Section 4(b)(2) of the Act*

Tribal Lands

In the proposed revised critical habitat designation published on January 17, 2008 (73 FR 3328), we identified Tribal lands in Units 6 and 9 as meeting the definition of critical habitat for the Quino checkerspot butterfly. At that time, we indicated the inclusion of Tribal lands in these units would serve to ensure the persistence of Core Occurrence Complexes in those units and would contribute to the conservation and recovery of the subspecies overall. However, we also indicated that we recognized the importance of government-to-government relationships with Tribes, and we solicited public comment on the appropriateness of the inclusion or the exclusion of those lands in the final designation of critical habitat. With the availability of the DEA, we are now considering exclusion of approximately 1,203 acres (ac) (487 hectares (ha)) of Tribal lands of the Cahuilla Band of Indians within proposed Unit 6, and 3,156 ac (1277 ha) of Tribal lands of the Campo Band of Kumeyaay Indians within proposed Unit 9. As discussed in section 6 of the DEA, socioeconomic data demonstrate a high impact to Tribal economies and economic vulnerability of the Tribes. Using a 3 percent discount rate, approximately $7.07 to $9.81 million in incremental impacts are anticipated to be incurred by the Campo Band of Kumeyaay Indians over the next 23 years (2008 to 2030); using a 7 percent discount rate, those impacts are approximately $5.04 to $6.99 million. The cost of conservation efforts for the butterfly and its habitat on the Cahuilla Band of Indians' Tribal lands are not estimated because their development plans do not yet specify implementation programs and dates for specific projects, thus no project modifications can be forecast. There will likely be costs, but these cannot be forecast at this time. Although projections provided by the Southern California Association of Governments Western Riverside Council of Governments for purposes of the DEA estimated no residential development impacts to the Cahuilla Band of Indians, Tribal members indicated to the Service at meetings and during telephone conversations that they have economic

plans similar to those of the Campo Band of Kumeyaay Indians, and the DEA indicated similar economic vulnerability for the Cahuilla Band of Indians as well.

Department of Defense Lands

Based on comments submitted during the initial public comment period from January 17, 2008, to March 17, 2008, we are also considering exclusion of the San Diego Air Force Space Surveillance Station (Surveillance Station; 109 ac (44 ha) within the 36,726–ac (14,862–ha) Unit 8) and the Navy-owned La Posta Mountain Warfare Training Facility (La Posta Facility; 1,083 ac (438 ha) within the 8,393–ac (3,397–ha) Unit 9) from critical habitat. Under section 4(a)(3)(B)(i) of the Act, the Secretary is prohibited from designating as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an Integrated Natural Resources Management Plan (INRMP) prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation. However, the Surveillance Station and the La Posta Facility do not currently have IMRMPs that meet these requirements. Therefore, we are considering excluding these areas under section 4(b)(2) of the Act for reasons of national security, as explained below.

The Surveillance Station is a U.S. Air Force (Air Force) installation used for space surveillance. The Air Force's mission of the Surveillance Station is to detect, track, and identify man-made objects in near-earth and deep space orbits as part of a series of receiving stations equipped with linear antenna arrays. Activities on the grounds of the Surveillance Station consist of occasional equipment inspection, maintenance, and mowing of nonnative plants to reduce the risk of fire damage. The need for additional consultations and possible conservation restrictions would limit the amount of natural infrastructure available for ongoing and future mission execution and training needed for national security. Short-notice, mission-critical activities not previously analyzed may be delayed in order to conduct section 7 consultation.

The Service already consulted with the Air Force regarding all current and foreseen activities and issued a biological opinion concluding that the Air Force is not likely to destroy or adversely modify the existing critical habitat, assuming identified conservation measures are implemented. An Integrated Natural Resources Management Plan (INRMP) is currently being prepared in coordination with the Service and the California Department of Fish and Game that will ensure conservation of the subspecies. The Air Force must implement the INRMP in accordance with the Sikes Act (16 U.S.C 670a), and must comply with the Sikes Act to provide for the conservation and rehabilitation of natural resources on military installations. Because the INRMP is not yet final and approved by the Secretary, the statutory prohibition on designation of these lands as critical habitat is inapplicable. However, the lands may be excluded from designation as critical habitat if the Secretary determines that the benefits of exclusion, including the benefits with respect to national security, outweigh the benefits of such designation.

The Navy-owned La Posta Facility provides training for Navy Special Operations Forces (SOF) to deploy to the U.S. Pacific and Central Commands in support of missions in the global war on terrorism. The La Posta Facility contains areas for critical, mission-essential training for these SOF troops prior to deployment into hostile areas of the world. With the closure of several contract sites previously conducting U.S. Navy Sea, Air and Land Forces (SEAL) Unit Level Training, the La Posta Facility is now the sole training site for Naval Special Warfare (NSW) commands and military support functions in the San Diego region for developing small, well-trained, highly mobile, and independent operational units. The La Posta Facility is also the only semi-remote, NSW-controlled complex supporting Assault and Tactical Weapons Training, and the only cold weather/mountain warfare site that provides training in unconventional warfare and special tactical intelligence in the San Diego region.

Delays in construction schedules due to additional environmental regulations would disrupt mission-critical training and the ability to acquire and perform special warfare skills. The SEAL training schedule is extremely concentrated and does not allow for any shifting of training blocks. By Department of Defense training policy, SEALs require a remote range built specifically for the skill set required, close to home, and without distractions. Attempts to duplicate this training at sites outside the San Diego area, either by contract forces or other military owned and operated sites, would not provide the qualified personnel needed for the NSW commitment to the global war on terrorism.

Aside from these additional areas now being considered for exclusion from the final revised critical habitat designation, the remainder of the exclusion discussion presented in the proposed rule remains unchanged.

**Changes to Proposed Revised Critical Habitat**

In this document we are proposing revisions to the area of proposed revised critical habitat in Unit 2 as described in the January 17, 2008, proposed rule (73 FR 3328). This revision involves removal of approximately 27 acres of proposed revised critical habitat from two areas along the shoreline of Lake Skinner in Riverside County. Based on new GIS database information, we determined these two areas do not contain the features essential to the conservation of the Quino checkerspot butterfly because they are primarily wetlands. Removal of these areas from proposed revised critical habitat does not alter the textual description of Unit 2 as described in the January 17, 2008, proposed rule (73 FR 3328). A revised legal description and revised map for proposed critical habitat Unit 2 are included with this notice.

**Required Determinations—Amended**

In our proposed rule dated January 17, 2008 (73 FR 3328), we indicated that we would defer our determination of compliance with several statutes and Executive Orders until the information concerning potential economic impacts of the designation and potential effects on landowners and stakeholders became available in the DEA. We have now made use of the DEA to make these determinations. In this document, we affirm the information in our proposed rule concerning Executive Order (E.O.) 13132, E.O. 12988, the Paperwork Reduction Act, the National Environmental Policy Act, and the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951). However, based on the DEA data, we revised our required determinations concerning E.O. 12866 and the Regulatory Flexibility Act, E.O. 13211 (Energy, Supply, Distribution, and Use), the Unfunded Mandates Reform Act, and E.O. 12630 (Takings).

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

The Office of Management and Budget (OMB) has determined that this proposed rule is not significant and has not reviewed this proposed 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 (5 U.S.C. 601 et seq.)*

Under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 802(2)), 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). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. Based on our DEA of the proposed revised designation, we provide our analysis for determining whether the proposed rule would result in a significant economic impact on a substantial number of small entities. Based on comments we receive, we may revise this determination as part of a final rulemaking.

According to the Small Business Administration (SBA), small entities include small organizations, such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term significant economic impact is meant to apply to a typical small business firm's business operations.

To determine if the proposed revised designation of critical habitat for the Quino checkerspot butterfly would affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities, such as residential and commercial development. In order to determine whether it is appropriate for our agency to certify that this rule would not have a significant economic impact on a substantial number of small entities, we considered each industry or category individually. In estimate the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement. Critical habitat designation will not affect activities that do not have any Federal involvement; designation of critical habitat affects activities conducted, funded, permitted, or authorized by Federal agencies.

Designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. In areas where the species is present, Federal agencies already are required to consult with us under section 7 of the Act on activities they fund, permit, or implement that may affect the Quino checkerspot butterfly. Federal agencies also must consult with us if their activities may affect critical habitat.

In the DEA of the proposed revision to critical habitat, we evaluate the potential economic effects on small business entities resulting from implementation of conservation actions related to the proposed revision to critical habitat for the Quino checkerspot butterfly. The DEA identifies the estimated incremental impacts associated with the proposed rulemaking as described in sections 2 through 7 of the DEA, and evaluates the potential for economic impacts related to activity categories including residential development, Tribal activities, habitat management, and non-residential development. The DEA concludes that the incremental impacts resulting from this rulemaking that may be borne by small businesses will be associated only with residential development. Incremental impacts are either not expected for the other types of activities considered or, if expected, will not be borne by small entities.

As discussed in Appendix A of the DEA, the largest impacts of the proposed rule on small businesses would result from section 7 consultations with the Service on development projects not subject to an existing or proposed habitat conservation plan. In the 23-year time frame for the analysis, 14 developers may experience significant impacts. Furthermore, approximately 6 developers per year will experience impacts that likely represent less than 1 percent of the value of a new home. In the high estimate scenario, 5 projects in Unit 9 and 9 projects in Unit 10 are likely to require consultation with the Service as a result of the proposed rule. Conservatively assuming that each project is undertaken by a separate entity, as many as 14 developers are likely to be affected over the 23-year time frame of the analysis. At the high-end, the one-time costs resulting from the consultation process, including administrative time spent by the businesses, compensation costs, and the value of time delays, total approximately $16.1 million for the projects in Unit 9 and $26.8 million for the projects in Unit 10. Additionally, over the 23-year time frame, a high-end estimate of 131 projects (approximately 6 projects per year) will experience additional administrative costs as a result of the consultation. These costs result from the need to address adverse modification in a consultation that would occur even in the absence of critical habitat. These additional administrative costs are estimated to be $1,000 per project. No information regarding the probability that these businesses are small entities is available. However, assuming they are small businesses, the number of small entities significantly affected is not likely to be substantial.

In summary, we considered whether the proposed rule would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that, if promulgated, the proposed revision to critical habitat would not have a significant economic impact on a substantial number of small entities. Therefore, an initial regulatory flexibility analysis is not required.

*Executive Order 13211—Energy Supply, Distribution, and Use*

On May 18, 2001, the President issued E.O. 13211 on 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 proposed revision to critical habitat for the Quino checkerspot butterfly is not considered a significant regulatory action under E.O. 12866. OMB's guidance for implementing this Executive Order outlines nine outcomes that may constitute ''a significant adverse effect'' when compared to no regulatory action. As discussed in Appendix A, the DEA finds that none of these criteria are relevant to this analysis. The DEA identified Calpine Corporation, San Diego Gas and Electric, and Southern California Edison as entities involved in the production of energy; however, designation of critical habitat is not expected to lead to any adverse outcomes (such as a reduction in electricity production or an increase in the cost of energy production or distribution), and a Statement of Energy Effects is not required.

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

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501), the Service makes the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or Tribal governments,'' with two exceptions. It excludes ''a condition of federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding'' and the State, local, or Tribal governments ''lack authority'' to adjust accordingly. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program.''

Critical habitat designation does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. Designation of critical habitat may indirectly impact non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat. However, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above on to State governments.

(b) We do not believe that this rule would significantly or uniquely affect small governments because it would not produce a Federal mandate of $100 million or greater in any year; that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. The DEA concludes incremental impacts may occur due to project modifications that may need to be made for development and Tribal activities; however, these are not expected to affect small governments. Incremental impacts stemming from various species conservation and development control are expected to be borne by the Campo Band of Kumeyaay Indians, the Ramona Band of Cahuilla Indians, and the Cahuilla Band of Indians, which are not considered small governments. Consequently, we do not believe that the revised critical habitat designation would significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required.

*Executive Order 12630—Takings*

In accordance with E.O. 12630 (''Government Actions and Interference with Constitutionally Protected Private Property Rights''), we have analyzed the potential takings implications of proposing revised critical habitat for the Quino checkerspot butterfly in a takings implications assessment. Our takings implications assessment concludes that the proposed revision to critical habitat for the Quino checkerspot butterfly does not pose significant takings implications.

**References Cited**

A complete list of all references we cited in the proposed rule and in this document is available on the Internet at *http://www.regulations.gov* or by contacting the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** section).

**Authors**

The primary authors of this rulemaking are the staff members of the Carlsbad Fish and Wildlife Office.

**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 further amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as proposed to be amended at 73 FR 3328, January 17, 2008, as follows:

## 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. Critical habitat for the Quino checkerspot butterfly (*Euphydryas editha quino*) in § 17.95(i), which was proposed to be revised on January 17, 2008, 73 FR 3328, is proposed to be amended by revising paragraph 7(i), and map of Units 1 and 2 (Warm Springs Unit and Skinner/Johnson Unit).

**§ 17.95 Critical habitat—fish and wildlife.**

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(i) *Insects.*

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Quino Checkerspot Butterfly (*Euphydryas editha quino*)

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(7) Unit 2, for Quino checkerspot butterfly, Skinner/Johnson Unit, Riverside County, California. From USGS 1:24,000 quadrangles Murrieta, Bachelor Mountain, Winchester, Sage, and Hemet.

(i) Unit 2, for Quino checkerspot butterfly, Skinner/Johnson Unit, Riverside County, California. From USGS 1:24,000 quadrangles Murrieta,

Bachelor Mountain, Winchester, Sage, and Hemet. Land bounded by the following Universal Transverse Mercator (UTM) North American Datum of 1927 (NAD27) coordinates (E, N): 499998, 3720683; 500090, 3720605; 500299, 3720612; 500398, 3720607; 500579, 3720598; 500586, 3720598; 500634, 3720490; 500669, 3720410; 500666, 3720385; 500621, 3720047; 500624, 3719960; 500626, 3719917; 500628, 3719893; 500709, 3719672; 500767, 3719516; 500399, 3719573; 500318, 3719585; 500313, 3719586; 500316, 3719555; 500351, 3719141; 500362, 3719006; 500367, 3718993; 500460, 3718706; 500676, 3718678; 500697, 3718685; 500717, 3718691; 500841, 3718731; 500841, 3718731; 500851, 3718734; 500863, 3718678; 500886, 3718565; 500977, 3718127; 500979, 3718098; 500993, 3717945; 500998, 3717897; 500976, 3717895; 500945, 3717893; 500755, 3717880; 500647, 3717873; 500501, 3717863; 500501, 3717863; 500483, 3717862; 500483, 3717862; 500452, 3717860; 500350, 3717853; 500302, 3717849; 500279, 3717848; 500304, 3717761; 500401, 3717425; 500428, 3717332; 500428, 3717332; 500435, 3717307; 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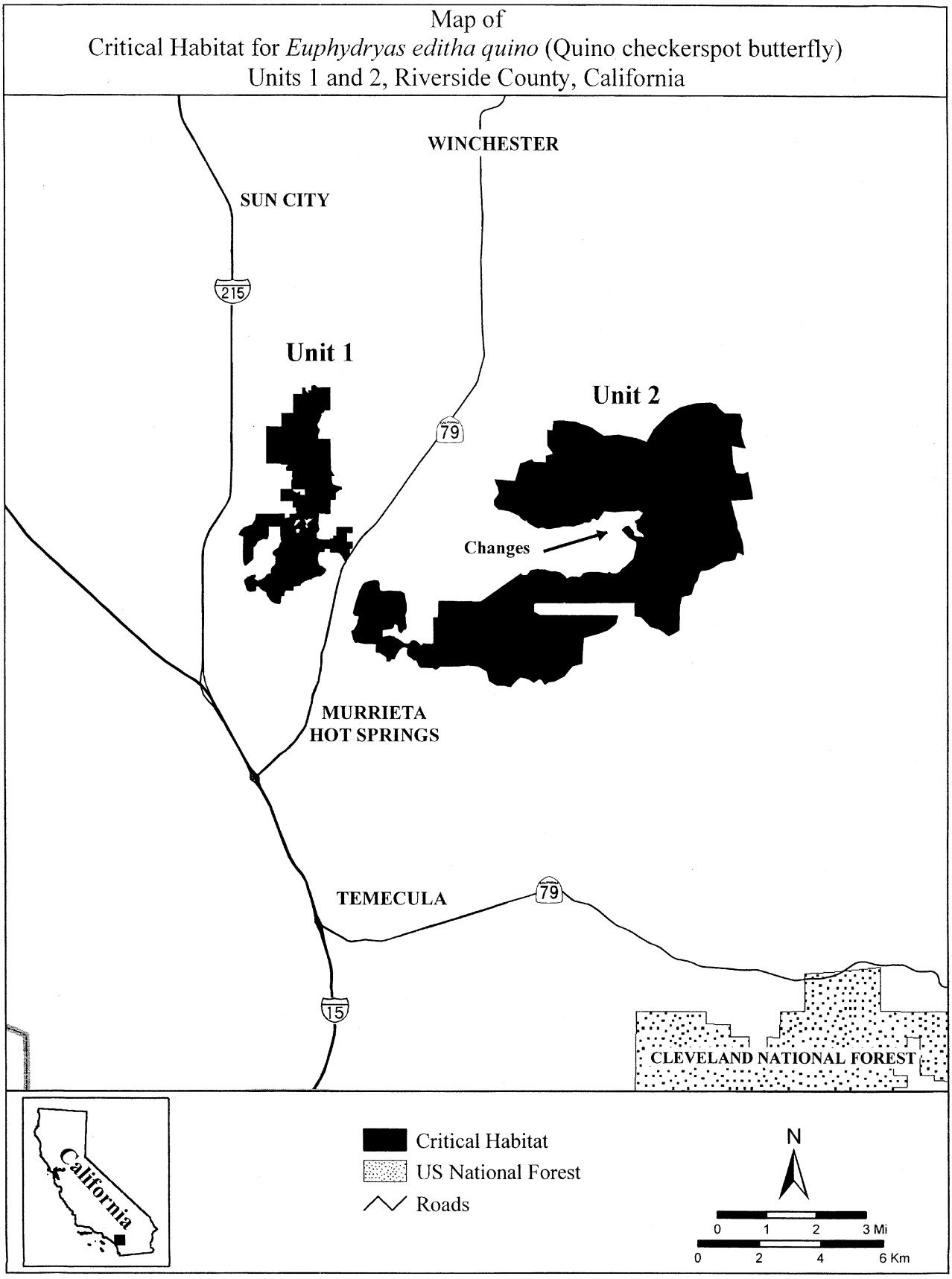
BILLING CODE 4310–55–P


Map of
Critical Habitat for *Euphydryas editha quino* (Quino checkerspot butterfly)
Units 1 and 2, Riverside County, California
WINCHESTER
SUN CITY
215
Unit 1
Unit 2
79
Changes
MURRIETA
HOT SPRINGS
TEMECULA
79
15
CLEVELAND NATIONAL FOREST
California
Critical Habitat
US National Forest
Roads
N
0 1 2 3 Mi
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Dated: December 8, 2008.

**Lyle Laverty,**

*Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. E8–29671 Filed 12–18–08; 8:45 am]

**BILLING CODE 4310–55–C**

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 216

**[Docket No. 0808041027–81574–01]**

**RIN 0648–AX08**

## Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Space Vehicle and Test Flight Activities from Vandenberg Air Force Base (VAFB), California

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

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

**SUMMARY:** NMFS has received a request from the U.S. Air Force (USAF) for authorization for the take of marine mammals, by harassment, incidental to launching space launch vehicles, intercontinental ballistic and small missiles, and aircraft and helicopter operations at VAFB. By this document, NMFS is proposing regulations to govern that take. In order to issue a Letter of Authorization (LOA) and issue final regulations governing the take, NMFS must determine that the taking will have a negligible impact on the species or stocks and will not have an unmitigable adverse impact on the availability of such species or stock for taking for subsistence uses. NMFS must also prescribe the means of effecting the least practicable adverse impact on such species or stock and their habitats.

**DATES:** Comments and information must be received no later than January 5, 2009.

**ADDRESSES:** You may submit comments, identified by 0648–AX08, by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal: *http://www.regulations.gov*.
- Hand delivery or mailing of paper, disk, or CD-ROM comments should be addressed to P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225.

*Instructions:* All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

A copy of the application containing a list of references used in this document and the Draft Environmental Assessment (EA) may be obtained by writing to the above address, by telephoning the contact listed under **FOR FURTHER INFORMATION CONTACT**, or on the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications*. Documents cited in this proposed rule may also be viewed, by appointment, during regular business hours at the above address. To help NMFS process and review comments more efficiently, please use only one method to submit comments.

**FOR FURTHER INFORMATION CONTACT:** Candace Nachman, Office of Protected Resources, NMFS, (301) 713–2289, ext. 156.

**SUPPLEMENTARY INFORMATION:**

### Background

Sections 101(a)(5)(A) and (D) of the Marine Mammal Protection Act (MMPA; 16 U.S.C. 1361 *et seq*.) direct the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings may be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for certain subsistence uses, and that the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such taking are set forth.

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as:

> an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

The National Defense Authorization Act of 2004 (NDAA) (Public Law 108–136) removed the ''small numbers'' and ''specified geographical region'' limitations and amended the definition of ''harassment'' as it applies to a ''military readiness activity'' to read as follows (Section 3(18)(B) of the MMPA):

> (i) any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A Harassment]; or (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B Harassment].

### Summary of Request

On March 21, 2008, NMFS received an application from the USAF requesting authorization for the take of four species of marine mammals incidental to space vehicle and test flight activities from VAFB, which would impact pinnipeds on VAFB and the Northern Channel Islands (NCI). NMFS proposes regulations to govern these activities, to be effective from February 7, 2009, through February 6, 2014. These regulations, if implemented, would allow NMFS to issue annual LOAs to the USAF. The current regulations and LOA expire on February 6, 2009. These training activities are classified as military readiness activities. Marine mammals may be exposed to continuous noise due mostly to combustion effects of aircraft and launch vehicles and impulsive noise due to sonic boom effects. The USAF requests authorization to take four pinniped species by Level B Harassment.

### Description of the Specified Activity

VAFB (see Figure 1 in the USAF application) is headquarters to the 30th Space Wing (SW), the Air Force Space Command unit that operates VAFB and the Western Range. VAFB operates as a missile test base and aerospace center, supporting west coast space launch activities for the USAF, Department of Defense, National Aeronautics and Space Administration, and commercial contractors. VAFB is the main west coast launch facility for placing commercial, government, and military

satellites into polar orbit on expendable (unmanned) launch vehicles, and for testing and evaluation of intercontinental ballistic missiles (ICBM) and sub-orbital target and interceptor missiles. In addition to space vehicle and missile launch activities at VAFB, there are helicopter and aircraft operations for purposes such as search-and-rescue, delivery of space vehicle components, launch mission support, and security reconnaissance. The USAF expects to launch a maximum of 30 rockets and missiles per year from VAFB.

There are currently six active space launch vehicle (SLV) facilities at VAFB (VAFB, 2007), used to launch satellites into polar orbit. These facilities support the launch programs for space vehicles including the Atlas V, Delta II, Delta IV, Falcon, Minotaur, and Taurus. The Falcon has yet to launch from VAFB and is scheduled for its first launch in August, 2009 (30 SW, 2008a). Details on the vehicle types and the sound exposure levels (SELs) produced by each missile or rocket are described in the following sections.

**Atlas V**

The Atlas V vehicle is launched from Space Launch Complex (SLC)-3E on south VAFB, the site of the previous Atlas IIAS program. This SLC is approximately 9.9 km (6.2 mi) from the main haul-out area on VAFB, known as Rocky Point (see Figure 2 in the USAF application), which encompasses several smaller haul-outs. SLC–3E is approximately 11.1 km (6.9 mi) from the closest north VAFB haul-out, known as the Spur Road haul-out site (Figure 3 in the application) and 13.5 km (8.4 mi) from the next closest haul-out, the nearby Purisima Point haul-out site (Figure 3 in the application).

The Atlas V is a medium lift vehicle that can be flown in two series of configurations - the Atlas V400 series and the Atlas V500 series. Both series use the Standard Booster as the single body booster. The V400 series accommodates a 4.2 m (13.8 ft) payload fairing and as many as three solid rocket boosters. The V500 series accommodates a 5.4 m (17.7 ft) fairing and as many as five solid rocket boosters. The Atlas V400 series will lift as much as 7,800 kg (17,196 lbs) into geosynchronous transfer orbit or as much as 13,620 kg (30,027 lbs) into low earth orbit. The Atlas V500 series will lift as much as 8,700 kg (19,180 lbs) into geosynchronous transfer orbit or as much as 21,050 kg (46,407 lbs) into low earth orbit. The Atlas V consists of a common booster core (CBC; 3.8 m (12.5 ft) in diameter and 32.5 m (106.6 ft) high) powered by an RD180 engine that burns a liquid propellant fuel consisting of liquid oxygen and RP1 fuel (kerosene). The RD180 engine provides 840,000 lbs of thrust on liftoff. There is a Centaur upper stage (3.1 m (10.2 ft) in diameter and 12.7 m (41.7 ft) high) powered by a liquid oxygen and liquid hydrogen fuel.

The first Atlas V launch occurred on March 13, 2008. Acoustic monitoring was conducted for this launch at VAFB. However, an equipment malfunction during the launch prevented the proper functioning of the digital audio tape (DAT) recorder during the launch. Since acoustic data was only gathered with the sound level meter (SLM), not all metrics were obtained for that launch. The Atlas V launch had an A-weighted SEL (ASEL) of 96.5 dB (MSRS, 2008c). The Atlas V was predicted to create a sonic boom of as much as 7.2 pounds per square foot (psf), impacting the NCI including San Miguel Island (SMI; see Figure 4 in the USAF application). The size of the actual sonic boom would depend on meteorological conditions, which can vary by day and season and with the trajectory of the vehicle. A sonic boom greater than 1 psf was predicted for the initial Atlas V launch, thus acoustic monitoring was performed on SMI. Measurements conducted at Cardwell Point indicated a sonic boom of 1.24 psf with a rise time of 2.4 milliseconds (ms).

**Delta II**

The Delta II is launched from SLC–2 on north VAFB (see Figure 3 in the USAF application) approximately 2 km (1.2 mi) from the Spur Road harbor seal haul-out site and 2.3 km (1.4 mi) from the Purisima Point haul-out site. The Delta II is a medium-sized launch vehicle approximately 38 m (124.7 ft) tall. The Delta II uses a Rocketdyne RS–27A main liquid propellant engine and additional solid rocket strap-on graphite epoxy motors (GEMs) during liftoff. A total of three, four, or nine GEMs can be attached for added boost during liftoff. When nine GEMs are used, six are ignited at liftoff and three are lit once the rocket is airborne. When three or four GEMs are used they are all ignited at liftoff. The number of GEMs attached to each vehicle will determine the amount of sound power produced by the vehicle.

Eight Delta II launches have been acoustically quantified near the Spur Road harbor seal haul-out site. The Delta II is the second loudest of the SLVs at the Spur Road haul-out site, the Taurus vehicle being the loudest (see Table 2 in the application). The Delta II has an unweighted SEL measurements (based on the six initial acoustically-measured launches) ranging from 126.5 to 128.8 dB and averaging 127.4 dB, as measured by the DAT recorder. The C-weighted SEL (CSEL) ranged from 124.3 to 126.7 dB with an average of 125.4 dB (DAT). The ASEL measurements from both a SLM and the DAT were similar and ranged from 111.8 to 118.2 dB and had an average of 114.5 dB (DAT). The maximum fast A-weighted sound level (Lmax) values ranged from 104.2 to 112.5 dB and averaged 109.5 dB.

Sonic booms have been measured on SMI from three Delta II launches: the EO–1, Iridium MS–12, and AURA (November 2000, February 2002, and July 2004, respectively). Both the Iridium MS–12 and AURA had two small sonic booms impact the Point Bennett area of SMI. Iridium MS–12 had peak overpressures of 0.47 and 0.64 psf and rise times of 18 and 91 ms, while AURA had peak overpressures of 0.79 and 1.34 psf and rise times of 9.5 and 10.5 ms. The Delta II EO 1 had a single sonic boom with a peak overpressure of 0.4 psf and rise time of .041 ms.

**Delta IV**

The Delta IV is launched from SLC–6, which is 2.8 km (1.7 mi) north of the main harbor seal haul-out site at South Rocky Point (see Figure 2 in the USAF application). The Delta IV family of launch vehicles consists of five launch vehicle configurations utilizing a CBC first stage (liquid fueled) and zero, two, or four strap on solid rocket GEMs. The Delta IV comes in four medium lift configurations and one heavy lift configuration consisting of multiple CBCs (Table 4 in the application). The Delta IV can carry payloads from 4,210 to 13,130 kg (9,281 to 28,947 lbs) into geosynchronous transfer orbit.

Previously the Athena launch vehicle was launched from SLC–6. The Athena was a much smaller vehicle than the Delta IV but was one of the top three loudest vehicles (Table 1 in the application) at the haul-out, given its close proximity. Because the Delta IV was predicted to be the loudest vehicle at the south VAFB harbor seal haul-out site, it was required that acoustic and biological monitoring be conducted for its first three launches. In addition, harbor seal hearing tests were required before and after each of the first three launches.

The first two Delta IV launches occurred in 2006. Although the Delta IV is larger than the Athena, it was found after its initial launch (NROL–22, June 2006) that the Delta IV had similar noise levels to the Athena vehicle. As measured by the DAT, the unweighted SEL was 127.7 dB, while the CSEL was

122.9 dB, and the ASEL was 106.2 dB (Fillmore *et al.*, 2006). The Lmax was found to be 103.1 dB (Fillmore *et al.*, 2006).

During its second launch (DMSP–17, November 2006), the DAT recorder was located at the VAFB Boathouse (near where the harbor seal hearing tests were performed), rather than at the more usual sound monitoring location of Oil Well Canyon, where an SLM was placed. The DAT measured the unweighted SEL at 131.3 dB, the CSEL at 127.5 dB, and the ASEL at 111.3 dB. The Lmax was measured at 102.6 dB (Thorson *et al.*, 2007).

The Delta IV was predicted to create maximum sonic booms of as much as 7.2 psf for the largest of the medium configurations and 8 to 9 psf for the heavy configuration (Table 4 in the application). The size of the actual sonic boom would depend on meteorological conditions, which can vary by day and season, and with the trajectory of the vehicle. A sonic boom greater than one psf was predicted for the initial Delta IV launch, thus acoustic monitoring was performed on SMI. An equipment malfunction resulted in uncertainty regarding the amplitude of the sonic boom that was recorded for the launch, and the peak overpressure from the boom could have ranged from 0.77 psf to as much as 3.36 psf. The rise time was able to be determined and was measured at 8.7 ms. Because a sonic boom was not predicted for the second Delta IV launch, monitoring was not performed on SMI.

Capture attempts of harbor seals for the initial Delta IV launch were unsuccessful; therefore, no hearing tests were performed on seals for that launch. Capture attempts for the second Delta IV launch were successful, and hearing tests were performed. There was no evidence that the launch noise from the Delta IV DMSP 17 caused a loss in harbor seal hearing acuity. However, given a 2 hr delay in starting the hearing test due to safety constraints, it is possible that a mild temporary threshold shift (TTS) could have been fully recovered by the time the testing was started. Even so, no long-term hearing loss from the Delta IV launch noise was found (Thorson *et al.*, 2007).

The third Delta IV launch is currently scheduled for December, 2010. Appropriate biological and acoustic monitoring, as well as hearing testing, are planned for this launch.

**Falcon**

The Falcon is the launch vehicle for Space Exploration Technologies (Space X). Space X is a commercial program planning to launch small payloads into low earth orbit from VAFB. While it has not been officially decided (30 SW, 2008a), it is anticipated that Space X will utilize SLC–4E, instead of SLC–3W as originally planned (30 SW, 2008c). The Space X launch vehicle includes the Falcon I SLV, classified as a light-lift vehicle. It is a two-stage liquid oxygen and rocket grade kerosene powered launch vehicle and is 21.3 m (69.9 ft) in length and 1.7 m (5.6 ft) in diameter (Space X, 2007). Beginning in 2009, the Falcon 1e vehicle will also be available. It is also 1.7 m (5.6 ft) in diameter, but will have an extended first stage and will be 26.8 m (87.9 ft) in length (Space X, 2007). The Falcon I has a thrust of 105,500 lbs (in vacuum) and the Falcon 1e has 115,000 lbs (in vacuum) and are capable of delivering approximately 554 kg (1,221 lbs) into sun synchronous low earth orbit (Space X, 2007). The first Falcon launch from VAFB is currently scheduled for August, 2009 (30 SW, 2008a).

**Minotaur**

The Orbital Suborbital Program launch vehicle, known as Minotaur I, is launched from SLC–8 on south VAFB (see Figure 2 in the USAF application), approximately 2.3 km (1.4 mi) from the south VAFB haul-out sites. The Minotaur I is a four stage, all solid propellant ground launch vehicle (Orbital Sciences Corporation, 2006a). The launch vehicle consists of modified Minuteman II Stage I and Stage II segments, mated with Pegasus upper stages (Orbital Sciences Corporation, 2006a). The Minotaur is a small vehicle, approximately 19.2 m (63 ft) tall (Orbital Sciences Corporation 2006b), with approximately 215,000 lbs of thrust.

Two Minotaur launches were acoustically monitored at VAFB (January 2000 and July 2000). The unweighted SEL measurements varied by 3.5 dB between the two launches and were measured to be 119.4 and 122.9 dB. The CSELs varied less and were measured at 116.6 and 117.9 dB. From the DAT and SLM measurements, the ASEL ranged from 104.9 to 107.0 dB. The launch noise reached an Lmax level of 101.7 and 103.4 dB. No sonic booms of greater than one psf were predicted to impact the NCI for these two launches, nor for a third launch for which only biological monitoring was performed at VAFB given that acoustics had been previously quantified.

**Taurus**

The Taurus SLV is launched from 576E on north VAFB, approximately 0.5 km (0.3 mi) from the Spur Road harbor seal haul-out site and 2.3 km (1.4 mi) from the Purisima Point haul-out site (see Figure 3 in the USAF application). The standard Taurus is a small launch vehicle, at approximately 24.7 m (81 ft) tall and is launched in two different configurations (Defense Advanced Research Projects Agency (DARPA) and standard) with different first stages providing 500,000 or 400,000 lbs of thrust, respectively. The different vehicle configurations have different thrust characteristics, with the standard configuration providing less thrust than DARPA.

The launch noise from five Taurus launches has been measured near the Spur Road haul-out site. The Taurus is the loudest of the launch vehicles at the Spur Road haul-out site, due to the close proximity of its launch pad to the haul-out site. The unweighted SEL measurements from the four initially measured Taurus vehicles ranged from 135.8 to 136.8 and averaged 136.4 dB. The CSEL measurements were slightly lower as expected, ranging from 133.8 to 134.8 dB and averaged 134.5 dB. The ASEL measurements ranged from 123.5 to 128.9 dB with an average of 126.6 dB (SLM). The Lmax values were measured to range from 118.3 to 122.9 dB and averaged 120.9 dB (SLM). No sonic booms greater than one psf were predicted to impact the NCI for any of the six Taurus launches monitored since 1998.

**ICBM and Missile Defense Agency Interceptor and Target Vehicles**

There are a variety of small missiles launched from north VAFB, including the Minuteman III and several types of interceptor and target vehicles for the Missile Defense Agency (MDA) program. The Peacekeeper missile program was recently deactivated. Active missile launch facilities (LFs) are spread throughout northern VAFB (see Figure 3 in the application), and are within approximately 1 to 3.9 km (0.6 to 2.4 mi) of the Lion's Head haul-out site, and approximately 11 to 16.5 km (6.8 to 10.3 mi) north of the Spur Road and Purisima Point haul-out sites. In addition to the LFs, Test Pad (TP)-01 is present on north VAFB. Although not currently active or associated with a missile program, MDA may eventually utilize this pad. The trajectories of ICBM and MDA launches are generally westward and therefore do not cause sonic boom impacts on the NCI.

*ICBM:* The Minuteman III missile is an ICBM developed as part of the U.S. strategic deterrence force. The Minuteman III is launched from an underground silo. It is composed of three rocket motors, and is 18 m (59 ft) in length by 1.7 m (5.6 ft) in diameter with a first stage thrust of 202,600 lbs.

The launch noise from the June 7, 2002, launch from LF–26 (see Figure 3 in the USAF application) was measured at the Lion's Head haul-out site. This LF is approximately 3 km (1.9 mi) away from the haul-out site. The ASEL measurement of the launch noise was 100.6 dB and the Lmax value of 98.2 dB.

The launch noise from the May 24, 2000, launch from LF–09 (Figure 3 in the application) was measured at the Spur Road haul-out site. At a distance of over 15 km from LF–09, the unweighted SEL measurement was 114.7 dB and the CSEL measurement was 111.6 dB. The ASEL measurement was 26 dB down from the unweighted value and was measured at 88.7 dB. The Lmax was measured to be 83.3 dB.

*MDA Interceptor and Target Vehicles:* The MDA continues development of various systems and elements, including the Ballistic Missile Defense System (BMDS), the Ground-based Midcourse Defense (GMD) element of BMDS, the Kinetic Energy Interceptor (KEI) element, and the Air-Borne Laser (ABL) element.

The BMDS mission is to defend against threat missiles in each phase or segment of the missile's flight. MDA has been conducting and will continue to conduct BMDS testing at VAFB through 2014 and beyond.

The GMD element is designed to protect the U.S. in the event of a limited ballistic missile attack by destroying the threat missile in the mid-course phase of its flight. During the mid-course phase, which occurs outside the earth's atmosphere for medium and long-range missiles, the missile coasts in a ballistic trajectory. The missiles are comprised of a commercially available, solid propellant booster consisting of two or three stages, and an exo-atmospheric kill vehicle or emulator. A two-stage booster is being added to the current three-stage booster. The Ground Based Interceptor (GBI) was previously approved for launching from VAFB (68 FR 25347, May 12, 2003). GBI flight tests are planned from LF–23. As a scheduled risk mitigation, some limited testing may occur from LF–24 (currently being refurbished for use).

The second element of BMDS, the KEI element, includes development of the KEI booster and its flight tests. MDA anticipates a minimum of three KEI launches per year from 2009 to at least 2012. Candidate launch sites include 576E, TP–01, and LF–06.

The third element of BMDS, the ABL element, is being developed to provide an effective defense to limited ballistic missile threats during the boost segment of an attacking missile's flight. Under the ABL program, there could be as many as 10 launches per year. Launches could occur from LF–06a, which would be a new LF, yet to be constructed, near the current LF–06. Possible launch vehicles could include Black Brant IX, Hera, Terrier/Orion, two-stage Terrier, Liquid Fueled Target System (LFTS), Terrier Lynx, Storm, ARIES, Castor I, Lance, Patriot PAC–2, STRYPI-II, and Hermes.

As a part of BMDS testing, MDA envisions launching a wide variety of target missiles from VAFB northern LFs on westerly trajectories. Table 5 in the USAF application identifies missiles being considered by MDA for use at VAFB. Many of the small missiles under 13 m (42.7 ft), including the Hera, Lance, Patriot As A Target (PAAT), Black Brant, Terrier, SRTYPI II, Castor I, Storm, ARIES and Hermes, in addition to missiles already approved for VAFB (such as Minuteman missiles and the three-stage GBIs), and the new generation of missiles from the MDA, such as the KEI and the GBI two-stage, are to be covered under this application for the five-year programmatic permit because of their launch site's proximity to the Lion's Head harbor seal pupping site that was established in 2002.

The LFTS target missile is a single-stage, short range, ballistic missile with a non-separating payload. The missile is fueled by kerosene, initiator fuel, and an oxidizer (Inhibited Red Fuming Nitric Acid). The Flexible Target Family target missiles include the LV 2 and the LV 3 missiles, which are solid-fueled.

As shown in Table 5 in the application, all of the target and interceptor missiles are smaller than the Minuteman III or Peacekeeper missiles previously or currently launched from VAFB. The MDA notes that the actual heights of the missiles shown in Table 5 will vary depending on the payload and associated electronic packages (e.g., flight termination system) or special modifications. Many of the missile types have interchangeable first or second stage motors; therefore, most may have similar noise characteristics, depending on their configuration. Missiles for which acoustic measurements have previously been made, as well as vehicle size, are included in Table 6 of the application.

The main missile programs and missile types are described herein, but others may be implemented before this permit expires. The USAF would notify NMFS of any new missile programs that would be implemented at VAFB. Completely new types of missiles would be monitored acoustically and biologically, during their first launch, even if the launch occurs outside of the pupping season, using the standard launch monitoring protocol for VAFB. However, configuration changes in existing missiles would only be monitored during the pupping season, as is done for all other missile launches.

The MDA's BMDS test plans, including those involving tests from VAFB, are subject to constant change as the BMDS is being developed through spiral evolution. Therefore, it is difficult for the MDA to predict with accuracy its future launch schedule or number of launches over the next five years. However, due to test resource limitations, the MDA does not envision conducting more than three missile tests per quarter (on average) over the next five years from VAFB, and none of the missiles would be larger than the Minuteman III. This limitation (i.e., one missile per quarter and none being larger than the Minuteman III) can be used to establish the potential impacts posed by the MDA testing at VAFB over the next five years.

In order to compare launch noise from past and current SLVs, as it was received near the north and south VAFB marine mammal haul-out sites, Tables 1 through 3 in the USAF application provide information on the SELs that were measured during previous launch events. Table 1 in the application provides a comparison of SELs as measured at the sound monitoring site by the south VAFB marine mammal haul-out site. Table 2 in the application provides the SELs as measured at the sound monitoring site by the north VAFB Spur Road marine mammal haul-out site. Finally, Table 3 in the application provides the SELs as measured at the sound monitoring site by the north VAFB Lion's Head marine mammal haul-out site.

**Aircraft Operations**

The VAFB runway, located on north VAFB (see Figure 3 in the application), supports various aircraft operations further described below. Aircraft operations include tower operations, such as take offs and landings (training operations) from the airfield, and range operations, such as overflights and flight tests. Using data from fiscal years (FY) 2003, 2006, and 2007 (FY 2004 and 2005 data are not available), the number of tower operations averaged 12,325 operations per FY, while range operations averaged 502 operations per FY.

*Flight Test Operations:* VAFB is a limited site for flight testing and evaluation of fixed-wing aircraft. Three approved routes are used that avoid the established pinniped haul-out sites. Aircraft flown through VAFB airspace and supported by 30 SW include, but

are not limited to, B1 and B2 bombers, F–15, F–16, and F–22 fighters, V/X–22, Unmanned Aerial Vehicles, and KC–135 tankers.

*Fixed-wing Aircraft Operations:* Various fixed-wing aircraft (jet and propeller aircraft) use VAFB for a variety of purposes, including delivery of space or missile vehicle components, launching of space vehicles at high altitude (e.g., the Pegasus), and emergency landings. All aircraft are required to remain outside of the 305–m (1,000–ft) bubble around pinniped rookeries or haul-out sites, except when performing a life-or-death rescue mission, when responding to a security incident, or during an aircraft emergency. There have been no observed impacts to pinnipeds from fixed-wing aircraft operations during launch monitoring or pinniped surveys.

*Helicopter Operations:* The number of helicopter operations at VAFB decreased in 2008 with the deactivation of the VAFB helicopter squadron. However other squadrons and units continue to use VAFB for purposes which include, but are not limited to, transit through, exercises, and launch mission support. All helicopters are required to remain outside of the 305–m (1,000–ft) bubble around pinniped rookeries or haul-out sites. Exceptions may occur when performing a life-or-death rescue mission, when responding to a security incident, or during an aircraft emergency. There have been no observed impacts to pinnipeds from helicopter operations during launch monitoring or pinniped surveys.

**Description of Habitat and Marine Mammals Affected by the Activity**

*VAFB*

VAFB is composed of approximately 99,000 acres of land and approximately 64.4 km (40 mi) of coastline on the coast of central California, within Santa Barbara County (see Figure 1 in the USAF application). The most common marine mammal inhabiting the VAFB coastline is the Pacific harbor seal (*Phoca vitulina richardii*). Harbor seals are local to the area, rarely traveling more than 50 km (31 mi) from the haul-out site. They haul out on small offshore rocks or reefs and sandy or cobblestone cove beaches. There are four main harbor seal haul-out sites on VAFB; three are on north VAFB and one is on south VAFB.

On north VAFB, harbor seals primarily use the offshore rocky area near Spur Road; the Purisima Point reef; and the offshore rocky area of Lion's Head (Figure 3 in the application). The Spur Road and Purisima Point haul-out sites are in the vicinity of the Delta II launch site, SLC–2, and the Taurus launch site, referred to as 576E. The Lion's Head haul-out site is located in the vicinity of the LFs. As many as 110 seals may haul out at Spur Road and as many as 45 seals may haul out at Purisima Point (SRS Technologies, 2003b). Based on monthly counts conducted in 2005 through 2007, only one to two pups were observed at the Spur Road and Purisima Point haul-out sites. As many as 17 seals may haul out at Lion's Head, with as many as three pups (Thorson *et al.*, 2004). These three sites are mostly to completely under water at higher tides (above 1.2 m (3.9 ft)), preventing seals from hauling out at those times.

The main haul-out area on south VAFB, from the VAFB Harbor north to South Rocky Point beach, is comprised of many sand and cobblestone coves and rocky ledges, with most seals found between Harbor Seal Beach and South Rocky Point (approximately 1.5 km (0.9 mi) of coastline; Figure 2 in the application). The raised rocky ledge of Flat Iron Rock provides an area to haul out during most tides (except for very high tides combined with high swells and wind); therefore, this area is used more often and by more seals than any other VAFB haul-out site. Weaned pups, juveniles and some adult females use Weaner Cove, just to the north of Flat Iron Rock, throughout most of the year. During periods of high winds, seals may move from Flat Iron Rock into the more protected Weaner Cove. Peak numbers, as many as 515 seals hauled out at one time (SRS Technologies, 2003b), usually occur at the south VAFB haul-out site in the afternoon (1100 to 1600 Pacific Time), but the number of seals present is also influenced by a combination of high tides and large swells, high temperature, or strong winds (SRS Technologies, 2003b). During the pupping season (March through June), as many as 49 mother-pup pairs can be found hauled out in the area just north of Harbor Seal Beach and at Weaner Cove, making these areas the main pupping sites on VAFB (SRS Technologies, 2003b). During molting (May through July) adult and some juvenile harbor seals primarily use the Flat Iron Rock area, while weaned pups, juveniles and a few adult females use the coves just north and south of Flat Iron Rock (SRS Technologies, 2002).

*NCI*

The Northern Channel Islands (NCI) are located approximately 50 km (31 mi) south of the southern point on VAFB (see Figure 4, inset in the USAF application). Three islands, San Miguel, Santa Cruz, and Santa Rosa, make up the main NCI, with San Miguel Island being the primary site for pinniped rookeries. The NCI are part of the Channel Islands National Park and the Channel Islands National Marine Sanctuary.

*San Miguel Island*

On SMI, commonly found species of pinnipeds include California sea lions (*Zalophus californianus*), northern elephant seals (*Mirounga angustirostris*), northern fur seals (*Callorhinus ursinus*) and Pacific harbor seals. Guadalupe fur seals (*Arctocephalus townsendi*) and Steller sea lions (*Eumetopias jubatus*) have bred in the past on SMI, but sightings have been rare since the mid–1980's. The main rookeries of sea lions, elephant seals and fur seals are found at Point Bennett on the west end of SMI (see Figure 4 in the USAF application). California sea lions occur at Point Bennett, along the south side of the island, to Cardwell Point, on the east. Northern elephant seals occur at Point Bennett and from Crook Point to Cardwell Point, with small numbers along the north coast. Northern fur seals occur in the Point Bennett area. Harbor seals occur along the north coast and from Crook Point to Cardwell Point.

There are approximately 23,000 California sea lion pups (30 SW, 2008c), over 10,000 elephant seal pups (Lowry, 2002) and over 4,000 fur seal pups born on SMI each year (Carretta *et al.*, 2007). Pacific harbor seals pup on the north and east end of SMI; 2,500 northern elephant seals and several hundred sea lions also pup on the east end of SMI at Cardwell Point (Lowry, 2002). Most sea lions and elephant seals on the south and east end of SMI are non-breeding (juvenile or molting) animals. This area is composed of high cliffs with small sandy coves where several hundred seals haul out. From approximately December through July, pupping and breeding activities overlap between the four main species (see Table 7 in the application and Table 1 here).

Currently, the main impacts to species on SMI are: environmental conditions, food limitations (i.e., El Nino or fisheries interactions), and competition with other pinniped species for breeding space. For all species, adverse impacts to populations occur periodically because of a decrease in the availability of food items due to El Nino events. Commercial fisheries have impacted Steller sea lion and northern fur seal populations (Sydeman and Allen, 1999). Competition among pinniped species is occurring as the growing populations of sea lions and

elephant seals displace less aggressive harbor seals for haul-out space.

TABLE 1. SUMMARY OF THE PUPPING (BIRTHING AND NURSING PERIOD), BREEDING, AND MOLTING SEASONS OF THE FOUR MAIN PINNIPED SPECIES ON SMI.

| Species | Pupping Season | Breeding Season | Molting Season |
|---|---|---|---|
| California sea lion | May-July | May-August | August-December |
| Northern fur seal | May-July | May-July | August-October |
| Northern elephant seal | December-March | December-March | April-August |
| Pacific harbor seal | March-May | March-June | May-July |

*Santa Cruz Island*

On Santa Cruz Island the main species of marine mammal inhabiting the island is the harbor seal. California sea lions and northern elephant seals rarely haul out on Santa Cruz Island, except when sick or injured. There are approximately 1,050 harbor seals found on Santa Cruz Island during the spring aerial surveys (Lowry and Carretta, 2003). Based on sonic boom prediction models for previous launches, the majority of sonic booms produced by launches from VAFB do not impact Santa Cruz Island.

*Santa Rosa Island*

On Santa Rosa Island, the main species of marine mammals inhabiting the island are the harbor seal and the northern elephant seal. In 2001, 1,567 elephant seal pups were born on Santa Rosa (Lowry, 2002). There are approximately 900 harbor seals found on Santa Rosa Island during the spring aerial surveys (Lowry and Carretta, 2003). Some California sea lions pup on Santa Rosa, but it has not been established as a rookery to date. Pinnipeds generally use the west end of the island, adjacent to SMI. Based on sonic boom prediction models for previous launches, the majority of sonic booms produced by launches from VAFB do not impact Santa Rosa Island.

**Comments and Responses**

On July 25, 2008, NMFS published a notice of receipt of application for an LOA in the **Federal Register** (73 FR 43410) and requested comments and information from the public for 30 days. NMFS received comments from the Marine Mammal Commission (Commission) and one private citizen. The Commission supports NMFS' decision to publish proposed regulations for the specified activities provided that the research, mitigation, and monitoring activities described in the application and the current regulations are incorporated into the rule. NMFS has incorporated the research, mitigation, and monitoring into the proposed rule. The other comment opposed the issuance of an authorization without any specific substantiation for why such an authorization should not be issued. For the reasons set forth in this preamble, NMFS believes issuance of the authorization is appropriate.

**Marine Mammals Potentially Affected by the Activity**

At both VAFB and the NCI, Pacific harbor seals, California sea lions, and northern elephant seals haul out on beaches throughout the year. Northern fur seals, Steller sea lions, and Guadalupe fur seals have not been reported on VAFB. However, northern fur seals and Guadalupe fur seals can be found on SMI. Northern fur seals are only found on the west end of SMI at Point Bennett and Castle Rock, just offshore of SMI. Each year at SMI, zero to two Guadalupe fur seals are seen generally in the summer (Melin and DeLong, 1999). Steller sea lions have not been sighted on SMI since 1998. This was a single observation of a sub-adult male in the spring prior to the breeding season (Thorson *et al.*, 1999a). Previously, the last observation of a Steller sea lion was made in the mid–1980's.

The USAF has compiled information on the abundance, status, and distribution of the species on VAFB and the NCI from surveys that they have conducted over the last decade and from NMFS Stock Assessment Reports (SARs). This information may be viewed in the USAF's LOA application (see **ADDRESSES**). Additional information is available in the NMFS SARs, which are available at: *http://www.nmfs.noaa.gov/pr/pdfs/sars/po2007.pdf*.

**Potential Effects of Specified Activities on Marine Mammals**

The activities under these regulations create two types of noise: Continuous (but short-duration) noise, due mostly to combustion effects of aircraft and launch vehicles; and impulsive noise, due to sonic boom effects. Launch operations are the major source of noise on the marine environment from VAFB. The operation of launch vehicle engines produces significant sound levels. Generally, noise is generated from four sources during launches: (1) Combustion noise from launch vehicle chambers; (2) jet noise generated by the interaction of the exhaust jet and the atmosphere; (3) combustion noise from the post-burning of combustion products; and (4) sonic booms. Launch noise levels are highly dependent on the type of first-stage booster and the fuel used to propel the vehicle. Therefore, there is a great similarity in launch noise production within each class size of launch vehicles.

The noise generated by VAFB activities will result in the incidental harassment of pinnipeds, both behaviorally and in terms of physiological (auditory) impacts. The noise and visual disturbances from SLV and missile launches and aircraft and helicopter operations may cause the animals to lift their heads, move towards the water, or enter the water. The following information provides background on marine mammal responses to launch noise that has been gathered under previous LOAs for these activities, as well as a scientific research permit issued to VAFB by NMFS for a research program (Permit No. 859–1680–01) to determine the short and long-term effects of SLV noise and sonic booms on affected marine mammals.

*Marine Mammal Response to Launch Noise*

Seals may leave the haul-out site and enter the water due to the noise created by launch vehicles during launch operations. The percentage of seals leaving the haul-out increases with noise level up to approximately 100 dB ASEL, after which almost all seals leave, although data have shown that some

percentage of seals have remained on shore during launches. Time-lapse video photography during four launch events revealed that the seals that reacted to the launch noise but did not leave the haul-out were all adults. Because adult seals reacted less strongly than other younger seals, this suggests that adults had possibly experienced other launch disturbances and had habituated to them.

The louder the launch noise, the longer it took for seals to begin returning to the haul-out site and for the numbers to return to pre-launch levels. Seals may begin to return to the haul-out site within 2–55 min of the launch disturbance and the haul-out site usually returned to pre-launch levels within 45–120 min. In two past Athena IKONOS launches with ASELs of 107.3 and 107.8 dB at the closest haul-out site, seals began to haul-out again approximately 16–55 min post-launch (Thorson *et al.*, 1999a; 1999b). In contrast, noise levels from an Atlas launch and several Titan II launches had ASELs ranging from 86.7 to 95.7 dB at the closest haul-out and seals began to return to the haul-out site within 2–8 min post-launch (Thorson and Francine, 1997; Thorson *et al.*, 2000).

The main concern on the NCI from VAFB launch activities is potential impacts from sonic booms created during launches of SLVs from VAFB. During the period of 1997 through 2005, and in 2007 there were no sonic booms above 2 psf recorded on the NCI. Small sonic booms between 1 and 2 psf usually elicit a heads up response or slow movement toward and entering the water, particularly for pups. In 2006, due to an equipment malfunction, there was uncertainty about the peak overpressure from the Delta IV NROL–22 launch, which could have ranged between 0.77 and 3.36 psf. During the 1996 Titan IV K–22 launch, sonic booms of 1 to 9.2 psf reached SMI and caused many sea lions and some elephant seals to enter the water near the loudest sonic boom (Stewart *et al.*, 1996). There were no injuries or mortalities as a result of that sonic boom or the reactions by pinnipeds on SMI.

*Haul-out Behavior and Population Dynamics*

During the scientific research program, haul-out behavior was determined by capturing and attaching radio frequency transmitters to the hind flippers of 41 harbor seals. Twenty-four seals were tagged in the Rocky Point area of south VAFB, and 17 were tagged at Point Conception (control site; see Figure 1 in the USAF application). The tagged seals ranged in age from pups (4 months) through adults. A radio receiver-scanner and electronic data logger were stationed on the cliffs above each haul-out site and recorded the presence of any radio tagged seal every 15 min while the seals are hauled out of the water. The time of arrival, time of departure, and time on shore, could be calculated from the data collected by the telemetry system.

The main influence on the daily haul-out patterns of harbor seals on south VAFB was the time of day ($r^2 = 0.72$; n = 423) rather than tide height ($r^2 = 0.23$; n = 423), as the peak number of seals hauled out occurred daily between 1100 and 1700 hours. Haul-out behavior was also influenced by combinations of high tide and large swell or high temperature and no wind. Either of these combinations may cause seals not to haul out at all or to leave the haul-out site early. Seals remained on shore for 8.1 hr plus or minus 1.6 hr (range 1.2 - 14.7 hr). There was no significant difference in the time of day or duration of hauling out between south VAFB and Point Conception (t-test, P>.05).

Site fidelity, which is defined herein as an individual's continued use of the same haul-out area for at least 6 months, was high at both south VAFB and Point Conception. The mean site fidelity at VAFB was 77 percent (adults 84 percent, juveniles 72 percent, and pups 63 percent), and at Point Conception was 71 percent (adults 81 percent, juveniles 74 percent, and pups 53 percent). The trend of increasing site fidelity with age is common in all harbor seal populations, as young seals cannot compete for haul-out space with adults, and move to other less preferred haul-out sites (Kovacs *et al.*, 1990; Suryan and Harvey, 1998). There have been four juveniles tagged at Point Conception that have moved to VAFB, but no juveniles have moved from VAFB to Point Conception.

The total population of harbor seals at VAFB in 2002 was estimated to be 1,115 (850 on south VAFB and 265 on north VAFB; SRS Technologies, 2003a), using telemetry data to correct for seals that were at sea during the census. A correction factor of 1.7 times the ground count was used. From 2000 through 2007 there were three to seven SLV launches per year (average of 4.4 SLV launches annually), and there appeared to be only short-term disturbance effects to harbor seals as a result of launch noise. The harbor seal population increased from 1997 to 2002 at an annual rate of 12.7 percent; however, the number of total harbor seals on south VAFB was lower in 2007 (356 seals) than 2006 (511 seals). The only decrease in the population during the 1997 to 2002 period occurred during the 1998 El Nino season, when there was a 13.6 percent decrease from the previous year. The number of harbor seal pups observed increased at a rate of 26.7 percent annually through 2003, except during the El Nino events. The number of pups on south VAFB continued to increase from 2004 through 2006 (high of 53 pups) but fell again in 2007 (38 pups). Pup production grew at a rate of 7.9 percent at Point Conception through 2006, except during El Nino events. Point Conception has limited area where females and pups can haul out without being harassed by other seals or exposed to high tides and swells. There are more haul-out areas for females with pups at VAFB; therefore only an El Nino type disturbance, which includes weather and food availability effects, should affect pup production at VAFB.

*Auditory Brainstem Response (ABR) Tests*

To determine if harbor seals experience changes in their hearing sensitivity as a result of launch noise, ABR testing was conducted on 18 harbor seals for four Titan IV launches, one Taurus launch, and one Delta IV launch.

Following standard ABR testing protocol, the ABR was measured from one ear of each seal using sterile, sub-dermal, stainless steel electrodes. A conventional electrode array was used, and low-level white noise was presented to the non-tested ear to reduce any electrical potentials generated by the non-tested ear. A Bio-logic Systems Corporation evoked potential computer was used to produce the click and an 8 kilohertz (kHz) tone burst stimuli, through standard audiometric headphones. Over 1,000 ABR waveforms were collected and averaged per trial. Initially the stimuli were presented at sound pressure levels (SPL) loud enough to obtain a clean reliable waveform, and then decreased in 10 dB steps until the response was no longer reliably observed. Once response was no longer reliably observed, the stimuli were then increased in 10 dB steps to the original SPL. By obtaining two ABR waveforms at each SPL, it was possible to quantify the variability in the measurements.

Good replicable responses were measured from most of the seals, with waveforms following the expected pattern of an increase in latency and decrease in amplitude of the peaks, as the stimulus level was lowered. One seal had substantial decreased acuity to the 8 kHz tone-burst stimuli prior to the launch. The cause of this hearing loss was unknown but was most likely

congenital or from infection. Another seal had a great deal of variability in waveform latencies in response to identical stimuli. This animal moved repeatedly during testing, which may have reduced the sensitivity of the ABR testing on this animal for both the click and 8 kHz tone burst stimuli. Two of the seals were released after pre-launch testing but prior to the launch of the Titan IV B–34, as the launch was delayed for many days, and five days is the maximum duration permitted to hold the seals for testing.

Detailed analysis of the changes in waveform latency and waveform replication of the ABR measurements for the 14 seals, showed no detectable changes in the seals' hearing sensitivity as a result of exposure to the launch noise. The delayed start (1.75 to 3.5 hr after the launches) for ABR testing allows for the possibility that the seals may have recovered from a TTS before testing began. However, it can be said with confidence that the post-launch tested animals did not have permanent hearing changes due to exposure to the launch noise from the Titan IV, Taurus, or Delta IV SLVs. These results are consistent with previous NMFS conclusions for such activities in its prior rulemakings (63 FR 39055, July 21, 1998; 69 FR 5720, February 6, 2004).

NMFS also notes that stress from long-term cumulative sound exposures can result in physiological effects on reproduction, metabolism, and general health, or on the animals' resistance to disease. However, this is not likely to occur as a result of the activities from VAFB, because of the infrequent nature and short duration of the noise, including the occasional sonic boom. Research indicates that population levels at these haul-out sites have remained constant in recent years, giving support to this conclusion.

The USAF does not anticipate a significant impact on any of the species or stocks of marine mammals from launches from VAFB. For even the largest launch vehicles, such as Delta IV, the launch noises and sonic booms can be expected to cause a startle response and flight to water for those harbor seals, California sea lions and other pinnipeds that are hauled out on the coastline of VAFB and on the NCI. The noise may cause TTS in hearing depending on exposure levels, but no PTS is anticipated.

**Numbers of Marine Mammals Estimated to be Taken by Harassment**

The marine mammal species NMFS believes likely to be taken by Level B harassment incidental to launch and aircraft and helicopter operations at VAFB are harbor seals, California sea lions, northern elephant seals, and northern fur seals. All of these species are protected under the MMPA, and none are listed under the Endangered Species Act (ESA). Numbers of animals that may be taken by Level B harassment are expected to vary due to factors such as type of SLV, location of the sonic boom, weather conditions (which can influence the size of the sonic boom), the time of day, and the time of year. For this reason, ranges are given for the harassment estimates of marine mammals. Aircraft operations will occur frequently but will avoid pinniped haul-out areas and are unlikely to disturb pinnipeds.

As noted earlier, sightings of Steller sea lions and Guadalupe fur seals have been extremely rare the last few decades or low at VAFB and on the NCI. Therefore, no takes by harassment are anticipated for either of these species incidental to the proposed activities.

*Estimated Takes at VAFB*

Harbor seals: As many as 600 harbor seals per launch may be taken. Depending on the type of rocket being launched, the time of day, time of the year, weather conditions, tide and swell conditions, the number of seals that may be taken will range between 0 and 600. Launches and aircraft operations may occur at any time of the year so any age classes and gender may be taken.

*California sea lions:* As many as 200 sea lions per launch may be taken. Sea lions at VAFB are usually juveniles of both sexes and sub-adult males that haul out in the fall during the post breeding dispersal. Births generally do not occur at VAFB, but five pups were observed at VAFB in 2003, an El Nino year, although all were abandoned by their mothers and died within several days of birth. Sick or emaciated weaned pups may also haul out briefly. The number of sea lions that may be taken will range between 0 and 200.

*Northern elephant seals:* As many as 200 elephant seals per launch may be taken. Weaned elephant seal pups, juveniles, or young adults of both sexes, may occasionally haul out at VAFB for several days to rest or as long as 30 days to molt. Injured or sick seals may also haul out briefly. The number of northern elephant seals that may be taken will range between 0 and 200.

*Northern fur seals:* There are no reports of northern fur seals at VAFB. Therefore, it is unlikely that any fur seals will be taken.

*Estimated Takes on the NCI*

Sonic booms created by SLVs may impact marine mammals on the NCI, particularly SMI. Missile launches utilize westward trajectories so do not cause sonic boom impacts to the NCI. The PCBoom sonic boom modeling program will continue to be used to predict the area of sonic boom impact and magnitude of the sonic boom on the NCI based on the launch vehicle, speed, trajectory, and meteorological conditions. Prior to each SLV launch, a predictive sonic boom map of the impact area and magnitude of the sonic boom will be generated. Based on previous monitoring of sonic booms created by SLVs on SMI (Thorson *et al.*, 1999a: 1999b), it is estimated that as much as approximately 25 percent of the marine mammals may be disturbed on SMI (Thorson *et al.*, 1999a; 1999b). Most sonic booms that reach SMI are small (<1 psf), although larger sonic booms are possible, but rarely occur. A conservative take estimate of as much as 25 percent of the animals present is used for each species per launch.

*Harbor seals:* As many as 200 harbor seals of all age classes and sexes may be taken per launch on the NCI. The number of harbor seals that may be taken will range between 0 and 200.

*California sea lions:* As many as 5,800 sea lion pups and 2,500 juvenile and adult sea lions of either sex may be taken on the NCI per launch. The number of sea lions that may be taken will range between 0 and 8,300.

*Northern elephant seals:* As many as 3,000 northern elephant seal pups and 10,000 northern elephant seals of all age classes and sexes may be taken per launch on the NCI. The number of elephant seals that may be taken will range between 0 and 13,000.

*Northern fur seals:* As many as 300 northern fur seal pups and 1,100 juvenile and adult northern fur seals of both sexes may be taken per launch at SMI. The number of fur seals that may be taken will range between 0 and 1,400.

With the incorporation of mitigation measures proposed later in this document, the USAF and NMFS expect that only Level B incidental harassment may occur as a result of the proposed activities and that these events will result in no detectable impact on marine mammal species or stocks or on their habitats.

**Potential Effects of Specified Activities on Marine Mammal Habitat**

Impacts on marine mammal habitat are part of the consideration in making a finding of negligible impact on the species and stocks of marine mammals. Habitat includes, but is not necessarily limited to, rookeries, mating grounds, feeding areas, and areas of similar

significance. Only short-term disturbance of marine mammals is expected as a result of the proposed activities. No impacts to marine mammal habitats are anticipated on VAFB or the NCI.

**Potential Effects of Specified Activities on Subsistence Needs**

NMFS has preliminarily determined that the issuance of an LOA for USAF space vehicle and missile launches and aircraft and helicopter operations at VAFB would not have an unmitigable adverse impact on the availability of the affected species or stocks for subsistence use since there are no such uses for these pinniped species in California.

**Mitigation**

To minimize impacts on pinnipeds on beach haul-out sites and to avoid any possible sensitizing or predisposing of pinnipeds to greater responsiveness towards the sights and sounds of a launch, the USAF has prepared the following mitigation measures.

All aircraft and helicopter flight paths must maintain a minimum distance of 1,000 ft (305 m) from recognized seal haul-outs and rookeries (e.g., Point Sal, Purisima Point, Rocky Point), except in emergencies or for real-time security incidents (e.g., search-and-rescue, fire-fighting) which may require approaching pinniped haul-outs and rookeries closer than 1,000 ft (305 m). For missile and rocket launches, unless constrained by other factors including, but not limited to, human safety, national security concerns or launch trajectories, holders of LOAs must schedule launches to avoid, whenever possible, launches during the harbor seal pupping season of March through June. NMFS also proposes to expand the requirement so that the USAF must avoid, whenever possible, launches which are predicted to produce a sonic boom on the NCI during harbor seal, elephant seal, California sea lion, and northern fur seal pupping seasons.

If post-launch surveys determine that an injurious or lethal take of a marine mammal has occurred, the launch procedure and the monitoring methods must be reviewed, in cooperation with NMFS, and appropriate changes must be made through modification to an LOA, prior to conducting the next launch of the same vehicle under that LOA.

**Monitoring**

As part of its application, the USAF provided a monitoring plan, similar to that in the current regulations (50 CFR 216.125), for assessing impacts to marine mammals from rocket and missile launches at VAFB. This monitoring plan is described, in detail, in their application (30 SW, 2008c). The USAF will conduct the following monitoring under the regulations.

The monitoring will be conducted by a NMFS-approved marine mammal biologist experienced in surveying large numbers of marine mammals. Monitoring at the haul-out site closest to the launch facility will commence at least 72 hours prior to the launch and continue until at least 48 hours after the launch.

*Monitoring for VAFB*

Biological monitoring at VAFB will be conducted for all launches during the harbor seal pupping season, 1 March to 30 June. Acoustic and biological monitoring will be conducted on new space and missile launch vehicles during at least the first launch, whether it occurs within the pupping season or not. Also, the third Delta IV launch will be monitored, and ABR testing of seals in close proximity to the launch is planned. The testing will be authorized under a scientific research permit issued under Section 104 of the MMPA. Such work is currently conducted under Permit No. 859–1680–01, which expires on January 1, 2009. The USAF has submitted an application to NMFS for issuance of a new scientific research permit to continue the ABR tests, as well as other research projects. The ABR tests would be required once NMFS issues the Section 104 research permit. NMFS estimates that the tests would be required for years 2–5 of these proposed regulations.

Monitoring will include multiple surveys each day that record, when possible, the species, number of animals, general behavior, presence of pups, age class, gender, and reaction to launch noise, sonic booms, or other natural or human-caused disturbances. Environmental conditions such as tide, wind speed, air temperature, and swell will also be recorded. Time-lapse photography or video will be used during daylight launches to document the behavior of mother-pup pairs during launch activities. For launches during the harbor seal pupping season (March through June), follow-up surveys will be made within 2 weeks of the launch to ensure that there were no adverse effects on any marine mammals. A report detailing the species, number of animals observed, behavior, reaction to the launch noise, time to return to the haul-out site, any adverse behavior and environmental conditions will be submitted to NMFS within 90 days of the launch.

*Monitoring for the NCI*

Monitoring will be conducted on the NCI (San Miguel, Santa Cruz, and Santa Rosa Islands) whenever a sonic boom over 1 psf is predicted (using the most current sonic boom modeling programs) to impact one of the Islands. Monitoring will be conducted at the haul-out site closest to the predicted sonic boom impact area. Monitoring will be conducted by a NMFS-approved marine mammal biologist experienced in surveying large numbers of marine mammals. Monitoring will commence at least 72 hours prior to the launch and continue until at least 48 hours after the launch.

Monitoring will include multiple surveys each day that record the species, number of animals, general behavior, presence of pups, age class, gender, and reaction to launch noise, sonic booms, or other natural or human-caused disturbances. Environmental conditions such as tide, wind speed, air temperature, and swell will also be recorded. Due to the large numbers of pinnipeds found on some beaches of SMI, smaller focal groups should be monitored in detail rather than the entire beach population. A general estimate of the entire beach population should be made once a day and their reaction to the launch noise noted. Photography or video will be used during daylight launches to document the behavior of mother-pup pairs or dependent pups during launch activities. During the pupping season of any species affected by a launch, follow-up surveys will be made within 2 weeks of the launch to ensure that there were no adverse effects on any marine mammals. A report detailing the species, number of animals observed, behavior, reaction to the launch noise, time to return to the haul-out site, any adverse behavior and environmental conditions will be submitted to NMFS within 90 days of the launch.

**Reporting**

A report containing the following information must be submitted to NMFS within 90 days after each launch: (1) Date(s) and time(s) of each launch; (2) date(s), location(s), and preliminary findings of any research activities related to monitoring the effects on launch noise and sonic booms on marine mammal populations; and (3) results of the monitoring programs, including but not necessarily limited to (a) numbers of pinnipeds present on the haul-out prior to commencement of the launch, (b) numbers of pinnipeds that may have been harassed as noted by the number of pinnipeds estimated to have

entered the water as a result of launch noise, (c) the length of time(s) pinnipeds remained off the haul-out or rookery, (d) the numbers of pinniped adults or pups that may have been injured or killed as a result of the launch, and (4) any behavioral modifications by pinnipeds that likely were the result of launch noise or the sonic boom.

If a freshly dead or seriously injured pinniped is found during post-launch monitoring, the incident must be reported within 48 hours to the NMFS Office of Protected Resources and the NMFS Southwest Regional Office.

An annual report must be submitted to NMFS at the time of renewal of the LOA described in § 216.127, that describes any incidental takings under an LOA not reported in the 90–day launch reports, such as the aircraft test program and helicopter operations and any assessments made of their impacts on hauled-out pinnipeds.

A final report must be submitted to NMFS no later than 180 days prior to expiration of these regulations. This report must summarize the findings made in all previous reports and assess both the impacts at each of the major rookeries and the cumulative impact on pinnipeds and any other marine mammals from Vandenberg activities.

**ESA**

In December, 2003, NMFS determined that these activities are not likely to adversely affect any species or their habitats that are listed as threatened or endangered under the ESA. Therefore, consultation under section 7 of the ESA is not required.

**NEPA**

The USAF prepared a Final EA and issued a Finding of No Significant Impact (FONSI) in 1997 as part of its application for an incidental take authorization. On March 1, 1999 (64 FR 9925), NMFS adopted this EA as provided for by the Council on Environmental Quality regulations. In 2003, NMFS prepared its own EA and issued a FONSI for the final rule issued in February, 2004. NMFS has prepared a new Draft EA for issuance of regulations and annual LOAs to the USAF for these proposed activities. The Draft EA will be made available for public comment concurrently with these proposed regulations (see **ADDRESSES**). NMFS will either finalize the EA and prepare a FONSI or prepare an Environmental Impact Statement prior to issuance of the final rule.

**Coastal Zone Management Act Consistency**

The USAF conducts separate consultations with the California Coastal Commission (CCC) for each launch activity, as each one is considered a separate Federal action. Past consultations between the USAF and the CCC have indicated that activities from VAFB similar to those described in this document are consistent to the maximum extent practicable with the enforceable policies of the California Coastal Act (CCA). The USAF is in consultation with the CCC for those launch activities that have not yet been found to be consistent with the CCA. Therefore, NMFS has preliminarily determined that the activities described in this document are consistent to the maximum extent practicable with the enforceable policies of the CCA.

**National Marine Sanctuaries Act**

NMFS has preliminarily determined that this action is not likely to destroy, cause the loss of, or injure any national marine sanctuary resources. NMFS will conclude any necessary consultation with the National Ocean Service's Office of National Marine Sanctuaries prior to issuance of the final rule.

**Preliminary Determinations**

NMFS has preliminarily determined that the launching of SLVs, ICBMs, and small missiles and aircraft and helicopter operations at VAFB, as described in this document and in the application for regulations and subsequent LOAs, will result in no more than Level B harassment of harbor seals, California sea lions, northern elephant seals, and northern fur seals. The effects of these military readiness activities from VAFB will be limited to short term and localized changes in behavior, including temporarily vacating haul-outs, and possible TTS in the hearing of any pinnipeds that are in close proximity to a launch pad at the time of a launch. NMFS has also preliminarily determined that any takes will have no more than a negligible impact on the affected species and stocks. No take by injury and/or death is anticipated, and the potential for permanent hearing impairment is unlikely. Harassment takes will be at the lowest level practicable due to incorporation of the mitigation measures mentioned previously in this document. NMFS has proposed regulations for these exercises that prescribe the means of affecting the least practicable adverse impact on marine mammals and their habitat and set forth requirements pertaining to the monitoring and reporting of that taking. Additionally, the launch activities and aircraft and helicopter operations will not have an unmitigable adverse impact on the availability of marine mammal stocks for subsistence use, as there are no subsistence uses of these four pinniped species in California waters.

**Classification**

Pursuant to the procedures established to implement section 6 of Executive Order 12866, the Office of Management and Budget has determined that this proposed rule is not significant.

Pursuant to section 605(b) of the Regulatory Flexibility Act, the Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The 30th SW, USAF, is the entity that will be affected by this rulemaking, not a small governmental jurisdiction, small organization or small business, as defined by the Regulatory Flexibility Act. As a result, NMFS concludes the action would not result in a significant economic impact on a substantial number of small entities.

**List of Subjects in 50 CFR Part 216**

Exports, Fish, Imports, Indians, Labeling, Marine mammals, Penalties, Reporting and recordkeeping requirements, Seafood, Transportation.

Dated: December 15, 2008.

**John Oliver,**

*Deputy Assistant Administrator for Operations, National Marine Fisheries Service.*

For reasons set forth in the preamble, 50 CFR part 216 is proposed to be amended as follows:

## PART 216—REGULATIONS GOVERNING THE TAKE OF MARINE MAMMALS INCIDENTAL TO SPECIFIED ACTIVITIES

1. The authority citation for part 216 continues to read as follows:

**Authority:** 16 U.S.C. 1361 *et seq.*

2. Subpart K is added to part 216 to read as follows:

### Subpart K—Taking Of Marine Mammals Incidental To Space Vehicle And Test Flight Activities

Sec.

## Subpart K—Taking Of Marine Mammals Incidental To Space Vehicle And Test Flight Activities

### § 216.120 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the incidental taking of those marine mammals specified in paragraph (b) of this section by the 30th Space Wing, United States Air Force, and those persons it authorizes to engage in:

(1) Launching up to 30 space and missiles vehicles each year from Vandenberg Air Force Base, for a total of up to 150 missiles and rockets over the 5–year period of these regulations,

(2) Launching up to 20 rockets each year from Vandenberg Air Force Base, for a total of up to 100 rocket launches over the 5–year period of these regulations,

(3) Aircraft flight test operations, and

(4) Helicopter operations from Vandenberg Air Force Base.

(b) The incidental take of marine mammals on Vandenberg Air Force Base and in waters off southern California, under the activity identified in paragraph (a) of this section, is limited to the following species: Harbor seals (*Phoca vitulina*); California sea lions (*Zalophus californianus*); northern elephant seals (*Mirounga angustirostris*); and northern fur seals (*Callorhinus ursinus*).

### § 216.121 Effective dates.

Regulations in this subpart are effective from February 7, 2009, through February 6, 2014.

### § 216.122 Permissible methods of taking.

(a) Under Letters of Authorization issued pursuant to § 216.106 and 216.127, the 30th Space Wing, U.S. Air Force, its contractors, and clients, may incidentally, but not intentionally, take marine mammals by harassment, within the area described in § 216.120, provided the activity is in compliance with all terms, conditions, and requirements of these regulations and the appropriate Letter of Authorization.

(b) The taking of marine mammals is authorized for the species listed in § 216.120(b) and is limited to Level B Harassment.

### § 216.123 Prohibitions.

Notwithstanding takings contemplated in § 216.120 and authorized by a Letter of Authorization issued under §§ 216.106 and 216.127, no person in connection with the activities described in § 216.120 may:

(a) Take any marine mammal not specified in § 216.120(b);

(b) Take any marine mammal specified in § 216.120(b) other than by incidental, unintentional harassment;

(c) Take a marine mammal specified in § 216.120(b) if such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(d) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or a Letter of Authorization issued under §§ 216.106 and 216.127.

### § 216.124 Mitigation.

(a) The activity identified in § 216.120(a) must be conducted in a manner that minimizes, to the greatest extent practicable, adverse impacts on marine mammals and their habitats. When conducting operations identified in § 216.120(a), the mitigation measures contained in the Letter of Authorization issued under §§ 216.106 and 216.127 must be implemented. These mitigation measures include (but are not limited to):

(1) All aircraft and helicopter flight paths must maintain a minimum distance of 1,000 ft (305 m) from recognized seal haul-outs and rookeries (e.g., Point Sal, Purisima Point, Rocky Point), except in emergencies or for real-time security incidents (e.g., search-and-rescue, fire-fighting), which may require approaching pinniped haul-outs and rookeries closer than 1,000 ft (305 m).

(2) For missile and rocket launches, holders of Letters of Authorization must avoid, whenever possible, launches during the harbor seal pupping season of March through June, unless constrained by factors including, but not limited to, human safety, national security, or for space vehicle launch trajectory necessary to meet mission objectives.

(3) Vandenberg Air Force Base must avoid, whenever possible, launches which are predicted to produce a sonic boom on the Northern Channel Islands during harbor seal, elephant seal, California sea lion, and northern fur seal pupping seasons of March through June.

(4) If post-launch surveys determine that an injurious or lethal take of a marine mammal has occurred, the launch procedure and the monitoring methods must be reviewed, in cooperation with the National Marine Fisheries Service (NMFS), and appropriate changes must be made through modification to a Letter of Authorization, prior to conducting the next launch under that Letter of Authorization.

(5) Additional mitigation measures as contained in a Letter of Authorization.

(b) [Reserved]

### § 216.125 Requirements for monitoring and reporting.

(a) Holders of Letters of Authorization issued pursuant to §§ 216.106 and 216.127 for activities described in § 216.120(a) are required to cooperate with NMFS, and any other Federal, state or local agency with authority to monitor the impacts of the activity on marine mammals. Unless specified otherwise in the Letter of Authorization, the Holder of the Letter of Authorization must notify the Administrator, Southwest Region, NMFS, by letter or telephone, at least 2 weeks prior to activities possibly involving the taking of marine mammals. If the authorized activity identified in § 216.120(a) is thought to have resulted in the mortality or injury of any marine mammals or in any take of marine mammals not identified in § 216.120(b), then the Holder of the Letter of Authorization must notify the Director, Office of Protected Resources, NMFS, or designee, by telephone (301–713–2289), within 48 hours of the discovery of the injured or dead animal.

(b) Holders of Letters of Authorization must designate qualified, on-site individuals approved in advance by NMFS, as specified in the Letter of Authorization, to:

(1) Conduct observations on harbor seal, elephant seal, and sea lion activity in the vicinity of the rookery nearest the launch platform or, in the absence of pinnipeds at that location, at another nearby haul-out, for at least 72 hours prior to any planned launch occurring during the harbor seal pupping season (1 March through 30 June) and continue for a period of time not less than 48 hours subsequent to launching.

(2) For launches during the harbor seal pupping season (March through June), conduct follow-up surveys within 2 weeks of the launch to ensure that there were no adverse effects on any marine mammals,

(3) Monitor haul-out sites on the Northern Channel Islands, if it is determined by modeling that a sonic boom of greater than 1 psf could occur in those areas (this determination will be made in consultation with NMFS),

(4) Investigate the potential for spontaneous abortion, disruption of effective female-neonate bonding, and other reproductive dysfunction,

(5) Supplement observations on Vandenberg and on the Northern Channel Islands with video-recording of mother-pup seal responses for daylight launches during the pupping season,

(6) Conduct acoustic measurements of those launch vehicles that have not had sound pressure level measurements made previously, and

(7) Include multiple surveys each day that surveys are required that record the species, number of animals, general behavior, presence of pups, age class, gender and reaction to launch noise, sonic booms or other natural or human caused disturbances, in addition to recording environmental conditions such as tide, wind speed, air temperature, and swell.

(c) Holders of Letters of Authorization must conduct additional monitoring as required under an annual Letter of Authorization.

(d) Holders of Letters of Authorization must submit a report to the Southwest Administrator, NMFS, within 90 days after each launch. This report must contain the following information:

(1) Date(s) and time(s) of the launch,

(2) Design of the monitoring program, and

(3) Results of the monitoring program, including, but not necessarily limited to:

(i) Numbers of pinnipeds present on the haul-out prior to commencement of the launch,

(ii) Numbers of pinnipeds that may have been harassed as noted by the number of pinnipeds estimated to have entered the water as a result of launch noise,

(iii) The length of time pinnipeds remained off the haul-out or rookery,

(iv) Numbers of pinniped adults, juveniles or pups that may have been injured or killed as a result of the launch, and

(v) Behavioral modifications by pinnipeds that were likely the result of launch noise or the sonic boom.

(e) An annual report must be submitted at the time of renewal of the Letter of Authorization.

(f) A final report must be submitted at least 180 days prior to expiration of these regulations. This report will:

(1) Summarize the activities undertaken and the results reported in all previous reports,

(2) Assess the impacts at each of the major rookeries,

(3) Assess the cumulative impacts on pinnipeds and other marine mammals from Vandenberg activities, and

(4) State the date(s), location(s), and findings of any research activities related to monitoring the effects on launch noise and sonic booms on marine mammal populations.

**§ 216.126 Applications for Letters of Authorization.**

(a) To incidentally take marine mammals pursuant to these regulations, the U.S. citizen (as defined by § 216.103) conducting the activity identified in § 216.120(a) (30th Space Wing, U.S. Air Force) must apply for and obtain either an initial Letter of Authorization in accordance with § 216.127 or a renewal under § 216.128.

(b) The application must be submitted to NMFS at least 30 days before the activity is scheduled to begin.

(c) Applications for a Letter of Authorization and for renewals of Letters of Authorization must include the following:

(1) Name of the U.S. citizen requesting the authorization,

(2) A description of the activity, the dates of the activity, and the specific location of the activity, and

(3) Plans to monitor the behavior and effects of the activity on marine mammals.

(d) A copy of the Letter of Authorization must be in the possession of the persons conducting activities that may involve incidental takings of pinnipeds.

**§ 216.127 Letters of Authorization.**

(a) A Letter of Authorization, unless suspended or revoked, will be valid for a period of time not to exceed the period of validity of this subpart, but must be renewed annually subject to annual renewal conditions in § 216.128.

(b) Each Letter of Authorization will set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact on the species, its habitat, and on the availability of the species for subsistence uses (i.e., mitigation); and

(3) Requirements for mitigation, monitoring and reporting.

(c) Issuance and renewal of the Letter of Authorization will be based on a determination that the total number of marine mammals taken by the activity as a whole will have no more than a negligible impact on the affected species or stock of marine mammal(s).

**§ 216.128 Renewal of Letters of Authorization.**

(a) A Letter of Authorization issued under § 216.106 and § 216.127 for the activity identified in § 216.120(a) will be renewed annually upon:

(1) Notification to NMFS that the activity described in the application submitted under § 216.126 will be undertaken and that there will not be a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming 12 months;

(2) Timely receipt of the monitoring reports required under § 216.125(d) and (e), and the Letter of Authorization issued under § 216.127, which has been reviewed and accepted by NMFS; and

(3) A determination by NMFS that the mitigation, monitoring and reporting measures required under §§ 216.124 and 216.125 and the Letter of Authorization issued under §§ 216.106 and 216.127, were undertaken and will be undertaken during the upcoming annual period of validity of a renewed Letter of Authorization.

(b) If a request for a renewal of a Letter of Authorization issued under §§ 216.106 and 216.128 indicates that a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming season will occur, NMFS will provide the public a period of 30 days for review and comment on the request. Review and comment on renewals of Letters of Authorization are restricted to:

(1) New cited information and data indicating that the determinations made in this document are in need of reconsideration, and

(2) Proposed changes to the mitigation and monitoring requirements contained in these regulations or in the current Letter of Authorization.

(c) A notice of issuance or denial of a renewal of a Letter of Authorization will be published in the **Federal Register**.

**§ 216.129 Modifications of Letters of Authorization.**

(a) Except as provided in paragraph (b) of this section, no substantive modification (including withdrawal or suspension) to the Letter of Authorization by NMFS, issued pursuant to §§ 216.106 and 216.127 and subject to the provisions of this subpart shall be made until after notification and an opportunity for public comment has been provided. For purposes of this paragraph, a renewal of a Letter of Authorization under § 216.128, without modification (except for the period of validity), is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in§ 216.120(b), a Letter of Authorization issued pursuant to §§ 216.106 and 216.127 may be substantively modified without prior notification and an opportunity for public comment. Notification will be

published in the **Federal Register** within 30 days subsequent to the action.

[FR Doc. E8–30237 Filed 12–18–08; 8:45 am]

**BILLING CODE 3510–22–S**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 660

**[Docket No. 080226308–81499–01]**

**RIN 0648–AW50**

## Fisheries Off West Coast States; Highly Migratory Species Fisheries

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

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

**SUMMARY:** NMFS issues a proposed rule to initiate collection of a permit fee for vessel owners participating in commercial and charter recreational fishing for highly migratory species (HMS) in the Exclusive Economic Zone (EEZ) off the West Coast of California, Oregon, and Washington. The HMS permits are issued under implementing regulations for the Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species (HMS FMP).

**DATES:** Comments must be received by January 20, 2009.

**ADDRESSES:** You may submit comments, identified by 0648–AW50, by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal *http://www.regulations.gov*
- Fax: 562–980–4047, Attn: Chris Fanning, Permits Coordinator.
- Mail: Rodney R. McInnis, Regional Administrator, Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802 4213.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter N/A in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule may be submitted to Rodney R. McInnis at the address listed above and by e-mail to *David__Rostker@omb.eop.gov*, or fax to (202) 395–7285.

**FOR FURTHER INFORMATION CONTACT:** Chris Fanning, Permits Coordinator, Sustainable Fisheries Division, NMFS, 562–980–4198.

**SUPPLEMENTARY INFORMATION:** On April 7, 2004, NMFS published a final rule to implement the HMS FMP (69 FR 18444) that included mandatory permit requirements at 50 CFR 660.707. At the time, there was no cost passed on to the vessel owners for the preparation and issuance of the permit. NMFS now proposes to charge an administrative fee for the recovery of HMS permit processing and issuance expenses. NMFS initiates rulemaking for this action pursuant to procedures established at 50 CFR 660.717(d) of the implementing regulations for the HMS FMP.

This proposed rule would specify that an application for an HMS permit, including the renewal of an existing permit, would include a fee payable by the vessel owner. The fee amount required will be determined in accordance with the NOAA Finance Handbook available at (*http://www.corporateservices.noaa.gov/~finance/FinanceHandbook.htm*) and specified on the application form. The fee amount is expected to be approximately $30-$40 at this time.

### Background

Section 303(b)(1) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA), 16 U.S.C. 1853(b)(1), authorizes the inclusion of a requirement for permit fees in fishery management plans. Section 304(d) of the MSA specifies that such fees may not exceed the administrative costs of issuing the permits. Historically, only some fishery management plans have authorized the collection of permit fees, resulting in a set of inconsistent permit fee policies around the country. NMFS has issued a policy directive (No. 30–120, effective January 3, 2005 and renewed in 2007) to establish a more consistent agency permit program that recovers the expense of permit processing and issuance for all permits issued by NMFS to the extent authorized by law. Policy directive No. 30–120 is available at: *http://www.nmfs.noaa.gov/directives/*.

In this case, the original Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species, as approved by NOAA in 2004, already included authority to collect permit fees. NMFS proposes to exercise this authority through this rulemaking.

### Classification

NMFS has determined that this proposed rule is consistent with the HMS FMP and preliminarily determined that this proposed rule is consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable laws, subject to public review and comment.

Information collection requirements for HMS Permits have been previously approved by OMB under the Southwest Region Family of Forms (OMB Control Number 0648–0204). This approval is valid through April 30, 2010. An amendment to this approved collection of information has been submitted and is undergoing review by OMB. The amendment would incorporate the permit fee collection component of this proposed rule, if finalized. Public reporting burden for the payment of HMS permit fees is estimated to average 5 minutes or less per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection information.

Public comment is sought regarding: whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; 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, including through the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information to NMFS Southwest Region at the **ADDRESSES** above, and by e-mail to *David__Rostker@omb.eop.gov* or fax to (202) 395–7285.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

This proposed rule has been determined to be significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The factual basis for this certification is as follows:

Approximately 1,772 HMS commercial and recreational charter vessels were permitted under the HMS FMP to operate off the U.S. West Coast in 2007, the most recent year for which annual data are available. These vessels are considered small business entities under NAICS Code 114111 with annual per vessel revenues under $4,000,000. Ex-vessel revenue for HMS landings on the West Coast in 2007 was approximately $21,000,000 which equates to an average of approximately $11,000 per vessel. The anticipated permit fee amount would be a very minor component of these vessels annual operating expenses which are estimated to be in the tens of thousands of dollars.

As a result, an initial regulatory flexibility analysis is not required and none has been prepared.

**List of Subjects in 50 CFR Part 660**

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: December 15, 2008.

**John Oliver,**

*Deputy Assistant Administrator for Operations, National Marine Fisheries Service.*

For the reasons set out in the preamble, 50 CFR part 660 is proposed to be amended as follows:

## PART 660—FISHERIES OFF THE WEST COAST STATES

1. The authority citation for part 660 continues to read as follows:

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

2. A new paragraph (e) is added to § 660.707 to read as follows:

**§ 660.707 Permits.**

* * * * *

(e) *Fees.* An application for a permit, or renewal of an existing permit under paragraph (b)(1) of this section will include a fee for each vessel. The fee amount required will be calculated in accordance with the NOAA Finance Handbook and specified on the application form.

[FR Doc. E8–30242 Filed 12–18–08; 8:45 am]

BILLING CODE 3510–22–S

# Notices

Federal Register
Vol. 73, No. 245
Friday, December 19, 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–2008–0135]**

### Notice of Request for Revision and Extension of Approval of an Information Collection; Animal Welfare

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Revision and 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 approval of a revision and extension of an information collection associated with Animal Welfare Act regulations for the humane handling, care, treatment, and transportation of certain animals by dealers, research facilities, exhibitors, carriers, and intermediate handlers.

**DATES:** We will consider all comments that we receive on or before February 17, 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-2008-0135* 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–2008–0135, 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–2008–0135.

*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 the Animal Welfare Act regulations, contact Dr. Barbara Kohn, Senior Staff Veterinarian, Animal Care, APHIS, 4700 River Road Unit 84, Riverdale, MD 20737; (301) 734–7833. 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:* Animal Welfare.

*OMB Number:* 0579–0036.

*Type of Request:* Revision and extension of approval of an information collection.

*Abstract:* Under the Animal Welfare Act (AWA or Act) (7 U.S.C. 2131 *et seq.*), the Secretary of Agriculture is authorized to promulgate standards and other requirements governing the humane handling, housing, care, treatment, and transportation of certain animals by dealers, research facilities, exhibitors, carriers, and intermediate handlers. The Secretary of Agriculture has delegated the authority for enforcement of the AWA to the Animal and Plant Health Inspection Service (APHIS).

The regulations in 9 CFR parts 1 through 3 were promulgated under the AWA to ensure the humane handling, care, treatment, and transportation of regulated animals under the Act. The regulations in 9 CFR part 2 require documentation of specified information by dealers, research institutions, exhibitors, carriers (including foreign air carriers), and intermediate handlers. The regulations in 9 CFR part 2 also require that facilities that use animals for regulated purposes obtain a license or register with the U.S. Department of Agriculture (USDA). Before being issued a USDA license, individuals are required to undergo prelicense inspections; once licensed, a licensee must periodically renew the license.

To help ensure compliance with the AWA regulations, APHIS performs unannounced inspections of regulated facilities. A significant component of the inspection process is review of records that must be established and maintained by regulated facilities. The information contained in these records is used by APHIS inspectors to ensure that dealers, research facilities, exhibitors, intermediate handlers, and carriers comply with the Act and regulations.

Facilities must make and maintain records that contain official identification for all dogs and cats and certification of those animals received from pounds, shelters, and private individuals. These records are used to ensure that stolen pets are not used for regulated activities. Dealers, exhibitors, and research facilities that acquire animals from nonlicensed persons are required to have the owners of the animals sign a certification statement verifying the owner's exemption from licensing under the Act. Records must also be maintained for animals other than dogs and cats when the animals are used for purposes regulated under the Act.

Research facilities must also make and maintain additional records for animals covered under the Act that are used for teaching, testing, and experimentation. This information is used by APHIS personnel to review the research facility's animal care and use program.

APHIS needs the reporting and recordkeeping requirements contained in 9 CFR part 2 to enforce the Act and regulations. APHIS also uses the collected information to provide a mandatory annual report of animal welfare activities to Congress.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

This notice includes a description of the information collection requirements currently approved by OMB under numbers 0579–0036 (Animal Welfare), 0579–0247 (Transportation of Animals on Foreign Air Carriers [part 2 requirements]), and 0579–0254 (Inspection, Licensing, and Procurement of Animals). After OMB approves and

combines the burden for the three collections under a single collection (number 0579–0036), the Department will retire numbers 0579–0247 and 0579–0254.

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 0.9737631 hours per response.

*Respondents:* Dealers, research facilities, exhibitors, carriers, and intermediate handlers; persons exempt from licensing under the AWA.

*Estimated annual number of respondents:* 7,402.

*Estimated annual number of responses per respondent:* 13.145906.

*Estimated annual number of responses:* 97,306.

*Estimated total annual burden on respondents:* 94,753 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 15th day of December 2008.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. E8–30213 Filed 12–18–08; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

**[Docket No. APHIS–2008–0130]**

### Notice of Request for Revision and Extension of Approval of an Information Collection; National Poultry Improvement Plan

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Revision and 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 approval of a revision and extension of an information collection associated with regulations for the National Poultry Improvement Plan.

**DATES:** We will consider all comments that we receive on or before February 17, 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–2008–0130* 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–2008–0130, 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–2008–0130.

*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 regulations associated with the National Poultry Improvement Plan, contact Mr. Andrew Rhorer, Senior Coordinator, National Poultry Improvement Plan, VS, APHIS, 1498 Klondike Road, Suite 101, Conyers, GA 30094; (770) 922–3496. 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:* National Poultry Improvement Plan.

*OMB Number:* 0579–0007.

*Type of Request:* Revision and extension of approval of an information collection.

*Abstract:* The Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture is authorized to, among other things, administer the National Poultry Improvement Plan (NPIP), the primary purpose of which is to protect the health of the U.S. poultry population. NPIP is a voluntary Federal-State-industry cooperative program for the improvement of poultry flocks and products through disease control techniques. Participation in all Plan programs is voluntary, but flocks, hatcheries, and dealers of breeding poultry must first qualify as ''U.S. Pullorum-Typhoid Clean'' as a condition for participation in the other Plan programs. The NPIP regulations are contained in 9 CFR parts 56, 145, 146, and 147.

In administering the Plan, APHIS requires a number of information collection activities and forms, including VS Forms 1–23/1–23A, Appraisal and Indemnity Claim for Animals Destroyed or Materials Destroyed/Continuation Sheet; VS Form 9–3, Report of Sales of Hatching Eggs, Chicks, and Poults; VS Form 9–4, Summary of Breeding Flock, Table-Egg Layer Flocks, Meat-Type Chicken and Turkey Slaughter Plants Participation; VS Form 9–5, Report of Hatcheries, Dealers, and Independent Flocks, Table-Egg Producers, Meat-Type Chicken and Turkey Slaughter Plants Participating in the NPIP; VS Form 9–6, Report of Salmonella Isolations to NPIP Official State Agencies; VS Form 9–7, Investigation of Salmonella Isolations in Poultry; VS Form 9–8, Flock Inspection and Check Testing Report; VS Form 9–9, Hatchery Inspection Form; VS Form 10–3, Request for Salmonella Serotyping; banding of sentinel birds for identification prior to flock vaccination; memorandums of understanding; recordkeeping; and printing and mailing to States, upon request, of computerized printouts of interstate sales by hatchery operators who ship large numbers of small chick orders.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

This notice includes a description of the information collection requirements currently approved by OMB under numbers 0579–0007 (National Poultry Improvement Plan) and 0579–0305 (Low Pathogenic Avian Influenza; Voluntary Control Program and Payment of Indemnity). After OMB approves and combines the burden for both collections under a single collection (number 0579–0007), the Department will retire number 0579–0305.

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 0.6159046 hours per response.

*Respondents:* Flock owners, breeders, hatchery operators, commercial table-egg layer producers, meat-type chicken slaughter plants, turkey slaughter plants, and State veterinary medical officers.

*Estimated annual number of respondents:* 12,222.

*Estimated annual number of responses per respondent:* 13.772541.

*Estimated annual number of responses:* 168,328.

*Estimated total annual burden on respondents:* 103,674 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 15th day of December 2008.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. E8–30215 Filed 12–18–08; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

**[Docket No. APHIS–2008–0134]**

### Notice of Request for Extension of Approval of an Information Collection; Revision of Fruits and Vegetables Import Regulations

**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 importation of new fruits and vegetables into the United States.

**DATES:** We will consider all comments that we receive on or before February 17, 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-2008-0134* 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–2008–0134, 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–2008–0134.

*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 the importation of new fruits and vegetables, contact Ms. Donna West, Senior Import Specialist, Commodity Import Analysis and Operations, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737–1231; (301) 734–8758. 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:* Revision of Fruits and Vegetables Import Regulations.

*OMB Number:* 0579–0293.

*Type of Request:* Extension of approval of an information collection.

*Abstract:* As authorized by the Plant Protection Act (PPA, 7 U.S.C. 7701 *et seq.*), 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, which administers regulations to implement the PPA.

The regulations in Subpart—Fruits and Vegetables (7 CFR 319.56–1 through 319.56–47) allow a number of fruits and vegetables to be imported into the United States, under specified conditions, from certain parts of the world. The regulations in §§ 319.56–4 and 319.56–5 provide for a notice-based process for recognizing pest-free areas and for approving the importation of certain new commodities that, based on the findings of a pest risk analysis, can be safely imported into the United States subject to designated phytosanitary measures. Importation of new commodities under this process requires the use of information collection activities, including the issuance of permits and phytosanitary certificates.

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 this information collection activity. These comments will help us:

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

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

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

(4) Minimize the burden of the 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 0.9615384 hours per response.

*Respondents:* Importers, exporters, and foreign national plant protection organizations.

*Estimated annual number of respondents:* 960.

*Estimated annual number of responses per respondent:* 2.16666.

*Estimated annual number of responses:* 2,080.

*Estimated total annual burden on respondents:* 2,000 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 15th day of December 2008.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. E8–30214 Filed 12–18–08; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

**[Docket No. APHIS–2008–0084]**

### Notice of Decision to Issue Permits for the Importation of Fresh White Asparagus From Senegal Into the Continental United States

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Notice.

**SUMMARY:** We are advising the public of our decision to begin issuing permits for the importation into the continental United States of fresh white asparagus from Senegal. Based on the findings of a pest risk analysis, which we made available to the public for review and comment through a previous notice, we believe that the application of one or more designated phytosanitary measures will be sufficient to mitigate the risks of introducing or disseminating plant pests or noxious weeds via the importation of fresh white asparagus from Senegal.

**DATES:** *Effective Date:* December 19, 2008.

**FOR FURTHER INFORMATION CONTACT:** Dr. Shirley Wager Pagé, Branch Chief, Commodity Import Analysis and Operations Staff, PPQ, APHIS, 4700 River Road, Unit 133, Riverdale, MD 20737–1231; (301) 734–8758.

**SUPPLEMENTARY INFORMATION:** Under the regulations in ''Subpart-Fruits and Vegetables'' (7 CFR 319.56 through 319.56–47, referred to below as the regulations), the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture prohibits or restricts the importation of fruits and vegetables into the United States from certain parts of the world to prevent plant pests from being introduced into and spread within the United States.

Section 319.56–4 of the regulations contains a performance-based process for approving the importation of commodities that, based on the findings of a pest risk analysis, can be safely imported subject to one or more of the designated phytosanitary measures listed in paragraph (b) of that section. Under that process, APHIS publishes a notice in the **Federal Register** announcing the availability of the pest risk analysis that evaluates the risks associated with the importation of a particular fruit or vegetable. Following the close of the 60-day comment period, APHIS may begin issuing permits for importation of the fruit or vegetable subject to the identified designated measures if: (1) No comments were received on the pest risk analysis; (2) the comments on the pest risk analysis revealed that no changes to the pest risk analysis were necessary; or (3) changes to the pest risk analysis were made in response to public comments, but the changes did not affect the overall conclusions of the analysis and the Administrator's determination of risk.

In accordance with that process, we published a notice [1] in the **Federal Register** on August 18, 2008 (73 FR 48189–48190, Docket No. APHIS–2008–0084), in which we announced the availability, for review and comment, of a pest risk analysis that evaluates the risks associated with the importation into the continental United States of fresh white asparagus from Senegal. We solicited comments on the notice for 60 days ending on October 17, 2008. We received one comment by that date, from a State department of agriculture. The commenter agreed that the mitigation measures described in the pest risk analysis would be adequate.

Therefore, in accordance with the regulations in § 319.56–4(c)(2)(ii), we are announcing our decision to begin issuing permits for the importation into the continental United States of fresh white asparagus from Senegal subject to the following phytosanitary measures:

- Each shipment of white asparagus must be accompanied by a phytosanitary certificate bearing the following additional declaration: ''The white asparagus in this consignment has been inspected and found free of *Cochliobolus pallescens* (*Curvulaia pallescens*).'' The phytosanitary certificate with the additional declaration must be issued by the national plant protection organization of Senegal.
- Each shipment is subject to inspection upon arrival in the United States.
- The white asparagus must be a commercial consignment as defined in 7 CFR 319.56–2.

These conditions will be listed in the Fruits and Vegetables Import Requirements database (available at *http://www.aphis.usda.gov/favir*). In addition to those specific measures, the fresh white asparagus will be subject to the general requirements listed in § 319.56–3 that are applicable to the importation of all fruits and vegetables.

**Authority:** 7 U.S.C. 450, 7701–7772, and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 15th day of December 2008.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. E8–30216 Filed 12–18–08; 8:45 am]

**BILLING CODE 3410–34–P**

[1] To view the notice and the pest risk analysis, go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2008-0084*.

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Klamath National Forest, California, Hi-Grouse Project

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of intent to prepare an environmental impact statement.

**SUMMARY:** The USDA Forest Service is preparing an Environmental Impact Statement (EIS) for the Hi-Grouse Project to reduce fuel hazard and restore forest health on the Goosenest Ranger District of the Klamath National Forest.

**DATES:** Comments concerning the scope of the analysis postmarked or received by 30 days after the publication of this notice are assured of being considered in the environmental analysis. The Draft Environmental Impact Statement is expected to be published in July 2009 and the Final Environmental Impact Statement is expected December 2009.

**ADDRESSES:** Send written comments to Goosenest District Ranger, Attn: Hi-Grouse Project, Klamath National Forest, 37805 Highway 97, Macdoel, CA 96058. You may also send electronic comments to the project e-mail box: *comments-pacificsouthwest-klamath-goosenest@fs.fed.us*.

**FOR FURTHER INFORMATION CONTACT:** District NEPA Planner, Wendy Dobrowolski at 530–398–5767 or Interdisciplinary Team Leader Lois Pfeffer at 559–359–7023 if you have questions, concerns or suggestions relating to this proposal.

**SUPPLEMENTARY INFORMATION:** The Hi-Grouse project area is located south of the Four Corners snowmobile trailhead and encompasses approximately 7,430 acres in the southeast portion of the Goosenest Ranger District. The legal description for the project area is all or portions of: T44N R2E Sections 23, 25–28, 32–36; T43N R2E, Sections 1–4, 9–13, T44N R3E Section 31, T43N R3E, Sections 6, 7, and 18 Mt. Diablo Meridian, Siskiyou County, California. State agencies, tribal governments, environmental groups, and local elected officials collaborated with the Forest Service early in the process to develop this project.

**Management Direction**

The project area includes a late-successional reserve, a special interest area and portions of the snowmobile trail system. Plans, policies and regulations that provide management direction for this project include (not limited to): Klamath National Forest Land and Resource Management Plan of 1995 (includes Standards and Guidelines from the Northwest Forest Plan); Goosenest Adaptive Management Area Ecosystem Analysis; Section 7(a)(1) of the Endangered Species Act; Healthy Forest Restoration Act; Clean Water Act; Clean Air Act; National Fire Plan; and Final Recovery Plan for the Northern Spotted Owl.

The project is designed to be consistent with all applicable policies and plans. The type of thinning proposed follows recommendations from the Late-Successional Reserve Assessment and Goosenest Adaptive Management Area analysis. The project is within the Fire-Prone Landscape area identified in the Northern Spotted Owl Recovery Plan. The entire project area (7,432 acres) lies within the Goosenest Adaptive Management Area and includes the following Management Areas (MA) as defined in the Klamath National Forest Land and Resource Management Plan of 1995 (Forest Plan): 4,635 acres General Forest MA 17; 2,574 acres Partial Retention Visual Quality Objective MA 15; 152 acres Special Habitat Late Successional Reserve MA 5; 71 acres Special Interest Area MA 7. There are no Riparian Reserves present in the project area.

**Background**

The Goosenest Adaptive Management Area was established under the Northwest Forest Plan (NWFP) with an emphasis on ''Development of ecosystem management approaches, including use of prescribed burning and other silvicultural techniques, for management of pine forests, including objectives related to forest health, production and maintenance of late-successional forest and riparian habitat, and commercial timber production'' (NWFP Standard & Guideline D–14). This area presents challenges typical of east-side forests that have experienced marked departures from historic species composition, density, and disturbance regimes.

The major influences on this area over the last 100 years are railroad logging beginning around 1900, grazing, fire suppression, and selective cutting prescriptions over the last several decades in the true fir dominated stands. Early logging removed the majority of the original pine forest and left white fir. The removal of pine seed sources, combined with livestock grazing and post-logging fires created ideal conditions for germination of true firs, which then became established and grew during the relatively warm and wet early half of the 20th century. Selective logging in the true fir types has lead to the introduction and spread of annosum root disease, which is now a major factor in stand health. Insect- and disease-related mortality is occurring in true firs and ponderosa pine. Mature lodgepole pine stands are continuing to experience heavy stand-replacing mortality due to the mountain pine beetle, and these high beetle populations are now infesting ponderosa pine within the white fir-pine type.

Many of the stands in the project area are overstocked and heavy mortality is expected to continue. Much of the project area is severely departed from the historic fire return intervals having missed several fire cycles. An overview of the existing and desired conditions broken into general stand types is provided below, as well as the need for change.

*White Fir/Pine Community*

*Desired Condition:* Pine-dominated stands that can withstand endemic level of insects and disease and are resilient in the event of a wildfire. White fir is a small component of the stands and generally found in moist pockets and north facing slopes.

*Existing Condition:* White fir has encroached, with the absence of natural fire, turning what was once a ponderosa pine dominated system into a white fir dominated stand too dense for ponderosa pine to withstand. Active bark beetle infestations have killed much of the pine, and what remains is highly susceptible to attack. White fir is not well suited for the site and limited to moist pockets or north facing slopes. The S-type of annosus root disease has been found in several of the stands, further reason that white fir will not be sustainable on these transitions zone sites.

*Need for Change:* White fir needs to be significantly reduced on these sites. Areas with extensive pine mortality may need to be planted with pine to achieve the desired condition. Fuel treatments are needed to reduce heavy fuel loadings.

*Mixed Conifer*

*Desired Condition:* Although not dominating most of these stands, ponderosa pine is a significant and sustainable component in these areas. These stands have a diverse assortment of diameter and age classes, high structural diversity, and old growth characteristics. Spotted owl and goshawk have ample habitat. Small openings provide for understory vegetation. These stands can withstand endemic level of insects and disease. The threat of stand-replacing wildfires has been reduced due to surrounding fuels treatments, and treatments within

these stands have improved localized fuel conditions.

*Existing Condition:* Many of these stands are overstocked, and high white fir densities are having negative impacts on the high elevation ponderosa pine. Many stands are growing in such dense conditions that individual trees are unable to develop large primary limbs and full crowns, and diameter growth is slowed. Important features for future spotted owl and goshawk habitat. Fuel loadings are extremely high in many areas where the white fir is beginning to self-thin.

*Need for Change:* Overall stand density needs to be reduced to sustainable levels. Future spotted owl and goshawk nesting and foraging habitat needs to be brought on-line by culturing trees in younger stands to increase rates of diameter growth and to retain full crowns. White fir encroachment needs to be removed in and around pockets of ponderosa pine.

*Lodgepole*

*Desired Condition:* In the lodgepole stands young, resilient, and overall healthy trees are desired. Species diversity is increased by the presence of white fir, ponderosa pine and aspen in these stands. Increasing aspen is desired to increase species diversity. Initial attack forces will be able to contain wildfires using fuelbreaks along roads as anchors.

*Existing Condition:* In dense, contiguous tracts of lodgepole dominated stands, growth is stagnating and mortality from disease and beetle attacks are increasing. These stands are loaded with fuels, near areas with valuable wildlife habitat. Mixed among some of the lodgepole are individual trees and pockets of ponderosa pine, white fir, and aspen.

*Need for Change:* To prevent the current and eminent tree mortality from adding to the existing fuel loadings these trees need to be removed. Biomass entries may be necessary to reduce the residual densities. To promote the expansion of aspen in areas where aspen stands exist, adjacent competing conifers should be removed.

**Purpose and Need for Action**

The purpose and need for action is to address the major gaps between desired conditions, described in the Forest Plan for the Goosenest Adaptive Management Area (AMA) and the Northern Spotted Owl Recovery Plan, and the current conditions in the project area.

The purpose and need components identified for this project area are listed below:

—Mimic natural processes through management actions to promote healthy ecological conditions and replicate the role of natural disturbances.
—Decrease stand density over most of the project area to reduce disease and insects to endemic levels, and provide for resilient stocking levels of desired species.
—Increase the proportion of ponderosa pine, sugar pine, and white pine on suitable sites to mimic historical stand conditions.
—Release understory in lodgepole pines stands to increase stand diversity and remove dead and soon-to-be dead trees to reduce current and future fuel accumulations.
—Treat heavy fuel loadings to reduce the threat of stand-replacing wildfire and mimic historical fire regimes of low intensity fire behavior, protect older forest habitat components in the project area, and provide for firefighter safety.
—Increase stand diversity to enhance overall vegetative diversity.
—Promote and maintain sustainable owl habitat elements in the Goosenest AMA and the Late Successional Reserve MAs by promoting resiliency to fire, insect and disease on the landscape and by culturing young trees to increase growth and crowns for future suitable habitat.
—Maintain sustainable nesting and foraging habitat in the goshawk territories. In meeting the needs above, the proposed action must also achieve the following purposes:
—Maintain aesthetic values especially along sensitive routes and areas seen from high places.
—Identify appropriate monitoring (learning) objectives related to project activities in line with the Goosenest AMA.

**Proposed Action**

The Goosenest Ranger District of the Klamath National Forest proposes to restore ponderosa pine and mixed conifers, thin and use fuel reduction techniques on approximately 5,085 acres within the Goosenest AMA. The proposed actions were designed to address the purpose and need components and move towards the desired conditions while meeting plan standards and guidelines. This project involves altering stand density, structure, and species compositions, and the abatement of fuels generated from proposed activities as well as treatment of pre-existing fuel accumulations. The following activities are included in the proposed action. Some treatments overlap such as thinning followed with fuels abatement and underburning; and fuel treatment corridors overlapping other treatments.

*Silvicultural Prescriptions and Objectives*

*Thinning from Below (2,682 acres)*—Thinning from below is a thinning method that removes the subordinate trees in the stand, i.e., those trees that are smaller and shorter than the trees forming the upper canopy. Stand density is reduced, allowing the trees with the best crown development and size to utilize the new growing space and increase growth and ability to withstand fire and insects and disease. Species composition can also be altered by favoring some species to be left over others. In this project, the objectives are to improve overall stand vigor, favor the largest fire-resistant trees and species, and reduce the potential for crown fire through removal of trees that act as fire ladders and that could sustain a crown fire. The percentage of ponderosa pine, sugar pine, and white pine will increase in the residual stand. Thinning intensity will vary and areas will be left un-thinned to maintain stand diversity. Treatment of conifer stumps with a fungicide (trade name Sporax) to prevent colonization and spread of the conifer root disease *Heterobasidion annosum*. The prescription will include small openings of ¼ to 1 acre in size in up to 15 percent of a treated stand. Fuels overall abatement treatments include: Yarding tree tops, pile and burning, lop and scatter, and biomass removal options. Overall abatement treatments will be carried out on 2,497 acres of the thinned acres. Additional fuels treatments include mechanical mowing on 309 acres and underburning of 1,742 acres in stands that have larger amounts of fire-resistant species.

*Ponderosa Pine/Mixed Conifer Restoration and Re-establishment (1,375 acres)*—This prescription involves thinning to favor ponderosa, sugar, and white pine as the residual tree species in stands where white fir and red fir are heavily infested with annosum root disease and planting of pines where they are lacking. Post-treatment conditions will vary from thinned patches dominated by the largest pines to thinned patches dominated by white fir to areas of open pine forest. The larger areas of open pine and areas dominated by white fir will be planted to ponderosa pine, as well as rust-resistant sugar pine and white pine on the appropriate sites. The prescription will include un-thinned areas and small openings of ¼ to 1 acre in size in up to 15 percent of a treated stand. Treatment of conifer stumps with a

fungicide (trade name Sporax) to prevent colonization and spread of the conifer root disease *Heterobasidion annosum*. Fuels treatments include overall abatement on all 1,375 acres with mechanical mowing on 107 acres followed with underburning of 939 acres in stands that have larger amounts of fire-resistant species. The objectives of this prescription are to restore historic species composition and stand structure to areas that have lost most of the historic pine species and are now dominated by diseased white fir.

*Lodgepole Pine Thinning/Fuels Reduction (428 acres)*—This prescription will remove remnant diseased lodgepole pines, pile fuels and thin the understory to promote the existing true firs and pine. The objective of this prescription is to move beetle-killed lodgepole stands towards an open stand structure with small trees of mixed species composition (including white fir, ponderosa pine, and lodgepole pine), that will be more resistant to mountain pine beetle mortality in the future. Treatment of stumps, 8 inches in diameter and larger, from live and recently dead conifers with a fungicide (trade name Sporax) would be done after tree cutting to prevent colonization and spread of the conifer root disease *Heterobasidion annosum*. Overall abatement treatments and mechanical mowing are planned on all 428 acres.

*Plantation Thinning (99 acres)*—Existing plantations will be thinned to promote growth, future fire resistance, and a mixed species composition with emphasis on ponderosa pine. Since ponderosa pine is generally the most under-represented species in these plantations due to natural seeding of lodgepole and true firs, it will be favored to be left over other species.

*Fuels Prescriptions and Objectives*

*Overall Abatement (4,442 acres)*—Overall abatement includes yarding tree tops, pile and burning, lop and scatter, and biomass removal treatment options.

*Yarding Tree Tops*—In all silvicultural prescriptions that involve tree removal, tree tops would be moved to the landing for treatment (reoffer as forest by products or burning). This treatment would reduce fuels levels as a result of operations.

*Biomass Removal*—Trees (generally less than 12''diameter breast height) would be removed in thinning operations to reduce potential crown fire behavior, improve species composition and reduce competition. Small diameter tree boles may be processed into bundles and removed.

*Piling and Burning*—Following silviculture treatment, piling and burning will be used in fuels treatment corridors or where post-treatment fuels present a fire hazard or may lead to difficulty carrying out prescribed underburning. It is not anticipated that this method will be used often since whole tree yarding will be done where possible.

*Lopping Scattering*—This method will be used primarily to treat slash generated in thinning of plantations. Objective will be to reduce height and continuity of fuels and promote faster decomposition. It is not anticipated that this method will be used often since mechanical treatment is a standard operating procedure. In areas that are inaccessible or unsafe for mechanized equipment, this treatment is an alternative.

*Mechanical Mowing (844 acres)*—Mowing will occur where shrubs and seedling and saplings are major determinants of fire behavior, as well as in lodgepole stands that are now dominated by small trees. Objectives will be to reduce shrub density and height and density of small trees to modify fire behavior.

*Underburning (2,723 acres)*—In some sites following thinning treatments, controlled underburning will be used to reduce natural fuel loads, past activity slash, shrubs and white fir understory trees, while increasing herbaceous species and encouraging pine regeneration by creating areas of exposed mineral soil. Where underburning is prescribed as a stand-alone treatment, cutting and piling of ladder fuels and mowing of brush could be carried out to reduce potential flame lengths and scorch to residual trees. Underburning will not be prescribed where the residual stand will be dominated by true firs; in these instances, fuels treatments will emphasize mechanical methods.

*Fuels Treatment Corridors (Approximately 13 miles/480 acres)*—This prescription was identified along major road corridors and certain access roads for fire control. Treatments will consist of small tree thinning and/or removal, pruning, mowing of brush, and hand or machine piling and burning of fuels concentrations. Treatments will generally extend 150 feet either side of the road, but may extend farther depending on slope and vegetation type.

*Road Maintenance and Temporary Roads*

*Road Maintenance (as needed)*—Access into the Hi-Grouse project area will be by a series of County and National Forest System (NFS) roads, near the community of Macdoel, California. The main NFS roads that serve the project area are: 15, 77, 44N80, 44N62, and 44N54.

Existing NFS roads within the project area received periodic clearing, blading and drainage structure maintenance in the 2007 and 2008 seasons. Roads needed for the project will be reassessed prior to and during activities to determine if maintenance is needed and may require light maintenance to meet project requirements, generally consisting of spot rocking, grading, and re-establishing drainage structures. There will be no new roads constructed or added to the Forest road system. All aggregate rock and water source requirements for this project can be met from existing sources on National Forest lands. No new sources will be developed.

*Temporary Roads*—Approximately 4.0 miles of temporary road will be needed to access thinning units, of which 3.25 miles will be on non-system roads from previous harvest entries. These roads will be decommissioned upon project completion. Decommissioning could include all or a combination of the following activities: (1) Placing earth or log mound barriers to prevent vehicle traffic; (2) subsoiling and outsloping the road surface; (3) installing water bars and other drainage structures; and (4) mulching with native materials (logging slash) or certified weed free straw.

New temporary roads will be located and constructed to design standards that minimize ground disturbance, protect resources, and provide safe transportation at the least possible cost.

Existing non-system roads are generally old jeep roads or temporary roads constructed for past harvest activities. Road reconstruction, as defined by Forest Service Manual 7700, will not be required.

*Monitoring*—Forest Plan monitoring (including Best Management Practices) will be conducted in conjunction with other Forest projects.

Tractor units will be monitored to ensure soil disturbance is within established guidelines. Northern spotted owl surveys will be conducted through the life of the project. As part of the Forest noxious weed program, inventory noxious weeds for 3 years after the project is completed or as long as it takes the vegetation to recover from project disturbance (as measured by ground duff cover and forb and shrub layer cover).

Upon completion of project activities, monitoring will be conducted to assess the positive or negative effects of fuels treatments. Monitoring will be completed by the Forest and/or interested stakeholders (multi-party

monitoring) and will be subject to available funding and the ability of stakeholders to contribute funds or in-kind services. The immediate (1–3 years post-project) and long-term effects on landscape attributes will be monitored using a fire effects monitoring and inventory system (e.g., FIREMON). Monitoring will be used to (1) Document basic information during different phases of the project, (2) establish changes in attributes and trends through time, (3) analyze short and long-term fire effects, and (4) determine if project objectives related to fuels were met. Monitoring will be conducted according to the Klamath National Forest Fuels and Fire Effects Monitoring Guide (USDA Forest Service 2007). Project data will be collected and input into the monitoring database at intervals established by the project monitoring plan.

**Lead and Cooperating Agencies**

The USDA Forest Services is the lead agency.

**Responsible Official**

The Responsible Official for this project is the Forest Supervisor for the Klamath National Forest, Patricia A. Grantham, 1312 Fairlane Road, Yreka, California 96097.

**Nature of Decision To Be Made**

The responsible official for this proposal is the forest supervisor. Based on the analysis in the final EIS, the responsible official will make the following decisions and document them in a record of decision: (1) Whether to treat stands within the project area as proposed, or in what manner; and (2) What project design features should be applied.

**Scoping Process**

How to Comment: Opinions, values and suggestions for the general management direction for the Klamath National Forest will be noted, but will not be as useful to the ID Team as comments that are specific to the proposal. The ID Team is looking specifically for comments that discuss any impacts the proposed actions might have, especially to landowners, minorities, the local economy, recreational use and wildlife habitat.

How Your Comments Are Used: Once the ID Team has read your comments and identified the significant issues, they will begin to develop alternatives to the proposed actions. After they develop the alternatives, the next step is to analyze the environmental effects of those alternatives, the proposed actions and also the ''No Action'' alternative.

The alternatives, analysis of effects and related discussion will be presented to the public in the draft EIS, which is expected to be available for review in the summer of 2009. Following public review of the draft EIS, the ID Team will use the comments received to revise the document into the final EIS. Based on the results of environmental analysis and public input, the decision maker may issue a decision in a document titled the ''Record of Decision''.

*Contact Information and Schedule*

Scoping comments postmarked or received by 30 days after the publication of the Notice of Intent in the **Federal Register** are assured of being considered in the environmental analysis. Please note that all input received during project planning is a matter of public record; therefore names and addresses of participants cannot be kept confidential. You may also submit an oral comment over the telephone, in person (during normal business hours). Written comments should be addressed to: Goosenest District Ranger, Klamath National Forest, Attn: Hi-Grouse Project, 37805 Hwy 97, Macdoel, California 96058.

You may also send electronic comments (.doc, .pdf, .rtf) to the District project e-mail box: *comments-pacificsouthwest-klamath-goosenest@fs.fed.us*.

A public meeting was held in the fall of 2007 to introduce interested parties to the project. The proposed treatments were field verified during the summer of 2008 and are similar to those discussed during the fall 2007 meeting. Feel free to contact the District office to arrange a meeting, or if you have any questions about submitting a comment, please contact Lois Pfeffer, ID Team leader at 559–359–7023 or Wendy Dobrowolski, District NEPA Planner, at the Goosenest Ranger District 530–398–5767.

**Preliminary Issues**

Effects to Northern Spotted Owl—During the development of the proposed action, the U.S. Fish and Wildlife Service designated approximately 1,751 acres of Critical Habitat for northern spotted owl within the Hi-Grouse project area. This new designation was not considered in the development of the proposed action and approximately 830 acres of the designated Critical Habitat is identified for forest restoration and fuels treatments. The newly designated critical habitat is depicted on the scoping map and will be considered in the development of alternatives and future resource protection measures.

Pine and mixed conifer restoration and re-establishment treatments would remove some current northern spotted owl habitat that is not expected to persist in the long term due to insects and disease. Pine and mixed conifer restoration treatments would maintain and promote largest, healthy remaining trees and re-establish historic species composition. Thinning treatments would increase sustainability of forest cover and northern spotted owl habitat over the long term by increasing the capacity of the stands to resist effects of drought, fire, insects and disease. Thinning and fuel reduction treatments would result in short-term impacts to some important northern spotted owl habitat elements, such as canopy cover and down woody debris. Treatments are designed to promote and maintain key elements of habitat (especially large fire-resistant trees) and restore historic forest conditions.

**Comment Requested**

This notice of intent initiates the scoping process which guides the development of the environmental impact statement. Your participation at this stage of the project is essential for the Interdisciplinary (ID) Team to develop effective, issue-driven alternatives and mitigations, as needed, to the proposed action. For the purposes of this EIS, an issue is defined as a point of discussion, dispute or debate about environmental effects of this proposed action. Issues are often identified by reviewing comments received from: the general public, Tribal governments, within the agency (including ID Team members), other federal agencies, state, county, and local governments and agencies. After the ID Team has reviewed all the comments received and identified the issues, they will begin to develop alternatives to the proposed actions that are based on any significant issues that were identified. You can help the Hi-Grouse ID Team develop effective alternatives by submitting your project-specific comments.

*Early Notice of Importance of Public Participation in Subsequent Environmental Review:* A draft environmental impact statement will be prepared for comment. The comment period on the draft environmental impact statement will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register**.

The Forest Service believes, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of draft environmental impact

statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 553 (1978). Also, environmental objections that could be raised at the draft environmental impact statement stage but that are not raised until after completion of the final environmental impact statement may be waived or dismissed by the courts. *City of Angoon* v. *Hodel*, 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris*, 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45-day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final environmental impact statement.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft environmental impact statement should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the draft environmental impact statement or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.

Comments received, including the names and addresses of those who comment, will be considered part of the public record on this proposal and will be available for public inspection.

**Authority:** 40 CFR 1501.7 and 1508.22; Forest Service Handbook 1909.15, Section 21.

Dated: December 11, 2008.

**Patricia A. Grantham,**

*Forest Supervisor, Klamath National Forest.*

[FR Doc. E8–30184 Filed 12–18–08; 8:45 am]

**BILLING CODE 3410–11–P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Shasta-Trinity National Forest, California; Pettijohn LSR Habitat Improvement and Fuels Reduction Project

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of intent to prepare an environmental impact statement.

**SUMMARY:** The Shasta-Trinity National Forest (STNF) will prepare an environmental impact statement (EIS) to document and publicly disclose the environmental effects of implementing a hazardous fuels reduction project on approximately 3200 acres of National Forest System lands. Located within an area known as the Pettijohn portion of the Clear Creek Late Successional Reserve (LSR) the proposed project would provide the LSR with enhanced protection from catastrophic wildfire, increased fire fighter safety and habitat improvement for wildlife species associated with old-growth ecosystems, including the Threatened northern spotted owl, *Strix occidentalis caurina*. The proposal includes thinning trees from below in overcrowded stands and in proposed Fuel Management Zones (FMZs). Most thinning would be accomplished through commercial timber harvest of sawtimber and biomass (chips). Road decommissioning is proposed on approximately 2.3 miles of road and road reconstruction is proposed on approximately 2 miles of existing roads to improve drainage and reduce erosion. No new system roads would be constructed. The Pettijohn LSR Habitat Improvement and Fuels Reduction Project is located south of Trinity Lake near the communities of Lewiston and Weaverville, California in sections 5–9, 16–21, 28, 32, and 33 in T34N, R8W; sections 48, 17, and 18 in T33N, R8W; and sections 1, 2, 9, 10, 12, 13, and 24 in T34N, R9W (Mt. Diablo Meridian).

**DATES:** Comments concerning the scope of the analysis must be received by no later than 30 days from date of publication of this notice in the **Federal Register**. The draft environmental impact statement is expected in May 2009 and the final environmental impact statement is expected in November 2009.

**ADDRESSES:** Send written comments to: Pettijohn Project c/o Thomas A. Quinn, Shasta-Trinity National Forest, Weaverville Ranger District, P.O. Box 1190, Weaverville, CA 96093, (530) 623–1758. Comments may also be sent via e-mail to: *comments-pacificsouthwest-shasta-trinity@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:** Thomas A. Quinn, Wildlife Biologist, Shasta-Trinity National Forest, Weaverville Ranger District, P.O. Box 1190, Weaverville, CA 96093, (530) 623–1758, taquinn@fs.fed.us.

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:**

#### Purpose and Need for Action

The purpose of the proposed action is to enhance and protect habitat for wildlife species associated with old-growth forest ecosystems, particularly the northern spotted owl (NSO) in the Clear Creek LSR.

The Clear Creek LSR is currently dominated by dense, mature (approximately 80 to 110 years old) conifer forest and contains less than the desired amount of old-growth habitat. A combination of historic logging and fire suppression has resulted in dense forests, tree species compositions, age-class structures and fuel conditions that are highly conducive to crown fires and reduced fire suppression effectiveness. The growth of potential and existing large tree components has been slowed and their natural resistance to mortality from pathogens, insects and fire has been endangered as a result of dense forest conditions. Because of existing ladder fuels, there is a high probability that a fire start within or adjacent to the project area would result in the loss of existing and developing old-growth habitat in the LSR. Because of fuels conditions, the use of prescribed fire by itself to achieve lower fuel loading is currently not safe or feasible.

Coordinated analyses conducted by the Forest Service and the U.S. Fish and Wildlife Service concluded that current habitat conditions in the Clear Creek LSR are insufficient to maintain the 20 pairs of breeding owls established in the northern spotted owl conservation strategy. The Clear Creek LSR Assessment identifies thinning overstocked young to mature conifer stands as a high priority treatment for managing forests within the LSR. Thinning stands and implementing fuel treatments would reduce fire hazard and risk, accelerate growth, and help to enhance and protect developing and existing large tree components within LSR forest stands.

The project is authorized under the Healthy Forest Restoration Act of 2003

(HFRA) for projects with a defined purpose of enhancing the protection of NSO and NSO critical habitat from catastrophic wildland fire. The proposed project is also being developed within the over-arching recommendations of the Trinity County Community Wildfire Protection Plan.

**Proposed Action**

The proposed action would meet the purpose and need by thinning from below in mature forests and thinning from below to create fuel management zones (FMZs) at strategic locations where they will tie in with existing FMZs. Fuels reduction treatments within the FMZs would help to reduce fire risk and hazard and provide for fire fighter safety. The proposed action also includes prescribed burning on approximately 101 acres and hand fuels treatment on approximately 11 acres to reduce fire risk in high-use areas. Road decommissioning is proposed on 2.3 miles to reduce road densities.

1. *Thinning From Below:* The proposed thinning would be applied on approximately 1,155 acres of overly dense conifer stands to accelerate the development of desired old-growth characteristics. The thinning would also decrease fuel levels to reduce the risk of losing these and adjacent stands to crown fires. The largest and healthiest trees, including trees with large cavities and other types of deformities (decadence) and viable hardwoods, would be retained. A sufficient number of trees would be removed to maintain or increase growth rates of the mature trees, reduce competition for the largest/oldest trees prolonging their persistence in the stands, and remove fuel ladders to a level where ground fires are less likely to climb to the upper canopy. Trees marked for removal will start with the smallest, least healthy conifers progressively including larger trees until the existing 70 to 90+ percent canopy cover is reduced to approximately 40 to 60 percent to make more water, nutrients, sunlight and growing space available to the remaining trees (conifers as well as hardwoods). Approximately 123 acres of Riparian Reserve (RR) are included in proposed thinning units; within RR the canopy would not be reduced below 60 percent. Biological legacies such as large/old green trees and other old-growth structural components (large snags, logs, viable hardwoods, etc.) would be retained within each thinning unit to provide these habitat components as the stand develops. Stands within 150 feet of roads identified as FMZ are included in proposed thinning units. To improve effectiveness of FMZs, the preliminary proposed action includes removing hazard trees within portions of thinning units directly adjacent to FMZ networks (about 149 acres of the total 1,155 acres proposed for thinning).

2. *FMZ Treatments:* A network of FMZs is proposed on approximately 1,995 acres to support the effectiveness and safety of future fire suppression, and/or prescribed fire. They would provide a potential point of control for future fire occurrence. These linear FMZs range from 300 feet wide (roadside) to approximately 600 or 1,200 feet wide (expanded) and are centered along approximately 36 miles of strategically located roads at the perimeter of the fireshed and within the LSR. Within overstocked stands adjacent to the identified roads within FMZ, small diameter understory (fuel ladder) trees (<11″ diameter at breast height (DBH)) would be reduced to roughly a 20 foot spacing and live and dead hazardous trees that could pose a danger to fire fighters would be removed. The perimeter FMZs tie in with roadside fuels projects already completed along State Highway 3 and County Road 204.

3. *Fuel Reduction in High Risk Areas:* The proposed action includes prescribed burning of dense brush surrounding a popular fishing access area at the east edge of the project area (approximately 101 acres), and hand thinning/piling/burning around a public rest area at the west edge of the project area along State Highway 3 (approximately 11 acres). Treatment of these areas would improve the effectiveness of the FMZ.

4. *Road Decommissioning:* The Roads Analysis Process (RAP) completed for the Pettijohn LSR Project area identified approximately 2.3 miles of little-used roads that are having negative effects on fish and water quality, or are disproportionately difficult to maintain. Decommissioning involves removing culverts, ripping and out-sloping road surfaces, and closure. The goal is to control surface runoff, erosion, and mass failure while making the road unavailable for future use.

5. *Landing Construction:* Up to an estimated maximum 39 temporary landings would be constructed, however, existing landings in the project area are preferred and would be reused whenever possible. No trees greater than 24 inches DBH would be cut for landings. New landings will not be constructed within Riparian Reserves (RR). Landings that currently exist in RR will be reused where they would require less ground disturbance than new construction.

**Responsible Official**

J. Sharon Heywood, Forest Supervisor, Shasta-Trinity National Forest.

**Nature of Decision To Be Made**

The Forest Supervisor will decide whether to implement the proposed action, take an alternative action that meets the purpose and need or take no action. The decision may include a non-significant amendment to modify the Shasta-Trinity Land and Resource Management Plan on page 4–37 ''Guidelines to Reduce Risks of Large-Scale Disturbance'' by adding the following statement: ''For the Pettijohn LSR Project, harvest is allowed within stands over 80 years old.''

**Preliminary Issues**

Preliminary issues raised during the collaboration process included snag retention, cutting trees over 80 years old, equipment crossing of RR, and the non-significant plan amendment.

**Scoping Process and Comment Requested**

This notice of intent initiates the scoping process for the Pettijohn LSR Project, which will guide the development of the environmental impact statement. The project is included in the Shasta-Trinity National Forest's quarterly schedule of proposed actions (SOPA). Information on the proposed action will also be posted on the forest website at: *http://www.fs.fed.us/rS/shastatrinity/projects/trmu-projects.shtml.* Comments submitted during this scoping process should be in writing and should be specific to the proposed action. The comments should describe as clearly and completely as possible any issues the conmentor has with the proposal. The scoping process includes:

(a) Identifying potential issues.

(b) Identifying issues to be analyzed in depth.

(c) Eliminating non-significant issues or those previously covered by a relevant previous environmental analysis.

(d) Exploring additional alternatives.

(e) Identifying potential environmental effects of the proposed action and alternatives. 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 environmental impact statement. 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.

**HFRA Process**

During October and November, 2008 the STNF sent out letters and notices requesting collaboration and inviting the public, federal, state and local agencies, tribes and non governmental organizations to participate in an HFRA meeting for the Proposed Action. The HFRA meeting was held November 12, 2008 at the Community Center in Lewiston, CA. The notice for the meeting was published in The Trinity Journal, Weaverville's weekly local newspaper and The Record Searchlight, the newspaper of record, located in Redding, CA. The notices were published in both papers on October 21st and November 2008. Comments and suggestions provided by persons at the meeting and submitted by persons who were unable to attend the meeting were used, in part, to design the Proposed Action. The project is consistent with the HFRA 2003, which contains provisions to expedite hazardous fuels reduction and forest restoration projects on federal lands that are at risk to wildland fire or insect and disease epidemics. Projects authorized under HFRA are defined under Section 102(a)(5)(B) of the act and are designed to actively involve the public in reducing the risk of catastrophic fire to communities and protecting threatened and endangered species habitat.

A USDA Forest Service interdisciplinary team designed a preliminary proposed action. Further collaborative efforts in conjunction with National Environmental Policy Act (NEPA) processes may result in further modifications to this proposed action. If significant issues are raised that cannot be addressed by modifying the proposed action, the Forest may develop other action alternatives.

Early Notice of Importance of Public Participation in Subsequent Environmental Review: A draft environmental impact statement will be prepared for comment. The comment period on the draft environmental impact statement will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register**.

The Forest Service believes, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of draft environmental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 553 (1978). Also, environmental objections that could be raised at the draft environmental impact statement stage but that are not raised until after completion of the final environmental impact statement may be waived or dismissed by the courts. *City of Angoon* v. *Hodel,* 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris,* 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45 day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final environmental impact statement.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft environmental impact statement should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the draft environmental impact statement or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.

(Authority: 40 CFR 1501.7 and 1508.22; Forest Service Handbook 1909.15, Section 21)

Dated: December 11, 2008.

**J. Sharon Heywood,**

*Forest Supervisor, Shasta-Trinity National Forest.*

[FR Doc. E8–30053 Filed 12–18–08; 8:45 am]

**BILLING CODE 3410–11–M**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Six Rivers National Forest, California, Lower Trinity and Mad River Travel Management EIS

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of Intent to prepare an Environmental Impact Statement.

**SUMMARY:** The Six Rivers National Forest (Six Rivers NF) will prepare an Environmental Impact Statement to disclose the impacts associated with the following proposed actions:

1. The prohibition of cross-country motor vehicle travel (with the exception of snowmobiles) off designated National Forest NFTS (NFTS) roads and trails by the public except as allowed by permit or other authorization.

2. Make a non-significant amendment to the Six Rivers NF Land and Resource Management Plan (Six Rivers Forest Plan) to conform with the Travel Management Rule (36 CFR Part 212 Subpart B).

3. Add approximately 58 miles (206 segments) of existing unauthorized routes to the NFTS as motorized trails open to the public for motor vehicle use by vehicle class and season of use.

4. Approximately 7 miles (5 segments) of existing NFTS roads are proposed for dual management as both a Maintenance level 1 (closed) road and as a motorized trail open to vehicles 50″ or less in width.

5. Make the following change to NFTS roads: Allow both highway licensed vehicles and non-highway licensed vehicles to use approximately 25½ miles (17 segments) of existing NFTS roads currently open to highway licensed vehicles only.

6. Make the following changes to NFTS trails:

a. Allow motor vehicles 50 inches or less in width on approximately 4 miles (1 segment) of existing NFTS trail currently open to motorcycles.

b. Convert approximately 6 miles (2 segments) of existing NFTS motorized trails to NFTS non-motorized trails.

**DATES:** The comment period on the proposed action will extend 45 days from the date the Notice of Intent is published in the **Federal Register**. Completion of the Draft Environmental Impact Statement (draft EIS) is expected in spring 2009 and the Final Environmental Impact Statement (final EIS) is expected in summer 2009.

**ADDRESSES:** Send written comments to: Travel Management Team, Six Rivers National Forest, 1330 Bayshore Way, Eureka, CA 95501. Electronic comments, in acceptable plain text (.txt), rich text (.rtf), or Word (.doc) may be submitted to *comments-pacificsouthwest-six-rivers@fs.fed.us.* Please insure that ''Travel Management'' occurs in the subject line.

**FOR FURTHER INFORMATION CONTACT:** Leslie Burkhart, Six Rivers National Forest, 1330 Bayshore Way, Eureka, CA 95501. Phone: 707–441–3520. E-mail: *comments-pacificsouthwest-six-rivers@fs.fed.us* with ''Travel Management'' in the subject line.

**SUPPLEMENTARY INFORMATION:**

**Background**

Over the past few decades, the availability and capability of motor vehicles, particularly off-highway vehicles (OHVs) and sport utility vehicles (SUVs) has increased tremendously. Nationally, the number of OHV users has climbed sevenfold in the past 30 years, from approximately 5 million in 1972 to 36 million in 2000. The ten states with the largest population also have the most OHV users. California has 4.35 million OHV users accounting for almost 11% of the U.S. total (Off-Highway Vehicle Recreation in the United States, Regions and States: A National Report from the National Survey on Recreation and the Environment (NSRE) Cordell, Betz, Green and Owens June 2005). There were 786,914 all terrain vehicles (ATVs) and OHV motorcycles registered in 2004, up 330% since 1980. Annual sales of ATVs and OHV motorcycles in California were the highest in the U.S. for the last 5 years. Four-wheel drive vehicle sales in California also increased by 1500% to 3,046,866 from 1989 to 2002.

Unmanaged OHV use has resulted in unplanned roads and trails, erosion, watershed and habitat degradation, and impacts to cultural resource sites. Compaction and erosion are the primary effects of OHV use on soils. Riparian areas and aquatic dependent species are particularly vulnerable to OHV use. Unmanaged recreation, including impacts from OHVs, is one of ''Four Key Threats Facing the Nation's Forests and Grasslands.'' (USDA Forest Service, June 2004).

On August 11, 2003, the Pacific Southwest Region of the Forest Service entered into a Memorandum of Intent (MOI) with the California Off-Highway Motor Vehicle Recreation Commission, and the Off-Highway Motor Vehicle Recreation Division of the California Department of Parks and Recreation. That MOI set in motion a region-wide effort to ''Designate OHV roads, trails, and any specifically defined open areas for motor vehicles on maps of the 19 National Forests in California by 2007.'' On November 9, 2005, the Forest Service published final travel management regulations in the **Federal Register** (FR Vol. 70, No. 216–Nov. 9, 2005, pp 68264–68291). Subpart B of the final Travel Management Rule requires designation of those roads, trails, and areas that are open to motor vehicle use on National Forests. Route designations will be made by class of vehicle and, if appropriate, by time of year. The final rule allows for motor vehicle use only on designated system routes and in designated areas.

On some National Forest System lands, long managed as open to cross-country motor vehicle travel, repeated use has resulted in unplanned, unauthorized, roads and trails. These routes generally developed without environmental analysis or public involvement, and do not have the same status as National Forest System roads and National Forest System trails included in the NFTS. Nevertheless, some unauthorized routes are well-sited, provide excellent opportunities for outdoor recreation by motorized and non-motorized users, and would enhance the National Forest System of designated roads, trails and areas. Other unauthorized routes are poorly located and cause unacceptable impacts. Only NFTS roads and NFTS trails can be designated for motor vehicle use. In order for an unauthorized route to be designated, it must first be added to the NFTS.

In accordance with the MOI, the Six Rivers NF completed an inventory of unauthorized routes on National Forest System lands and identified over 250 miles of unauthorized routes. The Six Rivers NF then used an interdisciplinary process to evaluate the routes that included working with the public to determine whether any of the unauthorized routes should be proposed for addition to the Six Rivers NFTS in this proposed action. The route evaluation identified a number of routes which could be considered in this or future decisions on the NFTS as a part of travel management on the Lower Trinity and Mad River Ranger Districts of the Six Rivers National Forest. Roads and trails (there are no areas) that are currently part of the Six Rivers NFTS and are open to motor vehicle travel will remain designated for such use except as described below under Proposed Action. This proposal focuses only on the prohibition of motor vehicle travel off designated routes and needed changes to the Six Rivers NFTS, including the addition of some unauthorized routes to the Six Rivers NFTS and minor changes to the existing motor vehicle restrictions. The proposed action is being carried forward in accordance with the Travel Management Rule (36 CFR Part 212, Subpart B).

In accordance with the Travel Management Rule, following a decision on this proposal, a Motor Vehicle Use Map (MVUM) will be published for both the Lower Trinity Ranger District and Mad River Ranger District of the Six Rivers NF. These MVUMs will identify all roads and trails that are designated for motor vehicle use. The MVUMs shall specify the classes of vehicles and, if appropriate, the times of year for which use is designated. Unauthorized routes not included in this proposal are not precluded from future consideration for addition to the NFTS and inclusion in a MVUM. Future decisions associated with changes to the MVUMs may trigger the need for documentation of environmental analysis.

**Purpose and Need for Action**

The following needs have been identified for this proposal:

1. There is a need for regulation of unmanaged cross-country motor vehicle travel by the public. The proliferation of unplanned, unauthorized, non-sustainable roads, trails, and areas created by cross-country travel adversely impacts the environment. The 2005 Travel Management Rule, 36 CFR Section 212, Subpart B, provides for a system of NFS roads, NFS trails, and areas on National Forest System lands that are designated for motor vehicle use. After roads, trails, and areas are designated, motor vehicle use off designated roads and trails and outside designated areas is prohibited by 36 CFR 261.13. Subpart B is intended to prevent resource damage caused by unmanaged motor vehicle use by the public. In accordance with national direction, implementation of Subpart B of the travel management rule for the Six Rivers National Forest is scheduled for completion in 2009.

2. There is a need for the Six Rivers Forest Plan to conform to the Travel Management Rule, 36 CFR 212, Subpart B. A review of the Six Rivers Forest Plan has found that OHV use is restricted to designated routes but there is no general prohibition of motor vehicle travel off of designated roads and trails.

3. There is a need for limited changes to the Six Rivers NFTS to:

a. Provide motor vehicle access to dispersed recreation opportunities (camping, hunting, fishing, hiking, horseback riding, etc.). A substantial portion of known dispersed recreation activities are not typically located directly adjacent to NFTS roads or NFTS motorized trails. Some dispersed recreation activities depend on foot or horseback access, and some depend on motor vehicle access. Those activities accessed by motor vehicles are typically accessed by short spurs that have been created primarily by the passage of motor vehicles. Many such unauthorized ''user-created'' routes are not currently part of the NFTS. Without adding them to the NFTS and designating them on a MVUM, the regulatory changes noted above would make continued use of such routes

illegal and would preclude access by the public to many dispersed recreation activities.

b. Provide a diversity of motorized recreation opportunities (4x4 vehicles, motorcycles, ATVs, SUVs, passenger vehicles, etc.). It is Forest Service policy to provide a diversity of road and trail opportunities for experiencing a variety of environments and modes of travel consistent with the National Forest recreation role and land capability (FSM 2353.03(2)). Implementation of Subpart B of the Travel Management Rule will severely reduce acres and miles of motorized recreation opportunities relative to current levels. As a result, there is a need to consider limited changes to the NFTS.

In making any limited changes to the National Forest Transportation system, the Six Rivers NF will be considering criteria contained in Subpart B of the Travel Management Rule, which include the following:

A. Impacts to natural and cultural resources.

B. Public safety.

C. Access to public and private lands.

D. Availability of resources for maintenance and administration of roads trails and areas that would arise if the uses under consideration are designated.

E. Minimizing damage to soil, watershed, vegetation, and other forest resources.

F. Minimizing harassment of wildlife and significant disruption of wildlife habitat.

G. Minimizing conflicts between motor vehicles and existing or proposed recreational uses of NFS lands or neighboring federal lands.

H. Minimizing conflicts among different classes of motor vehicle uses of NFS lands or neighboring federal lands.

I. Compatibility of motor vehicle use with existing conditions in populated areas, taking into account sound, emissions, and other factors.

When making any limited changes to National Forest System Roads, the Six Rivers NF will also consider the following:

1. Speed, volume, composition and distribution of traffic on roads.

2. Compatibility of vehicle class with road geometry and road surfacing

3. Maintaining valid existing rights of use and access (rights-of-way)

**Proposed Action**

1. The prohibition of cross-country motor vehicle travel (with the exception of snowmobiles) off designated National Forest NFTS (NFTS) roads, trails, and areas by the public except as allowed by permit or other authorization.

2. Make a non-significant amendment to the Six Rivers Forest Plan to conform to the Travel Management Rule, Subpart B. The text of Recreation Standard and Guideline for Motorized Recreation 18–21, Six Rivers Forest Plan, p. IV–124, which currently reads ''OHV use is restricted to designated routes'' shall be replaced in its entirety with the following text ''Prohibit motor vehicle travel (with the exception of snowmobiles) off designated roads, trails and areas except as allowed by permit or other authorization.''

3. Additions to the National Forest NFTS. The Six Rivers NF currently manages and maintains approximately 526 miles of NFTS roads and no NFTS motorized trails on the Lower Trinity Ranger District; and manages and maintains approximately 871 miles of NFTS roads and 36 miles of NFTS motorized trails on the Mad River Ranger District. Based on the stated purpose and need for action and route evaluation, the Six Rivers National Forest proposes to add approximately 19 miles (62 segments) of existing unauthorized routes to its NFTS as motorized trails on the Lower Trinity Ranger District; and to add approximately 39 miles (144 segments) of existing unauthorized routes to its NFTS motorized trails on the Mad River Ranger District open to the public for motor vehicle use by vehicle class and season of use. A summary of the additional NFTS motorized trails are listed below by Ranger District. Note that no additional motorcycle trails are proposed for the NFTS.

NFTS Motorized Trail Additions—Lower Trinity Ranger District

| Trail type | Proposed addition (miles) | Permitted vehicle classes | Year-round (miles) | Seasonal (miles) | Subject to mitigations (miles) |
|---|---|---|---|---|---|
| High Clearance | 5 | Trails open to high clearance wheeled vehicles | 3 | 2 | 1 |
| <=50″ | 14 | Trails open to wheeled vehicles 50 inches or less in width. | <1 | 14 | 12 |
| Motorcycle | none | Trails open to vehicles with two in-line wheels | N/A | N/A | N/A |

NFTS Motorized Trail Additions—Mad River Ranger District

| Trail type | Proposed addition (miles) | Permitted vehicle classes | Year-round (miles) | Seasonal (miles) | Subject to mitigations (miles) |
|---|---|---|---|---|---|
| High Clearance | 30 | Trails open to high clearance wheeled vehicles | 25 | 5 | 14 |
| <=50″ | 9 | Trails open to wheeled vehicles 50 inches or less in width. | 8 | 1 | 2 |
| Motorcycle | none | Trails open to vehicles with two in-line wheels | N/A | N/A | N/A |

The existing unauthorized routes proposed as additions to the Six Rivers NFTS as motorized trails occur across both Districts within many land allocations and resource emphasis areas; this includes proposed motorized trails within Late Successional Reserves, Inventoried Roadless Areas, and Key Watersheds as summarized in the following tables.

TRAIL ADDITIONS WITHIN AREAS OF INTEREST—LOWER TRINITY RANGER DISTRICT

| Trail type | Proposed addition total (miles) | Management areas of interest | | |
|---|---|---|---|---|
| | | Late successional reserve (miles) | Inventoried roadless areas (miles) | Key watershed (miles) |
| High Clearance | 5 | 1.7 | none | 1.9 |
| <=50″ | 14 | 2.4 | none | 5.9 |
| Motorcycle | none | N/A | N/A | N/A |

TRAIL ADDITIONS WITHIN AREAS OF INTEREST—MAD RIVER RANGER DISTRICT

| Trail type | Proposed addition total (miles) | Management areas of interest | | |
|---|---|---|---|---|
| | | Late successional reserve (miles) | Inventoried roadless areas (miles) | Key watershed (miles) |
| High Clearance | 30 | 10.3 | 1.9 | 2.4 |
| <=50″ | 9 | 2.5 | 1.3 | 1.3 |
| Motorcycle | none | N/A | N/A | N/A |

4. Co-location of Motorized Trail on NFTS roads closed year-round. Approximately 7 miles (5 segments) of existing NFTS roads are proposed for dual management as both a Maintenance level 1 (closed) road and as a motorized trail open to vehicles 50″ or less in width. Approximately 7 miles (4 segments) would be located on Lower Trinity Ranger District to expand motorized recreation opportunity by linking proposed motorized trails in the Waterman Ridge and Hennessy Ridge networks. Approximately 0.2 mile (1 segment) would be located on the Mad River Ranger District to provide access to a dispersed camp.

5. Limited Changes to the National Forest NFTS Roads. The Six Rivers National Forest proposes the following changes to NFTS roads to expand motorized trail opportunities, including increasing potential loops by using existing NFTS roads as links or connections within proposed networks of motorized trails: Allow both highway licensed vehicle and non-highway licensed vehicle use on approximately 8 miles (5 segments) of existing NFTS roads currently open to highway legal vehicles only on the Lower Trinity Ranger District. Allow both highway licensed vehicle and non-highway licensed vehicle use on approximately 17½ miles (12 segments) of existing NFTS roads currently open to highway legal vehicles only on the Mad River Ranger District. Of these changes, all but approximately 2½ miles (1 segment) on the Mad River Ranger District, are subject to California Vehicle Code regulations that include the requirement of a licensed operator operating the vehicle.

6. Limited Changes to NFTS Trails. The Six Rivers National Forest proposes the following changes to NFTS trails: Allow wheeled vehicles 50 inches or less in width on approximately 4 miles (1 segment) of existing NFTS trail currently open to motorcycles to augment the Pilot Creek motorized trail network on the Mad River Ranger District. Convert approximately 6 miles (2 segments) of existing NFTS motorized trails to NFTS non-motorized trails on the Mad River Ranger District because of safety concerns on a segment of Devil's Backbone and due to lack of use and potential adverse resource effects on the Bradburn Trail.

Maps and tables detailing the proposed action can be found at *http://www.fs.fed.us/r5/sixrivers/projects/ohv/*. In addition, maps will be available for viewing at:

- Six Rivers National Forest Supervisor's Office, 1330 Bayshore Way, Eureka, CA 95501; phone: 707–442–1721.
- Lower Trinity Ranger District, Highway 96 (2 miles North of Willow Creek), Willow Creek, CA 95573; phone: 630–629–2118.
- Mad River Ranger District, Highway 36 (28 miles east of Bridgeville), Bridgeville, CA 95526; phone: 707–574–6233.

**Responsible Official**

Tyrone Kelley, Forest Supervisor, Six Rivers National Forest, 1330 Bayshore Way, Eureka, CA 95501

**Nature of Decision To Be Made**

The responsible official will decide whether to adopt and implement the proposed action, an alternative to the proposed action, or take no action to make changes to existing prohibitions and allowances for public motor vehicle travel within the existing Six Rivers NF NFTS and prohibit cross country motor vehicle travel by the public off the designated system. Once the decision is made, the Six Rivers NF will publish two Motor Vehicle Use Maps (MVUM) identifying the roads and trails that are designated for motor vehicle use. The MVUMs shall specify the classes of vehicles and, if appropriate, the time of year for which use is designated. Future decisions associated with changes to the MVUMs may trigger the need for documentation of environmental analysis.

This proposal does not revisit previous administrative decisions that resulted in the current NFTS. This proposal is focused on implementing Subpart B of the Travel Management Rule. Previous administrative decisions concerning road construction, road reconstruction, trail construction, and land suitability for motorized use on the existing NFTS are outside of the scope of this proposal.

**Scoping Process**

Public participation will be especially important at several points during the analysis. The Forest Service will be seeking information, comments, and assistance from federal, state, and local agencies and other individuals or organizations who may be interested in or affected by the proposed action.

The Six Rivers NF has been meeting with local elected officials, Tribes, and community groups, including service and professional organizations, to discuss the Travel Management Rule and travel management on the Lower Trinity and Mad River Ranger Districts since 2005. In May and June of 2005,

public workshops were held in Eureka, Willow Creek, and Mad River, CA to inform the public about the Travel Management Rule. In October 2007 and April, May, and June 2008, public workshops were held in those same locations to gather information from the public about which routes they use and their concerns. Additionally, maps of inventoried routes were available on the Forest's Web site and Forest Service offices. The public used these maps to provide input into the process.

The comment period on the proposed action will extend 45 days from the date this Notice of Intent is published in the **Federal Register**.

The draft environmental impact statement is expected to be filed with the Environmental Protection Agency (EPA) and to be available for public review by spring 2009. EPA will publish a notice of availability of the draft EIS in the **Federal Register**. The comment period on the draft EIS will extend 45 days from the date the EPA notice appears in the **Federal Register**. At that time, copies of the draft EIS will be distributed to interested and affected agencies, organizations, and members of the public for their review and comment. It is very important that those interested in the management of the Six Rivers NF participate at that time.

The final EIS is scheduled to be completed in summer 2009. In the final EIS, the Forest Service will respond to comments received during the comment period that are: within the scope of the proposed action; specific to the proposed action; have a direct relationship with the proposed action; and include supporting reasons for the responsible official to consider. Submission of comments to the draft EIS is a prerequisite for eligibility to appeal under the 36 CFR part 215 regulations.

**Comment Requested**

This Notice of Intent initiates the scoping process which guides the development of the environmental impact statement.

Early Notice of Importance of Public Participation in Subsequent Environmental Review: A draft EIS will be prepared for comment. The comment period on the draft EIS will be 45 days from the date the EPA publishes the notice of availability in the **Federal Register**.

At this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of draft EISs must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 553 (1978). Also, environmental objections that could be raised at the draft EIS stage but that are not raised until after completion of the final EIS may be waived or dismissed by the courts. *City of Angoon* v. *Hodel,* 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris,* 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45 day comment period so that comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final EIS.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft EIS should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft EIS. Comments may also address the adequacy of the draft EIS or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.

Comments received, including the names and addresses of those who comment, will be considered part of the public record on this proposal and will be available for public inspection.

(Authority: 40 CFR 1501.7 and 1508.22; Forest Service Handbook 1909.15, Section 21)

Dated: December 12, 2008.

**Tyrone Kelley,**

*Forest Supervisor.*

[FR Doc. E8–30047 Filed 12–18–08; 8:45 am]

**BILLING CODE 3410–11–P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Superior National Forest Federal Hardrock Mineral Prospecting Permits Project.

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of intent to prepare an environmental impact statement (EIS).

**SUMMARY:** This analysis would address federal hardrock mineral exploration in terms of 32 current permit applications, future permit applications, current and future operating plans, and future use and occupancy authorizations (Special Use Permits) on the Superior National Forest (SNF) over the next 20 years. The project area covers all SNF managed lands available to mineral exploration. In accordance with the SNF Land and Resource Mangement Plan, the Boundary Waters Canoe Area Wilderness, Mining Protection Area, and Eligible Wild River Segments are not available to mineral exploration. The Forest Service is the lead agency for this EIS and the United States Department of the Interior (USDI), Bureau of Land Management (BLM) is a cooperating agency. As a cooperating agency, the BLM will adopt the EIS to support their own Record of Decision. Federal laws and policies will be outlined in the EIS that will require the SNF, as the agency managing the surface, and the BLM, as the agency responsible for managing sub-surface minerals resources, to consider the Prospecting Permit applications. Based on the Forest Service's recommendations and consent, the BLM will review those recommendations and decide whether to authorize the prospecting permits and operating plans.

**DATES:** Scoping for this project is planned for January 2009. When the scoping package is completed, it will be sent out for public review and comment. At that time, it will also be available for review, along with supplemental large scale maps, on the Internet at the following Web site: *http://www.fs.fed.us/r9/forests/superior/projects/.* The draft environmental impact statement is expected February 2010 and the final environmental impact statement is expected June 2010.

**ADDRESSES:** Send written comments to James W. Sanders, Forest Supervisor, 8901 Grand Avenue Place, Duluth, MN 55808.

**FOR FURTHER INFORMATION CONTACT:** If you would like additional information or have questions regarding this action, contact Patty Beyer, Project Coordinator at 906–226–1499 or Michael Jimenez, Forest Planner at 218–626–4383.

**SUPPLEMENTARY INFORMATION:**

**Purpose and Need for Action**

The purpose and need for this project is three-fold.

*First:* Analyze the effects to the environment from 32 permit applications and any future prospecting permit applications for hardrock mineral prospecting, and, determine: (a) If the lands requested under the 32 permit applications are available for mineral prospecting and what lands are available for future prospecting permit applications; (b) If activities carried out

under such permits are consistent with the purpose for which the land was acquired; and (c) What stipulations will be required for prospecting permits to be issued. The stipulations will include requirements for the protection of surface resources, and for access, construction, or use and protection of existing roads.

*Second:* Analyze the effects to the environment from future prospecting permit exploration operating plan activities associated with the 32 prospecting permit applications and future prospecting permit applications and to define the terms and conditions and best management practices (BMPs) that would be included in the Forest Service's consent to the BLM for approval of the operating plans. The terms and conditions and BMPs will include requirements for the protection of surface resources, and for access, construction, or use of existing roads.

*Third:* Analyze effects of special uses located outside of prospecting permit areas (off-permit areas). These activities will be administered under Forest Service Special Use Permits. This includes the need to evaluate the effects from road construction and road reconstruction on off-permit areas. Although specific proposals have not been made, estimates can be made regarding access needs to sites based on previous experience.

**Proposed Action**

The BLM has received 32 prospecting permit applications from four companies for federal hardrock mineral prospecting on the SNF. The applications cover approximately 43,446 acres and are located within the geologic complex call the Duluth Complex. The main target minerals include copper, nickel, cobalt, lead, zinc, silver, gold, titanium, Platinum Group Elements (PGE) and other associated minerals. In addition, all lands available for mineral exploration within the SNF will be analyzed for future prospecting permit applications and associated operating plans. Prospecting permits, if issued, include various exploration activities under operating plans such as drilling to obtain core samples and air-or-ground based geophysical surveys to determine the location and extent of mineralization, and where ore deposits may be located.

**Responsible Official and Nature of Decision To Be Made**

The Responsible Official for the Forest Service, the Forest Supervisor for the Superior National Forest, will decide the following three items based on the environmental analysis:

1. What consent recommendations and stipulations will be provided to the Regional Forester so that he may advise the BLM whether the Forest Service consents to the issuance of: (a) The 32 federal hardrock mineral prospecting permit applications, and (b) future hardrock mineral prospecting permits.

2. What advice will be provided to the BLM including terms and conditions and best management practices required for the protection of surface resources, and for access, construction, or use and protection of existing roads for: (a) Operating plans associated with the current 32 federal hardrock mineral prospecting permit applications, and (b) future operating plans associated with future hardrock minerals prospecting permits.

3. Whether to issue future special use and occupancy authorizations for off-prospecting permit areas activities associated with mineral exploration operating plans and what terms and conditions will be required for the protection and management of surface resources. The responsible official for the BLM, the Deputy State Director, will decide in a Record of Decision, whether to approve pending and future hardrock prospecting permits and associated operating plans.

**Scoping Process**

Public scoping will include notices in the newspaper of record, mailing of the scoping package (detailed information of the purpose and need for the project, the proposed action, description of the project area, maps, and proposed stipulations, terms and conditions, and best management practices) to interested and affected publics and posting of the project on the agency's project planning Web page and notice in the agency's quarterly Schedule of Proposed Actions.

**Comment Requested**

This notice of intent initiates the scoping proces which guides the development of the environmental impact statement. Comments received, including the names and addresses of those who comment, will be considered part of the public record on this proposal and will be available for public inspection.

**Authority:** 40 CFR 1501.7 and 1508.22; Forest Service Handbook 1909.15, Section 21.

Dated: November 19, 2008.

**James W. Sanders,**

*Forest Supervisor.*

[FR Doc. E8–30167 Filed 12–18–08; 8:45 am]

**BILLING CODE 3410–11–P**

## COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

### Procurement List; Additions and Deletion

**AGENCY:** Committee for Purchase From People Who Are Blind or Severely Disabled.

**ACTION:** Additions to and Deletion from Procurement List.

**SUMMARY:** This action adds to the Procurement List products to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and deletes from the Procurement List a product previously furnished by such agencies.

**DATES:** *Effective Date:* 1/19/2009.

**ADDRESSES:** Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia, 22202–3259.

**FOR FURTHER INFORMATION CONTACT:** Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or e-mail *CMTEFedReg@AbilityOne.gov*.

**SUPPLEMENTARY INFORMATION:**

**Additions**

On 10/10/2008, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice (73 FR 60236) of proposed additions to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the product and impact of the additions on the current or most recent contractors, the Committee has determined that the product listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

*Regulatory Flexibility Act Certification*

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the products to the Government.

2. The action will result in authorizing small entities to furnish the products to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-

O'Day Act (41 U.S.C. 46–48c) in connection with the products proposed for addition to the Procurement List.

*End of Certification*

Accordingly, the following products are added to the Procurement List:

**Products**

*United States Coast Guard Flags*

*NSNs:* 8345–00–242–0272—Flag, U.S. Coast Guard;
8345–01–087–4595—Flag, U.S. Coast Guard;
8345–01–087–4594—Flag, U.S. Coast Guard;
8345–01–168–1146—Flag, U.S. Coast Guard.
*NPA:* Goodwill Industries of South Florida, Inc., Miami, FL.
*Contracting Activity:* U.S. COAST GUARD, ELC.

C-list for the requirement of the U.S. Coast Guard.

**Deletions**

On 09/05/2008, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice (73 FR 51787) of proposed deletion to the Procurement List.

After consideration of the relevant matter presented, the Committee has determined that the product listed below are no longer suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

*Regulatory Flexibility Act Certification*

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in additional reporting, recordkeeping or other compliance requirements for small entities.

2. The action may result in authorizing small entities to furnish the product to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the product deleted from the Procurement List.

*End of Certification*

Accordingly, the following product is deleted from the Procurement List:

**Product:**

*Hose Assembly, Nonmetallic*

*NSN:* 4210–00–892–5494—Hose Assembly, Nonmetallic.
*NPA:* The Oklahoma League for the Blind, Oklahoma City, OK.
*Contracting Activity:* GSA/FAS southwest supply center (QSDAC), Fort Worth, TX.

**Barry S. Lineback,**

*Sr. Program Analyst.*

[FR Doc. E8–30188 Filed 12–18–08; 8:45 am]

**BILLING CODE 6353–01–P**

## COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

### Procurement List; Proposed Additions and Deletions

**AGENCY:** Committee for Purchase From People Who Are Blind or Severely Disabled.

**ACTION:** Proposed additions to and deletions from procurement list.

**SUMMARY:** The Committee is proposing to add to the Procurement List products and/or services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and to delete products previously furnished by such agencies.

*Comments Must Be Received on or Before:* January 18, 2009.

**ADDRESSES:** Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

*For Further Information or to Submit Comments Contact:* Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or e-mail *CMTEFedReg@AbilityOne.gov.*

**SUPPLEMENTARY INFORMATION:** This notice is published pursuant to 41 U.S.C 47(a) (2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

**Additions**

If the Committee approves the proposed additions, the entities of the Federal Government identified in this notice for each product or service will be required to procure the products and/or service listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

*Regulatory Flexibility Act Certification*

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. If approved, the action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the products and/or service to the Government.

2. If approved, the action will result in authorizing small entities to furnish the products and/or service to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the products and/or service proposed for addition to the Procurement List.

Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

*End of Certification*

The following products and/or services are proposed for addition to Procurement List for production by the nonprofit agencies listed:

**Products**

*Flags, United States Coast Guard*

NSNS: 8345–01–087–4593—Flag, U.S. Coast Guard;
8345–01–085–6033—Flag, U.S. Coast Guard;
8345–01–087–4592—Flag, U.S. Coast Guard;
8345–00–265–7522—Flag, U.S. Coast Guard;
8345–01–168–1145—Flag, U.S. Coast Guard;
8345–01–168–1147—Flag, U.S. Coast Guard;
8345–01–168–1144—Flag, U.S. Coast Guard;
8345–00–242–0271—Flag, U.S. Coast Guard;
8345–01–033–9300—Flag, U.S. Coast Guard;
8345–00–242–0270—Flag, U.S. Coast Guard;
8345–00–242–0269—Flag, U.S. Coast Guard;
8345–00–242–0268—Flag, U.S. Coast Guard;
8345–00–242–0267—Flag, U.S. Coast Guard;
8345–01–248–4071—Flag, U.S. Coast Guard;
8345–00–242–0266—Flag, U.S. Coast Guard;
8345–01–298–7403—Flag, U.S. Coast Guard;
8345–01–087–4597—Flag, U.S. Coast Guard;
8345–01–087–4596—Flag, U.S. Coast Guard;
8345–01–085–6034—Flag, U.S. Coast Guard.
NPA: Goodwill Industries of South Florida, Inc., Miami, FL.
Contracting Activity: U.S. COAST GUARD, ELC, Baltimore, MD.
Coverage: C-list for the requirements of the U.S Coast Guard, Baltimore, MD.

*United States Army Corps of Engineers Uniforms*

NSNs: COE051–Windbreaker;
COE050–3 Season Jacket;
COE048–Mesh Base Ball Cap;
COE047–Base Ball Cap;
COE046–Jacket;
COE045–Coveralls;
COE044–Unisex Coveralls;
COE043–Unisex Coveralls;
COE042–Parka;
COE041–Unisex Vest;
COE040–Sweatshirt;
COE039–Sweatshirt
COE036–Dress Belt;
COE035–Black Web Belt;
COE034B–Gloves;
COE034A–Gloves;

COE033–Jeans;
COE032–Jeans;
COE031–Pants;
COE030–Pants;
COE027–Unisex T-Shirt;
COE025–Unisex Shirt;
COE024–Work Shirt;
COE023–Work Shirt;
COE022–Work Shirt;
COE021–Work Shirt;
COE020–Work Shirt;
COE019–Work Shirt;
COE018–Cap;
COE017–Belt;
COE016A–Trousers;
COE016B–Trousers;
COE015A–Shirt;
COE015B–Shirt;
COE014A–Shirt;
COE014B–Shirt;
COE013–Skirt;
COE012–Pants;
COE011–Pants;
COE010–Tie Tac;
COE009–Tie;
COE008–Tab Bow;
COE007–Shirt;
COE006–Shirts;
COE005–Shirts;
COE004–Shirts;
COE003–Unisex Sweater;
COE002–Blazer;
COE001–Blazer.
NPA: Human Technologies Corporation, Utica, NY.
Contracting Activity: Dept of the Army, XU W072 Endist, Pittsburgh, PA.
Coverage: C-list for the requirements of the U.S. Army Corps of Engineers, Pittsburgh, PA.

**Services:**

*Service Type/Location:*

Grounds Maintenance, MCLB, Albany, GA, Marine Corps Logistics BASE, Albany, GA.
NPA: Power Works Industries, Inc., Columbus, GA.
Contracting Activity: Dept of the Navy, Commander, Albany, GA.

**Deletions**

*Regulatory Flexibility Act Certification*

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. If approved, the action will not result in additional reporting, recordkeeping or other compliance requirements for small entities.

2. If approved, the action will not result in authorizing small entities to furnish the products and/or service to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the products and/or service proposed for deletion from the Procurement List.

*End of Certification*

The following products are proposed for deletion from the Procurement List:

**Products:**

*Tape, Electronic Data Processing*

NSN: 7045–01–372–8269–Tape, Electronic Data Processing.
NPA: North Central Sight Services, Inc., Williamsport, PA.
Contracting Activity: Defense Supply Center Columbus, Columbus, OH.

*Markers, Lumocolor*

NSNs: 7520–01–507–6974 Markers, Lumocolor, Permanent;
7520–01–392–5296–Markers, Lumocolor, Permanent;
7520–01–507–6972–Markers, Lumocolor, Permanent;
7520–01–392–5295–Markers, Lumocolor, Permanent;
7520–01–507–6965–Markers, Lumocolor, Non-Permanent;
7520–00–422–5769–Markers, Lumocolor, Non-Permanent;
7520–01–507–6963–Markers, Lumocolor, Non-Permanent;
7520–01–507–6958–Markers, Lumocolor, Non-Permanent.
NPA: Winston-Salem Industries for the Blind, Winston-Salem, NC.
Contracting Activity: GSA/FSS Ofc Sup Ctr–Paper Products, New York, NY.

*Badge, Identification*

NSN: 8455–01–396–2284–Badge, Identification.
NPA: East Texas Lighthouse for the Blind, Tyler, TX.
Contracting Activity: GSA/FAS Southwest Supply Center (QSDAC), Fort Worth, TX.

**Barry S. Lineback,**

*Sr. Program Analyst.*

[FR Doc. E8–30189 Filed 12–18–08; 8:45 am]

**BILLING CODE 6353–01–P**

## COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

### Correction of Notice of Quarterly Update of A-List and Movement of Products Between the A-List, B-List and C-List

In the notice appearing on page 72445, FR Doc E8–28252, Clarification of Scope of Procurement List Additions, on November 28, 2008, the Committee published a list of products and NSNs that moved from B-List to A-List.

This notice adds two additional products and NSNs (Marker, Tube Type, Blue–7520–01–511–4319) and (Marker, Tube Type, Red–7520–01–511–4324) that moved from B-List to A-List.

**Barry S. Lineback,**

*Sr. Program Analyst.*

[FR Doc. E8–30190 Filed 12–18–08; 8:45 am]

**BILLING CODE 6353–01–P**

## BROADCASTING BOARD OF GOVERNORS

### Proposed New Collection; Comment Request

**AGENCY:** The Broadcasting Board of Governors.

**ACTION:** Proposed New Collection; Comment Request.

**SUMMARY:** The Broadcasting Board of Governors (BBG), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on an information collection titled, ''Personal Identity Verification (PIV) Request for BBG Credential.'' This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 [Pub. L. 104–13; 44 U.S.C. 3506(c)(2)(A)].

The information collection activity involved with this program is conducted pursuant to Homeland Security Presidential Directive (HSPD) 12, Federal Information Processing Standards (FIPS) 201, and Office of Management and Budget (OMB) Implementation Directive M–05–24, which directs and provides guidance to all Federal agencies to meet the Personal Identity Verification (PIV) requirements.

**DATES:** Comments must be submitted on or before February 17, 2009.

*Copies/For Further Information Contact:* Copies of this information collection proposal that will be submitted to OMB for approval may be obtained by calling or writing Ms. Jeannette Mancus, BBG Clearance Officer, BBG, IBB/A, Room 1274, 330 Independence Avenue, SW., Washington, DC 20237, telephone (202) 203–4664, or via e-mail address *JGMancus@BBG.GOV.*

**SUPPLEMENTARY INFORMATION:** Public reporting burden for this proposed collection of information is estimated to average 15 minutes (.25 of an hour) per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Responses are voluntary and respondents are required to respond only once. Comments are requested on the proposed information collection concerning:

(a) Whether the proposed collection of information is necessary for the proper performance of the agency, including whether the information has practical utility;

(b) The accuracy of the Agency's burden estimates;

(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.

*Comments:* Send comments regarding this burden estimate or any other aspect of this collection of information to Mr. Alexander T. Hunt, OMB Desk Officer for the BBG, via fax at 202–395–7285, or e-mail at *Alexander_T._Hunt@omb.eop*; and/or to Ms. Jeannette Mancus, the BBG Clearance Officer, BBG, IBB/A, Room 1657, 330 Independence Avenue, SW., Washington, DC 20237, telephone (202) 203–4664, e-mail address *JGMancus@bbg.gov.*

*Current Actions:* BBG is requesting approval of this new collection of information for a three-year period.

*Title:* Personal Identity Verification (PIV) Request for BBG Credential.

*Abstract:* Data from this information collection are used by BBG's Office of Security (M/SEC) to determine suitability for the issuance of a BBG credential to contractors employed by the BBG, and to identity proof and register applicants as part of the PIV process, in accordance with HSPD 12, FIPS 201, and OMB Implementation Directive M–05–24.

*Proposed Frequency of Responses:*

| | |
|---|---|
| Number of Respondents (Contractors Only) | 2431 |
| Number of Responses per Respondents | 1 |
| Total Responses over Three Year Period | 2431 |
| Hours per Response | .25 |
| Total Hours (Sub-Total) | 608 |

Dated: *December 12, 2008.*

**Marie E. Lennon,**

*Chief of Staff, International Broadcasting Bureau (IBB).*

[FR Doc. E8–30234 Filed 12–18–08; 8:45 am]

**BILLING CODE 8610–01–P**

## DEPARTMENT OF COMMERCE

### Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

*Agency:* National Oceanic and Atmospheric Administration (NOAA).

*Title:* Bottlenose Dolphin Conservation Outreach Survey.

*OMB Control Number:* None.

*Form Number(s):* None.

*Type of Request:* Regular submission.

*Burden Hours:* 563.

*Number of Respondents:* 1,125.

*Average Hours per Response:* 30 minutes.

*Needs and Uses:* The objective of this survey is to assess the level of awareness on issues related to regulations preventing feeding/harassment of wild bottlenose dolphins, which are protected under the Marine Mammal Protection Act. In particular, the survey is designed to determine what commercial operators and the general public know about specific regulations prohibiting feeding and harassment of bottlenose dolphins, and how they gained their knowledge and/or perceptions on the topic. This information will be used to help refine outreach and education materials and associated efforts. The initial geographic region for this survey is Panama City, Florida, where numerous incidences of dolphin harassment and feeding have been documented. The intent ultimately is to also use this survey in other areas of the southeast region to gain a similar understanding and ensure outreach messages are appropriate for intended audiences.

*Affected Public:* Individuals or households; business or other for-profit organizations.

*Frequency:* One time only.

*Respondent's Obligation:* Voluntary.

*OMB Desk Officer:* David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 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 David Rostker, OMB Desk Officer, FAX number (202) 395–7285, or *David_Rostker@omb.eop.gov*.

Dated: December 15, 2008.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. E8–30117 Filed 12–18–08; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**A–570–873; A–791–815**

### Ferrovanadium from the People's Republic of China and the Republic of South Africa: Continuation of Antidumping Duty Orders

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** As a result of the determinations by the Department of Commerce (''Department'') and the International Trade Commission (''ITC'') that revocation of the existing antidumping duty (''AD'') orders on ferrovanadium from the People's Republic of China (''PRC'') and the Republic of South Africa (''South Africa'') would likely lead to continuation or recurrence of dumping and material injury to an industry in the United States within a reasonably foreseeable time, the Department is publishing this notice of continuation of the AD orders.

**EFFECTIVE DATE:** December 19, 2008.

**FOR FURTHER INFORMATION CONTACT:** Juanita H. Chen at 202–482–1904; AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230.

**SUPPLEMENTARY INFORMATION:**

#### Background

On December 3, 2007, the Department initiated sunset reviews of the AD orders on ferrovanadium from the PRC and South Africa, pursuant to section 751(c) of the Tariff Act of 1930, as amended (''Act''). *See Initiation of Five-year (''Sunset'') Reviews, 72 FR 67890 (December 3, 2007); see also Notice of Amended Final Antidumping Duty Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Ferrovanadium From the People's Republic of China*, 68 FR 4168 (January 28, 2003); *Notice of Antidumping Duty Order: Ferrovanadium from the Republic of South Africa*, 68 FR 4169 (January 28, 2003). As a result of its reviews, the Department found that revocation of these AD orders would likely lead to continuation or recurrence of dumping and notified the ITC of the margins likely to prevail were the orders revoked. *See Ferrovanadium from the People's Republic of China and the Republic of South Africa: Final Results of the Expedited Sunset Reviews of the Antidumping Duty Orders*, 73 FR 19192

(April 9, 2008). On November 13, 2008, the ITC determined, pursuant to section 751(c) of the Act, that revocation of the AD orders on ferrovanadium from the PRC and South Africa would likely lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. *See Ferrovanadium From China and South Africa*, 73 FR 72837 (December 1, 2008), and ITC Publication 4046, Investigation Nos. 731–TA–986 and 987 (Review) (November 2008).

**Scope of the Orders**

The scope of the orders covers all ferrovanadium regardless of grade, chemistry, form, shape, or size. Ferrovanadium is an alloy of iron and vanadium that is used chiefly as an additive in the manufacture of steel. The merchandise is commercially and scientifically identified as vanadium. The scope specifically excludes vanadium additives other than ferrovanadium, such as nitrided vanadium, vanadium–aluminum master alloys, vanadium chemicals, vanadium oxides, vanadium waste and scrap, and vanadium–bearing raw materials such as slag, boiler residues and fly ash. Merchandise under the Harmonized Tariff Schedule of the United States (''HTSUS'') item numbers 2850.00.2000, 8112.92.0600, 8112.92.7000 and 8112.99.2000 are specifically excluded.[1] Ferrovanadium is classified under HTSUS item number 7202.92.00. Although the HTSUS item number is provided for convenience and customs purposes, the Department's written description of the scope of these orders remains dispositive.

**Continuation of Order**

As a result of the determinations by the Department and the ITC that revocation of the AD orders on ferrovanadium from the PRC and South Africa would likely lead to continuation or recurrence of dumping and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act, the Department hereby orders the continuation of the AD orders on ferrovanadium from the PRC and South Africa. U.S. Customs and Border Protection will continue to collect AD cash deposits at the rates in effect at the time of entry for all imports of subject merchandise. This review covers imports from all manufacturers and exporters of ferrovanadium from the PRC and South Africa.

The effective date of continuation of these AD orders will be the date of publication in the **Federal Register** of this notice. Pursuant to section 751(c)(2) of the Act, the Department intends to initiate the next five-year review of these orders not later than November 2013.

These five-year (''sunset'') reviews and notice are in accordance with section 751(c) of the Act and published pursuant to section 777(i)(1) of the Act.

Dated: December 12, 2008.

**Stephen J. Claeys,**

*Deputy Assistant Secretaryfor Antidumping and Countervailing Duty Operations.*

[FR Doc. E8–30271 Filed 12–18–08; 8:45 am]

**Billing Code: 3510–DS–S**

[1] In 2007, the HTSUS classifications of merchandise excluded from the scope changed from 8112.40.3000 to 8112.92.0600, and from 8112.40.6000 to 8112.92.7000 and 8112.99.2000. *See* Harmonized Tariff Schedule of the United States (2007) (Rev. 1), available at http://www.usitc.gov.

## DEPARTMENT OF COMMERCE

### International Trade Administration

**(A–533–840)**

### Certain Frozen Warmwater Shrimp from India: Partial Rescission of Antidumping Duty Administrative Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (the Department) is rescinding the administrative review of the antidumping duty order on certain frozen warmwater shrimp from India for the period February 1, 2007, through January 31, 2008, for 166 companies, based on: 1) timely withdrawals of the review requests; 2) confirmed statements of no shipments during the period of review (POR); 3) a mistaken initiation; and 4) multiple addresses.

**EFFECTIVE DATE:** December 19, 2008.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth Eastwood, AD/CVD Operations, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–3874.

**SUPPLEMENTARY INFORMATION:**

**Background**

On February 4, 2008, the Department published in the **Federal Register** a notice of opportunity to request an administrative review of the antidumping duty order on certain frozen warmwater shrimp from India for the period February 1, 2007, through January 31, 2008. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 73 FR 6477 (Feb. 4, 2008). Between February 22, 2008, and February 29, 2008, in accordance with 19 CFR 351.213(b)(2), certain Indian producers and exporters requested a review of this antidumping duty order. In addition, on February 29, 2008, the petitioner[1] also requested an administrative review for numerous Indian exporters of subject merchandise, and the Louisiana Shrimp Association requested an administrative review for two Indian producers/exporters of subject merchandise, in accordance with 19 CFR 351.213(b)(1).

In April 2008, the Department initiated an administrative review for 336 companies. These companies are listed in the Department's notice of initiation. *See Certain Frozen Warmwater Shrimp from Brazil, Ecuador, India and Thailand: Notice of Initiation of Administrative Reviews*, 73 FR 18754, 18757–18762 (Apr. 7, 2008) (*Notice of Initiation*).

In April and May 2008, the Department received statements from 18 companies that indicated that they had no shipments of subject merchandise to the United States during the POR. Also, the Department received clarified information regarding mailing addresses for several companies.

On July 7, 2008, in accordance with 19 CFR 351.213(d)(1), the petitioner withdrew its request for review for 144 companies.

On October 16, 2008, the Department issued a memorandum indicating that it intended to rescind the administrative review with respect to 166 respondent companies, and it invited comments on this action from interested parties. *See* the October 16, 2008 memorandum to the file from Elizabeth Eastwood, titled ''Intent to Rescind in Part the 2007–2008 Antidumping Duty Administrative Review on Frozen Warmwater Shrimp from India'' (Intent to Rescind Memorandum). On October 23, 2008, and November 6, 2008, the Department received comments from 32 U.S. producers opposing the rescission with respect to the 144 companies for which the petitioner withdrew its review request. On October 30, 2008, the petitioner responded to the comments filed on October 23, 2008.

**Partial Rescission of Review**

As noted above, the petitioner withdrew its requests for an administrative review for each of the following companies within the time limits set forth in 19 CFR 351.213(d)(1):

[1] The petitioner in this proceeding is the Ad Hoc Shrimp Trade Action Committee.

1) A.S. Marine Industries Pvt Ltd.
2) Adani Exports Ltd
3) Aditya Udyog
4) Agri Marine Exports Ltd.
5) AL Mustafa Exp & Imp
6) Alapatt Marine Exports
7) All Seas Marine P. Ltd.
8) Alsa Marine & Harvests Ltd.
9) Ameena Enterprises
10) Amison Foods Ltd.
11) Amison Seafoods Ltd.
12) Anjani Marine Traders
13) Aqua Star Marine Foods
14) Arsha Seafood Exports Pvt. Ltd.
15) ASF Seafoods
16) Ashwini Frozen Foods
17) Aswin Associates
18) Baby Marine (Eastern) Exports
19) Baby Marine Exports
20) Baby Marine Products
21) Balaji Seafood Exports I Ltd.
22) Baraka Overseas Traders
23) Bell Foods (Marine Division)
24) Bharat Seafoods
25) Bhisti Exports
26) Bilal Fish Suppliers
27) Capital Freezing Complex
28) Cham Exports Ltd.
29) Cham Ocean Treasures Co., Ltd.
30) Cham Trading Organization
31) Chand International
32) Cherukattu Industries (Marine Div.)
33) Danda Fisheries
34) Dariapur Aquatic Pvt. Ltd.
35) Deepmala Marine Exports
36) Dhanamjaya Impex P. Ltd.
37) Dorothy Foods
38) El–Te Marine Products
39) Excel Ice Services/Chirag Int'l
40) Firoz & Company
41) Freeze Engineering Industries (Pvt. Ltd.)

42) Gajula Exim P. Ltd.
43) Gausia Cold Storage P. Ltd.
44) Global Sea Foods & Hotel Ltd.
45) Goan Bounty
46) Gold Farm Foods (P) Ltd.
47) Golden Star Cold Storage
48) Gopal Seafoods
49) Gtc Global Ltd.
50) HA & R Enterprises
51) Hanswati Exports P. Ltd.
52) HMG Industries Ltd.
53) Honest Frozen Food Company
54) India CMS Adani Exports
55) India Seafoods
56) Indian Seafood Corporation
57) Interfish
58) InterSea Exports Corporation
59) J R K Seafoods Pvt. Ltd.
60) Kadalkanny Frozen Foods
61) Kaushalya Aqua Marine Product Exports Pvt. Ltd.
62) Keshodwala Foods
63) Key Foods
64) King Fish Industries
65) Konkan Fisheries Pvt. Ltd.
66) Lakshmi Marine Products
67) Lansea Foods Pvt. Ltd.
68) Laxmi Narayan Exports
69) Lotus Sea Farms
70) M K Exports
71) M. R. H. Trading Company
72) Malabar Marine Exports
73) Mamta Cold Storage
74) Marina Marine Exports
75) Marine Food Packers
76) Miki Exports International
77) Mumbai Kamgar MGSM Ltd.
78) Naik Ice & Cold Storage
79) Nas Fisheries Pvt. Ltd.
80) National Seafoods Company
81) National Steel
82) National Steel & Agro Ind.
83) N.C. Das & Company
84) New Royal Frozen Foods
85) Noble Aqua Pvt. Ltd.
86) Nsil Exports
87) Omsons Marines Ltd.
88) Padmaja Exports
89) Partytime Ice Pvt. Ltd.
90) Philips Foods India Pvt. Ltd.
91) Premier Exports International
92) Premier Marine Foods
93) R K Ice & Cold Storage
94) Rahul Foods (GOA)
95) Rahul International
96) Raj International
97) Ramalmgeswara Proteins & Foods Ltd.

98) Rameshwar Cold Storage
99) Ravi Frozen Foods Ltd.
100) Regent Marine Industries
101) Relish Foods
102) R F. Exports
103) Royal Link Exports
104) Rubian Exports
105) Ruby Marine Foods
106) Ruchi Worldwide
107) S K Exports (P) Ltd.
108) SS International
109) Sabri Food Products
110) Sagar Samrat Seafoods
111) Salet Seafoods Pvt Ltd.
112) Samrat Middle East Exports (P) Ltd.

113) Sarveshwari Ice & Cold Storage P Ltd.
114) Satyam Marine Exports
115) Sea Rose Marines (P) Ltd.
116) Sealand Fisheries Ltd.
117) Seaperl Industries
118) Sharat Industries Ltd.
119) Shimpo Exports
120) Shipper Exporter National Steel
121) Siddiq Seafoods
122) Skyfish
123) SLS Exports Pvt. Ltd.
124) Sonia Fisheries
125) Sourab
126) Sreevas Export Enterprises
127) Sri Sidhi Freezers & Exporters Pvt. Ltd.
128) Star Fish Exports
129) Supreme Exports
130) The Canning Industries (Cochin) Ltd.

131) Tony Harris Seafoods Ltd.
132) Tri–Tee Seafood Company
133) Tri Marine Foods Pvt. Ltd.
134) Trinity Exports
135) Ulka Seafoods (P) Ltd.
136) Uniroyal Marine Exports Ltd.
137) Upasana Exports
138) V Marine Exports
139) Vaibhav Sea Foods
140) Varnita Cold Storage
141) Veraval Marines & Chemicals P Ltd.

142) Vijayalaxmi Seafoods
143) Winner Seafoods
144) Z A Food Products

Pursuant to 19 CFR 351.213(d)(1), the Secretary will rescind an administrative review if a party that requested a review withdraws the request within 90 days of the date of publication of the notice of initiation. Therefore, because all requests for administrative reviews were timely withdrawn for 143 of the companies listed above, in accordance with 19 CFR 351.213(d)(1), we are rescinding this review with regard to these companies. However, with regard to the 144th company, Kadalkanny Frozen Foods, the review cannot be rescinded because there is an outstanding request for review for this company, which was submitted by the company itself.

In addition, in accordance with 19 CFR 351.213(d)(3), we are rescinding the review with respect to the following 14 companies because these companies reported no shipments of subject merchandise during the POR:

1) Capithan Exporting Co.
2) Cochin Frozen Foods Export Pvt. Ltd.
3) C P Aquaculture (India) Ltd.
4) G. KS Business Associates Pvt. Ltd.
5) K V Marine Exports
6) L.G Seafoods
7) Lewis Natural Foods Ltd.
8) Lourde Exports
9) Meenaxi Fisheries Pvt. Ltd.
10) Naik Seafoods Ltd.
11) Sanchita Marine Products P Ltd.
12) Sterling Foods
13) Triveni Fisheries P Ltd.
14) Varnita Cold Storage

We reviewed U.S. Customs and Border Protection (CBP) data and confirmed that there were no entries of subject merchandise from any of these companies. Consequently, in accordance with 19 CFR 351.213(d)(3) and consistent with our practice, we are rescinding our review for the companies listed above. *See, e.g., Certain Steel Concrete Reinforcing Bars From Turkey; Final Results and Rescission of Antidumping Duty Administrative*

*Review in Part*, 71 FR 65082, 65083 (Nov. 7, 2006) (*Rebar from Turkey*); *see also Certain Frozen Warmwater Shrimp From India; Partial Rescission of Antidumping Duty Administrative Review*, 71 FR 41419 (July 21, 2006).

The Department also initiated separate administrative reviews for the following companies with the same name but different addresses: 1) Apex Exports; 2) Choice Trading Corporation Pvt. Ltd.; 3) IFB Agro Industries Limited; 4) Kings Marine Products; 5) K V Marine Exports; 6) Navayuga Exports Ltd.; 7) Sai Marine Exports Pvt. Ltd.; and 8) Selvam Exports Private Limited. Specifically, these are companies for which we initiated multiple administrative reviews because the petitioner and/or the respondent listed separate addresses for the same companies in their review requests. *See Notice of Initiation*, 73 FR at 18757–18762. The Department sent out letters asking for clarification of the multiple addresses and same company names. We received responses from the companies verifying the correct address and that the company is the same. Therefore, we are rescinding the review with respect to these duplicate company addresses.

Finally, in the *Notice of Initiation*, the Department mistakenly included Royal Cold Storage India P Ltd. in the list of companies for which the review was initiated, in addition to the list of companies for which the review was not initiated. *See Notice of Initiation*, 73 FR at 18760, 18765. We are clarifying that the Department has not initiated an administrative review with respect to Royal Cold Storage India P Ltd. *Id.*, 73 FR at 18765.

On October 23, 2008, the Department received comments from 32 U.S. producers regarding the Department's *Intent to Rescind Memorandum*. In these comments, the U.S. producers objected to the petitioner's July 7, 2008, filing withdrawing its request for administrative reviews for certain Indian producers/exporters because: 1) these domestic producers, three of which were previously part of the Ad Hoc Shrimp Trade Action Committee, have retained their own counsel; and 2) as a result, the Ad Hoc Shrimp Trade Action Committee no longer represents the majority of the U.S. domestic industry. Thus, the U.S. producers requested that the Department not rescind the administrative reviews for the companies for which the petitioner withdrew its request. On October 30, 2008, the petitioner responded to the U.S. producers' comments by stating that all of its actions in the review were taken on behalf of the Ad Hoc Shrimp Trade Action Committee as a corporate entity, not on behalf of the individual members. Thus, it urged the Department to disregard the U.S. producers' request.

After considering the U.S. producers' October 23, 2008 submission, we disagree with the arguments made by these companies. The request for administrative review at issue was made by the Ad Hoc Shrimp Trade Action Committee, which is an interested party to this proceeding under section 771(9)(E) of the Tariff Act of 1930, as amended (the Act) (*i.e.*, the subsection applicable to trade associations). Contrary to the U.S. producers' assertions, this section of the Act does not require a trade association to represent a majority of the industry producing the domestic like product, but rather it merely requires a majority of the association's members to manufacture, produce, or wholesale a domestic like product in the United States. Further, 19 CFR 351.213(b)(1) does not require that a domestic interested party represent the majority of the domestic industry before it may request a review. In this case, both the administrative review requests and the corresponding withdrawal of certain of these requests were made on behalf of the Ad Hoc Shrimp Trade Action Committee, not the individual members of this group. Consequently, because the U.S. producers involved in the October 23, 2008, filing did not request any administrative reviews in this segment of the proceeding, we find that their objection to the petitioner's withdrawal of its request for administrative reviews of certain Indian producers/exporters does not provide a basis for the Department to maintain the review request for these companies.

**Assessment**

The Department intends to issue assessment instructions to CBP 15 days after the date of publication of this partial rescission of administrative review. The Department will direct CBP to assess antidumping duties at the cash deposit rate in effect on the date of entry for POR entries of the subject merchandise produced/exported by the companies for which we are rescinding the review based on the timely withdrawal of review requests.

With respect to POR entries of subject merchandise produced by companies for which we are rescinding the review based on certifications of no shipments, because these companies certified that they made no POR shipments of subject merchandise for which they had knowledge of U.S. destination, we will instruct CBP to liquidate these entries at the all–others rate established in the less–than-fair–value investigation if there is no rate for the intermediary (*e.g.*, a reseller, trading company, or exporter) involved in the transaction. *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003).

**Notification to Importers**

This notice serves as a reminder to importers for whom this review is being rescinded, of their responsibility under 19 CFR 351.402(f) to file a certificate regarding 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.

This notice is published in accordance with section 777(i) of the Act and 19 CFR 351.213(d)(4).

Dated: December 12, 2008.

**Stephen J. Claeys,**

*Deputy Assistant Secretaryfor Antidumping and Countervailing Duty Operations.*

[FR Doc. E8–30269 Filed 12–18–08; 8:45 am]

**Billing Code: 3510–DS–S**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**(A–549–822)**

### Certain Frozen Warmwater Shrimp from Thailand: Partial Rescission of Antidumping Duty Administrative Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (the Department) is rescinding the administrative review of the antidumping duty order on certain frozen warmwater shrimp from Thailand for the period February 1, 2007, through January 31, 2008, for 29 companies, based on: 1) timely withdrawals of the review requests; and 2) confirmed statements of no shipments during the period of review (POR).

**EFFECTIVE DATE:** December 19, 2008.

**FOR FURTHER INFORMATION CONTACT:** Kate Johnson, AD/CVD Operations, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–4929.

**SUPPLEMENTARY INFORMATION:**

**Background**

On February 4, 2008, the Department published in the **Federal Register** a notice of opportunity to request an administrative review of the antidumping duty order on certain frozen warmwater shrimp from Thailand for the period February 1, 2007, through January 31, 2008. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 73 FR 6477 (February 4, 2008). The Department received timely requests from the petitioner,[1] the Louisiana Shrimp Association (LSA), and certain individual companies, in accordance with 19 CFR 351.213(b), during the anniversary month of February 2008, for administrative reviews of the antidumping duty order on shrimp from Thailand.

On April 7, 2008, the Department initiated an administrative review for 165 companies. *See Certain Frozen Warmwater Shrimp from Brazil, Ecuador, India, and Thailand: Notice of Initiation of Administrative Reviews*, 73 FR 18754 (April 7, 2008).

Between March and May 2008, the Department received submissions from certain companies that indicated they had no shipments of subject merchandise to the United States during the POR.

On July 7, 2008, in accordance with 19 CFR 351.213(d)(1), the petitioner withdrew its request for review for the following eighteen companies: Anglo–Siam Seafoods Co., Ltd.; Applied DB Ind; Chonburi LC; Gallant Ocean (Thailand) Co., Ltd. (Gallant Ocean)[2]; Haitai Seafood Co., Ltd.; High Way International Co., Ltd.; Li–Thai Frozen Foods Co., Ltd.; Merkur Co., Ltd.; Ming Chao Ind Thailand; Nongmon SMJ Products; Queen Marine Food Co., Ltd.; SCT Co., Ltd.; Search & Serve; Smile Heart Foods Co., Ltd.; Shianlin Bangkok Co., Ltd.; Star Frozen Foods Co., Ltd.; Thai World Imports & Exports; and Wann Fisheries Co., Ltd.

On October 27, 2008, the Department issued a memorandum indicating that it intended to rescind the administrative review with respect to 29 respondent companies, and it invited comments on this action from interested parties. *See* October 27, 2008, Memorandum to The File from Kate Johnson titled ''Intent to Rescind in Part the Antidumping Duty Administrative Review on Certain Frozen Warmwater Shrimp from Thailand'' (Intent to Rescind Memorandum). On November 3, 2008, and November 13, 2008, the Department received comments from 32 U.S. producers opposing the rescission with respect to the companies for which the petitioner withdrew its review request. On November 6, 2008, the petitioner responded to the comments filed on November 3, 2008.

**Partial Rescission of Review**

Pursant to 19 CFR 351.213(d)(1), the Secretary will rescind an administrative review, in whole or in part, if a party requesting a review withdraws the request within 90 days of the date of publication of the notice of initiation. Therefore, because all requests for administrative reviews were timely withdrawn for the following companies, in accordance with 19 CFR 351.213(d)(1), we are rescinding this review with regard to these companies: 1) Anglo–Siam Seafoods Co., Ltd.; 2) Applied DB Ind; 3) Chonburi LC; 4) Haitai Seafood Co., Ltd.; 5) High Way International Co., Ltd.; 6) Li–Thai Frozen Foods Co., Ltd.; 7) Merkur Co., Ltd.; 8) Ming Chao Ind Thailand; 9) Nongmon SMJ Products; 10) Queen Marine Food Co., Ltd.; 11) SCT Co., Ltd.; 12) Search & Serve; 13) Smile Heart Foods Co., Ltd.; 14) Shianlin Bangkok Co., Ltd.; 15) Star Frozen Foods Co., Ltd.; 16) Thai World Imports & Exports; and 17) Wann Fisheries Co., Ltd. As noted above, the review requested by Gallant Ocean has not been withdrawn. Therefore, we are not rescinding the review with respect to this company.

In addition, in accordance with 19 CFR 351.213(d)(3), we are rescinding the review with respect to the following ten companies which submitted letters indicating that they had no shipments of subject merchandise during the POR: 1) Dynamic Intertransport Co., Ltd.; 2) Lucky Union Foods Co., Ltd.; 3) MKF Interfood (2004) Co., Ltd.; 4) NR. Instant Produce Co., Ltd.; 5) Siam Canadian Foods Co., Ltd.; 6) Sky Fresh Co., Ltd.; 7) Songkla Canning (PCL); 8) Surat Seafoods Co., Ltd.; 9) Tep Kinsho Foods Co., Ltd.; and 10) Thai Excel Foods Co., Ltd. We reviewed U.S. Customs and Border Protection (CBP) data and confirmed that there were no entries of subject merchandise from any of these companies. Consequently, in accordance with 19 CFR 351.213(d)(3) and consistent with our practice, we are rescinding our review for the companies listed above. *See, e.g., Certain Steel Concrete Reinforcing Bars From Turkey; Final Results and Rescission of Antidumping Duty Administrative Review in Part*, 71 FR 65082, 65083 (November 7, 2006).

Finally, the Department received no–shipment responses from the following companies for which there appeared to be U.S. customs entries of subject merchandise: 1) Grobest Frozen Foods Co., Ltd.; and 2) Thai Union Manufacturing Co., Ltd. We requested data on the relevant entries from CBP and determined that the entries made by Grobest Frozen Foods Co., Ltd. and Thai Union Manufacturing Co., Ltd. were not reportable transactions because they were either: 1) free samples; or 2) sales made by another producer/exporter. Therefore, in accordance with 19 CFR 351.213(d)(3), and consistent with the Department's practice, we are rescinding the review with respect to these two companies. *See, e.g., Certain Steel Concrete Reinforcing Bars from Turkey; Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination to Revoke in Part*, 70 FR 67665, 67666 (November 8, 2005).

On November 3, 2008, the Department received comments from 32 U.S. producers regarding the Department's Intent to Rescind Memorandum. In these comments, the U.S. producers objected to the petitioner's July 7, 2008, filing withdrawing its request for administrative reviews for certain Thai producers/exporters because: 1) these domestic producers, three of which were previously part of the Ad Hoc Shrimp Trade Action Committee, have retained their own counsel; and 2) as a result, the Ad Hoc Shrimp Trade Action Committee no longer represents the majority of the U.S. domestic industry. Thus, the U.S. producers requested that the Department not rescind the administrative reviews for the companies for which the petitioner withdrew its request. On November 6, 2008, the petitioner responded to the U.S. producers' comments by stating that all actions in the review were taken on behalf of the Ad Hoc Shrimp Trade Action Committee as a corporate entity, not on behalf of the individual members, and thus it urged the Department to disregard the U.S. producers' request.

After considering the U.S. producers' November 3, 2008, submission, we disagree with the arguments made by these companies. The request for administrative review at issue was made by the Ad Hoc Shrimp Trade Action Committee, which is an interested party to this proceeding under section 771(9)(E) of the Tariff Act of 1930, as amended (the Act) (*i.e.*, the subsection applicable to trade associations). Contrary to the U.S. producers' assertions, this section of the Act does not require a trade association to

[2] Gallant Ocean has not withdrawn its February 29, 2008, request for review.

represent a majority of the industry producing the domestic like product, but rather it merely requires a majority of the association's members to manufacture, produce, or wholesale a domestic like product in the United States. Further, 19 CFR 351.213(b)(1) does not require that a domestic interested party represent the majority of the domestic industry before it may request a review. In this case, both the administrative review requests and the corresponding withdrawal of certain of these requests were made on behalf of the Ad Hoc Shrimp Trade Action Committee, not the individual members of this group. Consequently, because the U.S. producers involved in the November 3, 2008, filing did not request any administrative reviews in this segment of the proceeding, we find that their objection to the petitioner's withdrawal of its request for administrative reviews of certain Thai producers/exporters does not provide a basis for the Department to maintain the review request for these companies.

**Assessment**

The Department intends to issue assessment instructions to CBP 15 days after the date of publication of this partial rescission of administrative review. The Department will direct CBP to assess antidumping duties at the cash deposit rate in effect on the date of entry for POR entries of the subject merchandise produced/exported by the companies for which we are rescinding the review based on the timely withdrawal of review requests.

With respect to POR entries of subject merchandise produced by companies for which we are rescinding the review based on certifications of no–shipments, because these companies certified that they made no POR shipments of subject merchandise for which they had knowledge of U.S. destination, we will instruct CBP to liquidate these entries at the all–others rate established in the less–than-fair–value investigation if there is no rate for the intermediary (*e.g.*, a reseller, trading company, or exporter) involved in the transaction. *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003).

**Notification to Importers**

This notice serves as a reminder to importers for whom this review is being rescinded, of their responsibility under 19 CFR 351.402(f) to file a certificate regarding 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.

This notice is published in accordance with section 777(i) of the Act and 19 CFR 351.213(d)(4).

Dated: December 15, 2008.

**Gary Taverman,**

*Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.*

[FR Doc. E8–30277 Filed 12–18–09; 8:45 am]

**BILLING CODE 3510–DS–S**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**A–580–836**

### Certain Cut–to-Length Carbon–Quality Steel Plate Products From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** In response to requests by interested parties, the Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on certain cut–to-length carbon–quality steel plate products from the Republic of Korea (Korea). This review covers one producer/exporter of the subject merchandise, Dongkuk Steel Mill Co., Ltd. (DSM). The period of review (POR) is February 1, 2007, through January 31, 2008.

The Department has preliminarily determined that DSM made U.S. sales at prices less than normal value. If these preliminary results are adopted in our final results of administrative review, we will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries. Interested parties are invited to comment on these preliminary results of review. We intend to issue the final results of review no later than 120 days from the publication date of this notice.

**EFFECTIVE DATE:** December 19, 2008.

**FOR FURTHER INFORMATION CONTACT:** Lyn Johnson or Minoo Hatten, AD/CVD Operations, Office 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230, telephone: (202) 482–5287 and (202) 482–1690, respectively.

**SUPPLEMENTARY INFORMATION:**

**Background**

On February 10, 2000, the Department published in the **Federal Register** an antidumping duty order on certain cut–to-length carbon–quality steel plate products (steel plate) from the Republic of Korea (Korea). See *Notice of Amendment of Final Determinations of Sales at Less Than Fair Value and Antidumping Duty Orders: Certain Cut–To-Length Carbon–Quality Steel Plate Products From France, India, Indonesia, Italy, Japan and the Republic of Korea*, 65 FR 6585 (February 10, 2000). On February 4, 2008, the Department published in the **Federal Register** a notice of ''Opportunity to Request Administrative Review'' of the order. See *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 73 FR 6477 (February 4, 2008).

In accordance with 19 CFR 351.213(b)(2), on February 29, 2008, DSM requested that the Department conduct an administrative review of its sales and entries of subject merchandise into the United State during the POR. Additionally, on February 29, 2008, and in accordance with 19 CFR 351.213(b)(1), domestic producers and interested parties, Nucor Corporation (Nucor) and ArcelorMittal Steel USA Inc. (ArcelorMittal), requested that the Department conduct a review of DSM. On March 31, 2008, the Department initiated an administrative review of DSM. See *Initiation of Antidumping and Countervailing Duty Administrative Reviews, Request for Revocation in Part, and Deferral of Administrative Review*, 73 FR 16837 (March 31, 2008). On October 15, 2008, we extended the due date for the preliminary results of review by 45 days to December 15, 2008. See *Certain Cut–to-Length Carbon–Quality Steel Plate Products From the Republic of Korea: Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review*, 73 FR 62477 (October 21, 2008).

The Department is conducting this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

**Scope of the Order**

The products covered by the antidumping duty order are certain hot–rolled carbon–quality steel: (1) 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 nominal or actual thickness of not less than 4 mm, which are cut–to-length (not in coils) and without

patterns in relief), of iron or non–alloy-quality steel; and (2) flat–rolled products, hot–rolled, of a nominal or actual thickness of 4.75 mm or more and of a width which exceeds 150 mm and measures at least twice the thickness, and which are cut–to-length (not in coils). Steel products included in the scope of the order are of rectangular, square, circular, or other shape and of rectangular or non–rectangular cross–section where such non–rectangular 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. Steel products that meet the noted physical characteristics that are painted, varnished, or coated with plastic or other non–metallic substances are included within this scope. Also, specifically included in the scope of the order are high strength, low alloy (HSLA) steels. HSLA steels are recognized as steels with micro–alloying levels of elements such as chromium, copper, niobium, titanium, vanadium, and molybdenum. Steel products included in this scope, regardless of Harmonized Tariff Schedule of the United States (HTSUS) definitions, are products in which: (1) Iron predominates, by weight, over each of the other contained elements, (2) the carbon content is two percent or less, by weight, and (3) none of the elements listed below is equal to or exceeds the quantity, by weight, respectively indicated: 1.80 percent of manganese, or 1.50 percent of silicon, or 1.00 percent of copper, or 0.50 percent of aluminum, or 1.25 percent of chromium, or 0.30 percent of cobalt, or 0.40 percent of lead, or 1.25 percent of nickel, or 0.30 percent of tungsten, or 0.10 percent of molybdenum, or 0.10 percent of niobium, or 0.41 percent of titanium, or 0.15 percent of vanadium, or 0.15 percent zirconium. All products that meet the written physical description, and in which the chemistry quantities do not equal or exceed any one of the levels listed above, are within the scope of the order unless otherwise specifically excluded. The following products are specifically excluded from the order: (1) Products clad, plated, or coated with metal, whether or not painted, varnished or coated with plastic or other non–metallic substances; (2) SAE grades (formerly AISI grades) of series 2300 and above; (3) products made to ASTM A710 and A736 or their proprietary equivalents; (4) abrasion–resistant steels (*i.e.*, USS AR 400, USS AR 500); (5) products made to ASTM A202, A225, A514 grade S, A517 grade S, or their proprietary equivalents; (6) ball bearing steels; (7) tool steels; and (8) silicon manganese steel or silicon electric steel.

Imports of steel plate are currently classified in the HTSUS under subheadings 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, 7212.50.0000, 7225.40.3050, 7225.40.7000, 7225.50.6000, 7225.99.0090, 7226.91.5000, 7226.91.7000, 7226.91.8000, and 7226.99.0000. The HTSUS subheadings are provided for convenience and customs purposes. The written description of the merchandise covered by the order is dispositive.

**Fair–Value Comparison**

To determine whether DSM's sales of the subject merchandise from Korea to the United States were at prices below normal value, we compared the constructed export price (CEP) to the normal value as described in the ''Constructed Export Price'' and ''Normal Value'' sections of this notice. Therefore, pursuant to section 777A(d)(2) of the Act, we compared the CEP of individual U.S. transactions to the monthly weighted–average normal value of the foreign like product where there were sales made in the ordinary course of trade.

**Product Comparisons**

In accordance with section 771(16) of the Act, we considered all products covered by the ''scope of the order'' section above produced and sold by DSM in the comparison market during the POR to be foreign like product for the purposes of determining appropriate product comparisons to U.S. sales of subject merchandise. Specifically, in making our comparisons, we used the following methodology. If an identical comparison–market model was reported, we made comparisons to weighted–average comparison–market prices that were based on all sales which passed the cost–of-production (COP) test of the identical product during the relevant or contemporary month. We calculated the weighted–average comparison–market prices on a level of trade–specific basis. If there were no contemporaneous sales of an identical model, we identified the most similar comparison–market model. To determine the most similar model, we matched the foreign like product based on the physical characteristics reported by the respondent in the following order of importance: quality, specification, heat treatments, thickness, and width.

**Constructed Export Price**

The Department based the price of DSM's U.S. sales of subject merchandise on CEP, as defined in section 772(b) of the Act, because the merchandise was sold, before importation, by a U.S.-based seller affiliated with the producer to unaffiliated purchasers in the United States. In accordance with section 772(d)(1) of the Act we calculated the CEP by deducting selling expenses associated with economic activities occurring in the United States, which includes direct selling expenses. In accordance with section 772(d)(1) of the Act, we also deducted those indirect selling expenses associated with economic activities occurring in the United States and the profit allocated to expenses deducted under section 772(d)(1) in accordance with sections 772(d)(3) and 772(f) of the Act. In accordance with section 772(f) of the Act, we computed profit based on the total revenues realized on sales in both the U.S. and comparison markets, less all expenses associated with those sales. We then allocated profit to expenses incurred with respect to U.S. economic activity based on the ratio of total U.S. expenses to total expenses for both the U.S. and comparison markets.

**Normal Value**

*A. Affiliation*

DSM made home–market sales to a wholly owned subsidiary of Dongkuk Industries Co., Ltd. (DKI). The Department has found DKI to be an affiliated party of DSM in prior reviews and has treated sales to DKI's wholly owned subsidiary as affiliated–party sales. See *Certain Cut–to-Length Carbon–Quality Steel Plate Products From the Republic of Korea: Preliminary Results and Rescission in Part of Antidumping Duty Administrative Review*, 70 FR 67428, 67429 (November 7, 2005) (*2004/05 Prelim*), unchanged in *Certain Cut–to-Length Carbon–Quality Steel Plate Products From the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 71 FR 13080 (March 14, 2006) (*2004/05 Final*). See also *Certain Cut–to-Length Carbon–Quality Steel Plate Products From the Republic of Korea: Preliminary Results and Rescission in Part of Antidumping Duty Administrative Review*, 72 FR 65701, 65703 (November, 2007) (*2006/07 Prelim*), unchanged in *Certain Cut–to-Length Carbon–Quality Steel Plate Products From the Republic of Korea: Final Results and Rescission in Part of*

*Antidumping Duty Administrative Review*, 73 FR 15132 (March 21, 2008) (2006/07 Final).

Section 771(33)(F) of the Act states that two or more persons directly or indirectly controlling, controlled by, or under common control with any person shall be considered affiliates. Accordingly, we have determined in this review that DSM and DKI are under common control of a family grouping and, thus, are affiliated. Our decision is supported by the evidence on the record of this review which indicates that the same familial relationships that formed the basis of our determination in *2004/05 Final*[1] and *2006/07 Final*[2] continue today. Further, although DSM identified DKI as an unaffiliated entity in its original questionnaire response, DSM confirmed in its supplemental response that there have not been any changes in the ownership or control of DSM and DKI during the POR that would affect the Department's 2007–2008 analysis of affiliation between the two companies. See DSM's Supplemental Questionnaire Response dated September 9, 2008, at 6. The detailed analysis of this issue contains business–proprietary information and, therefore, is available in a decision memorandum. See Memorandum to Laurie Parkhill concerning Affiliation Analysis for Dongkuk Steel Mill Co., Ltd., dated December 12, 2008. For the reasons stated above and outlined in the decision memorandum, the Department preliminarily continues to find that DSM and DKI are affiliated under section 771(33) of the Act.

*B. Home–Market Viability*

In accordance with section 773(a)(1)(c) of the Act, in order to determine whether there was a sufficient volume of sales of steel plate in the comparison market to serve as a viable basis for calculating the normal value, we compared the volume of the respondent's home–market sales of the foreign like product to its volume of the U.S. sales of the subject merchandise. DSM's quantity of sales in the home market was greater than five percent of its sales to the U.S. market. Based on this comparison of the aggregate quantities sold in the comparison market (*i.e.*, Korea) and to the United States and absent any information that a particular market situation in the exporting country did not permit a proper comparison, we preliminarily determine that the quantity of the foreign like product sold by the respondent in the exporting country was sufficient to permit a proper comparison with the sales of the subject merchandise to the United States, pursuant to section 773(a)(1) of the Act. Thus, we determine that DSM's home market was viable during the POR. *Id.* Therefore, in accordance with section 773(a)(1)(B)(i) of the Act, we based normal value for the respondent on the prices at which the foreign like product was first sold for consumption in the exporting country in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the U.S. sales.

*C. Overrun Sales*

Section 773(a)(1)(B) of the Act provides that normal value shall be based on the price at which the foreign like product is first sold, *inter alia*, in the ordinary course of trade. Section 771(15) of the Act defines ''ordinary course of trade'' as the ''conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind.''

DSM reported home–market sales of ''overrun'' merchandise (*i.e.*, sales of a greater quantity of steel plate than the customer ordered due to overproduction). In the past, the Department has examined various factors to determine whether ''overrun'' sales are in the ordinary course of trade. See *China Steel Corp. v. United States*, 264 F. Supp. 2d. 1339, 1364 (CIT May 14, 2003). See also *2004/05 Prelim*, 70 FR 67428, 67430, unchanged in *2004/05 Final*, 71 FR 13080. The Department has the discretion to choose how best to analyze the many factors involved in determining whether sales are made within the ordinary course of trade. See *Laclede Steel Co. v. United States*, 19 CIT 1076, 1078 (CIT August 11, 1995). These factors include, but are not limited to, the following: (1) whether the merchandise is ''off–quality'' or produced according to unusual specifications; (2) the comparative volume of sales and the number of buyers in the home market; (3) the average quantity of an overrun sale compared to the average quantity of a commercial sale; and (4) price and profit differentials in the home market.

Based on our analysis of these factors and the terms of sale, we preliminarily determine that DSM's overrun sales are outside the ordinary course of trade. Because our analysis makes use of business–proprietary information, the analysis is available in a separate decision memorandum. See Memorandum to Laurie Parkhill concerning Dongkuk Steel Mill Co., Ltd. Sales Outside the Ordinary Course of Trade, dated December 12, 2008.

*D. Cost–of-Production Analysis*

In the most recently completed administrative review, the Department determined that DSM sold the foreign like product at prices below the cost of producing the merchandise and, as a result, excluded such sales from the calculation of normal value. See *2006/07 Prelim*, 72 FR at 65704, unchanged in *2006/07 Final*, 73 FR 15132. Therefore, in this review, we have reasonable grounds to believe or suspect that DSM's sales of the foreign like product under consideration for the determination of normal value may have been made at prices below COP as provided by section 773(b)(2)(A)(ii) of the Act and, pursuant to section 773(b)(1) of the Act, we have conducted a COP investigation of DSM's sales in the comparison market.

In accordance with section 773(b)(3) of the Act, we calculated the COP based on the sum of the costs of materials and labor employed in producing the foreign like product, the selling, general, and administrative (SG&A) expenses, and all costs and expenses incidental to packing the merchandise. In our COP analysis, we used the comparison–market sales and COP information provided by DSM in its questionnaire response.

After calculating the COP, in accordance with section 773(b)(1) of the Act, we tested whether comparison–market sales of the foreign like product were made at prices below the COP within an extended period of time in substantial quantities and whether such prices permitted the recovery of all costs within a reasonable period of time. See section 773(b)(2) of the Act. We compared model–specific COPs to the reported comparison–market prices less any applicable movement charges, discounts, and rebates.

Pursuant to section 773(b)(2)(C) of the Act, when less than 20 percent of DSM's sales of a given product were at prices less than the COP, we did not disregard any below–cost sales of that product because the below–cost sales were not made in substantial quantities within an extended period of time. When 20 percent or more of DSM's sales of a given product during the POR were at prices less than the COP, we disregarded the below–cost sales because they were made in substantial

[1] See Memorandum to Holly Kuga from Malcolm Burke concerning the affiliation analysis for Dongkuk Steel Mill Co., Ltd., dated October 31, 2005.

[2] See Preliminary Analysis Memorandum for Dongkuk Steel Mill Co., Ltd., dated November 15, 2007, at 2.

quantities within an extended period of time pursuant to sections 773(b)(2)(B) and (C) of the Act and because, based on comparisons of prices to weighted-average COPs for the POR, we determined that these sales were at prices which would not permit recovery of all costs within a reasonable period of time in accordance with section 773(b)(2)(D) of the Act. Based on this test, we disregarded below–cost sales.

*E. Arm's–Length Test*

The Department may calculate normal value based on a sale to an affiliated party only if it is satisfied that the price to the affiliated party is comparable to the price at which sales are made to parties not affiliated with the exporter or producer, *i.e.*, sales at arm's–length prices. See 19 CFR 351.403(c). For affiliated–party sales, we excluded from our analysis sales to affiliated customers for consumption in the comparison market that we determined not to have been made at arm's–length prices. To test whether these sales were made at arm's–length prices, the Department compared the prices of sales of comparable merchandise to affiliated and unaffiliated customers, net of all rebates, movement charges, direct selling expenses, and packing. Pursuant to 19 CFR 351.403(c) and in accordance with our practice, when the prices charged to an affiliated party were, on average, between 98 and 102 percent of the prices charged to unaffiliated parties for merchandise comparable to that sold to the affiliated party, we determined that the sales to the affiliated party were at arm's–length prices. See *Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 FR 69186 (November 15, 2002) (explaining the Department's practice). We included in our calculations of normal value those sales to affiliated parties that were made at arm's–length prices.

*F. Price–to-Price Comparisons*

We based normal value on comparison–market sales to unaffiliated purchasers and sales to affiliated customers that passed the arm's–length test. DSM's comparison–market prices were based on the packed, ex–factory, or delivered prices. When applicable, we made adjustments for differences in packing and for movement expenses in accordance with sections 773(a)(6)(A) and (B) of the Act. We also made adjustments for differences in cost attributable to differences in physical characteristics of the merchandise pursuant to section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411 and for differences in circumstances of sale in accordance with section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410. For comparisons to CEP, we made circumstance–of-sale adjustments by deducting comparison–market direct selling expenses from normal value.

**Level of Trade**

To the extent practicable, we determine normal value for sales at the same level of trade as CEP sales. See section 773(a)(1)(B)(i) of the Act and 19 CFR 351.412. When there are no sales at the same level of trade, we compare CEP sales to comparison–market sales at a different level of trade. The normal–value level of trade is that of the starting–price sales in the comparison market.

To determine whether comparison–market sales are at a different level of trade than DSM's U.S. sales in this review, we examined stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. Based on our analysis, we have preliminarily determined that there is one level of trade in the United States and one level of trade in the home market and that the U.S. level of trade is at a less advanced stage than the home–market level of trade. Therefore, we have compared U.S. sales to home–market sales at different levels of trade.

Because there is only one level of trade in the home market, we were unable to calculate a level–of-trade adjustment based on DSM's home–market sales of the foreign like product and we have no other information that provides an appropriate basis for determining a level–of-trade adjustment. For DSM's CEP sales, to the extent possible, we determined normal value at the same level of trade as the U.S. sale to the unaffiliated customer and made a CEP–offset adjustment in accordance with section 773(a)(7)(B) of the Act. The CEP–offset adjustment to normal value is subject to the so–called offset cap, which is calculated as the sum of home–market indirect selling expenses up to the amount of U.S. indirect selling expenses deducted from CEP.

For a detailed description of our level–of-trade analysis for DSM in these preliminary results, see Preliminary Analysis Memorandum for Dongkuk Steel Mill Company, Ltd., dated December 12, 2008.

**Currency Conversion**

Pursuant to 19 CFR 351.415, we converted amounts expressed in foreign currencies into U.S. dollar amounts based on the exchange rates in effect on the dates of the relevant U.S. sales, as certified by the Federal Reserve Bank.

**Preliminary Results of Review**

As a result of this review, we preliminarily determine that the following weighted–average dumping margin exists for the period February 1, 2007, through January 31, 2008:

| Manufacturer/Exporter | Margin (percent) |
|---|---|
| Dongkuk Steel Mill Co., Ltd. ..... | 9.27 |

**Disclosure and Public Comment**

We will disclose the calculations used in our analysis to parties in this review within five days of the date of publication of this notice. Any interested party may request a hearing within 30 days of the publication of this notice in the **Federal Register**. If a hearing is requested, the Department will notify interested parties of the hearing schedule.

Interested parties are invited to comment on the preliminary results of this review. The Department will consider case briefs filed by interested parties within 30 days after the date of publication of this notice in the **Federal Register**. Interested parties may file rebuttal briefs, limited to issues raised in the case briefs. The Department will consider rebuttal briefs filed not later than five days after the time limit for filing case briefs. Parties who submit arguments are requested to submit with each argument a statement of the issue, a brief summary of the argument, and a table of authorities cited. Further, we request that parties submitting written comments provide the Department with a diskette containing an electronic copy of the public version of such comments.

We intend to issue the final results of this administrative review, including the results of our analysis of issues raised in the written comments, within 120 days of publication of these preliminary results in the **Federal Register**.

**Assessment Rates**

The Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries. In accordance with 19 CFR 351.212(b)(1), we calculated an importer–specific assessment rate for these preliminary results of review. We divided the total dumping margins for the reviewed sales by the total entered value of those reviewed sales for the importer. We will instruct CBP to assess the importer–specific rate uniformly, as appropriate, on all entries of subject merchandise made by the relevant importer during the POR. See 19 CFR 351.212(b). The Department intends to issue instructions

to CBP 15 days after the publication of the final results of review.

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) (*Assessment of Antidumping Duties*). This clarification will apply to entries of subject merchandise during the POR produced by DSM for which DSM did not know its merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries of DSM–produced merchandise at the all–others rate if there is no rate for the intermediate company(ies) involved in the transaction. For a full discussion of this clarification, see *Assessment of Antidumping Duties*.

**Cash–Deposit Requirements**

The following deposit requirements will be effective upon publication of the notice of final results of administrative review for all shipments of steel plate from Korea entered, or withdrawn from warehouse, for consumption on or after the date of publication, as provided by section 751(a)(2)(C) of the Act: (1) the cash–deposit rate for DSM will be the rate established in the final results of this review; (2) for previously reviewed or investigated companies not listed above, the cash–deposit rate will continue to be the company–specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the less–than-fair–value investigation but the manufacturer is, the cash–deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; (4) if neither the exporter nor the manufacturer has its own rate, the cash–deposit rate will be 0.98 percent, the all–others rate established in the LTFV investigation,[3] adjusted for the export–subsidy rate in the companion countervailing duty investigation.[4] This deposit requirement, when imposed, shall remain in effect until further notice.

[3] See *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-To-Length Carbon-Quality Steel Plate Products from Korea*, 64 FR 73196, 73214 (December 29, 1999). See also Memorandum To The File from Lyn Johnson concerning All-Others Rate, dated December 12, 2008.

[4] See *Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate From the Republic of Korea*, 64 FR 73176, 731818-86 (December 29, 1999), as amended in *Notice of Amended Final Determinations: Certain Cut-to-Length Carbon-Quality Steel Plate From India and the Republic of Korea*, 65 FR 6587, 6588 (February 10, 2000).

**Notification to Importers**

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this 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 doubled antidumping duties.

These preliminary results of administrative review are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 12, 2008.

**Stephen J. Claeys,**

*Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.*

[FR Doc. E8–30272 Filed 12–18–08; 8:45 am]

**BILLING CODE 3510–DS–S**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**(A–533–820)**

### Certain Hot-Rolled Carbon Steel Flat Products From India: Notice of Preliminary Results of Antidumping Duty Administrative Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** In response to requests from petitioners,[1] the Department of Commerce (''the Department'') is conducting an administrative review of the antidumping order on certain hot–rolled carbon steel flat products from India (''Indian Hot–Rolled''). This review covers one manufacturer and exporter of the subject merchandise: Essar Steel Limited (''Essar''). The Department has preliminarily determined that during the period of review (''POR''), Essar made sales of subject merchandise at less than normal value (''NV''). If these preliminary results are adopted in the final results of this administrative review, we will instruct U.S. Customs and Border Protection (''CBP'') to assess antidumping duties on all appropriate entries of subject merchandise during the POR.

**EFFECTIVE DATE:** December 19, 2008.

**FOR FURTHER INFORMATION CONTACT:** Joy Zhang or James Terpstra, AD/CVD Operations Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–1168 and (202) 482–3965, respectively.

**SUPPLEMENTARY INFORMATION:**

**Background**

On December 3, 2001, the Department published in the **Federal Register** the antidumping duty order on Indian Hot–Rolled. *See Notice of Amended Final Antidumping Duty Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Hot–Rolled Carbon Steel Flat Products from India*, 66 FR 60194 (December 3, 2001) (''*Amended Final Determination*''). On December 3, 2007, the Department published in the **Federal Register** a notice of ''Opportunity to Request Administrative Review'' of the antidumping duty order on Indian Hot–Rolled. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 72 FR 69889 (December 3, 2007). On December 31, 2007, petitioners requested an administrative review in the antidumping duty order on Indian Hot–Rolled, which were produced or exported by Ispat Industries Limited (''Ispat''), JSW Steel Limited (''JSW''), Tata Steel Limited (''Tata''), and Essar. On January 28, 2008, the Department published a notice of initiation of antidumping duty administrative review of Indian Hot–Rolled for the period December 1, 2006, through November 30, 2007. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 73 FR 4829 (January 28, 2008) (''*Initiation Notice*''). On February 25, 2008, the Department issued a memorandum informing the interested parties of the Department's intention to limit the number of companies it would examine in this review pursuant to section 777A(c)(2) of the Tariff Act of 1930, as amended (the ''Act'').[2] On February 26–27, 2008, Ispat, Tata, and JSW each informed the Department that they did not have shipments of the subject merchandise to the United States during the POR. On August 20,

[1] The petitioners are the United States Steel Corporation Steel and Nucor Corporation (collectively ''petitioners'').

[2] *See* Memorandum to File, Re: ''2006-2007 Antidumping Duty Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from India,'' Subject: ''Customs and Border Protection Data for Selection of Respondents for Individual Review,'' from Cindy Robinson, Senior Financial Analyst, through James Terpstra, Program Manager, and Melissa Skinner, Office Director, Office 3, AD/CVD Operations, dated February 25, 2008 (''Hot-Rolled Memo'').

2008, the Department published a notice extending the deadline for the preliminary results from September 1, 2008, to October 31, 2008. In this notice the Department also published its intent to rescind this administrative review in part with respect to Ispat, JSW and Tata. See Certain Hot–Rolled Carbon Steel Flat Products from India: Notice of Intent to Rescind Antidumping Duty Administrative Review in Part and Notice of Extension of Time Limits for Preliminary Results of Antidumping Administrative Review, 73 FR 49169 (August 20, 2008) (''Notice of Intent to Rescind and Prelim Extension'').

On April 11, 2008, the Department issued an antidumping questionnaire to Essar. The Department received responses to the original questionnaire from Essar. The Department subsequently issued supplemental questionnaires to Essar and received responses to the same.

On September 2, 2008, the Department sent a letter to all interested parties inviting comment on Draft Customs Instructions related to the Department's intent to rescind the administrative review with respect to Ispat, JSW and Tata. *See* Memorandum to File, Re: ''Draft Customs Instructions – Certain Hot–Rolled Carbon Steel Flat Products from India,'' dated September 2, 2008. The Department did not receive comments from any interested party. On November 3, 2008, the Department published a notice of rescission of this administrative review in part with respect to Ispat, JSW and Tata. *See Certain Hot–Rolled Carbon Steel Flat Products from India: Notice of Rescission, In Part, of Antidumping Duty Administrative Review*, 73 FR 65291 (November 3, 2008).

On October 28, 2008, the Department again extended the time period for issuing the preliminary results of the administrative review from October 31, 2008, to December 12, 2008. *See Certain Hot–Rolled Carbon Steel Flat Products from India: Notice of Extension of Time Limits for Preliminary Results of Antidumping Duty Administrative Review*, 73 FR 63945 (October 28, 2008).

**Period of Review**

The POR covered by this review is December 1, 2006, through November 30, 2007.

**Scope of the Order**

The merchandise subject to this order is certain hot–rolled carbon steel flat products of a rectangular shape, of a width of 0.5 inch or greater, neither clad, plated, nor coated with metal and whether or not painted, varnished, or coated with plastics or other non–metallic substances, in coils (whether or not in successively superimposed layers), regardless of thickness, and in straight lengths, of a thickness of less than 4.75 mm and of a width measuring at least 10 times the thickness. Universal mill plate (*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 a thickness not less than 4.0 mm is not included within the scope of this order.

Specifically included in the scope of this order are vacuum–degassed, fully stabilized (commonly referred to as interstitial–free (''IF'')) steels, high–strength low–alloy (''HSLA'') steels, and the substrate for motor lamination steels. IF steels are recognized as low–carbon steels with micro–alloying levels of elements such as titanium or niobium (also commonly referred to as columbium), or both, added to stabilize carbon and nitrogen elements. HSLA steels are recognized as steels with micro–alloying levels of elements such as chromium, copper, niobium, vanadium, and molybdenum. The substrate for motor lamination steels contains micro–alloying levels of elements such as silicon and aluminum.

Steel products included in the scope of this order, regardless of definitions in the Harmonized Tariff Schedule of the United States (''HTSUS''), are products in which: i) iron predominates, by weight, over each of the other contained elements; ii) the carbon content is 2 percent or less, by weight; and iii) none of the elements listed below exceeds the quantity, by weight, respectively indicated:

1.80 percent of manganese, or
2.25 percent of silicon, or
1.00 percent of copper, or
0.50 percent of aluminum, or
1.25 percent of chromium, or
0.30 percent of cobalt, or
0.40 percent of lead, or
1.25 percent of nickel, or
0.30 percent of tungsten, or
0.10 percent of molybdenum, or
0.10 percent of niobium, or
0.15 percent of vanadium, or
0.15 percent of zirconium.

All products that meet the physical and chemical description provided above are within the scope of this order unless otherwise excluded. The following products, by way of example, are outside or specifically excluded from the scope of this order:

- Alloy hot–rolled carbon steel products in which at least one of the chemical elements exceeds those listed above (including, *e.g.*, American Society for Testing and Materials (''ASTM'') specifications A543, A387, A514, A517, A506)).
- Society of Automotive Engineers (''SAE'')/American Iron & Steel Institute (''AISI'') grades of series 2300 and higher.
- Ball bearings steels, as defined in the HTSUS.
- Tool steels, as defined in the HTSUS.
- Silico–manganese (as defined in the HTSUS) or silicon electrical steel with a silicon level exceeding 2.25 percent.
- ASTM specifications A710 and A736.
- United States Steel (''USS'') Abrasion–resistant steels (USS AR 400, USS AR 500).
- All products (proprietary or otherwise) based on an alloy ASTM specification (sample specifications: ASTM A506, A507).
- Non–rectangular shapes, not in coils, which are the result of having been processed by cutting or stamping and which have assumed the character of articles or products classified outside chapter 72 of the HTSUS.

The merchandise subject to this order is currently classifiable in the HTSUS at subheadings: 7208.10.15.00, 7208.10.30.00, 7208.10.60.00, 7208.25.30.00, 7208.25.60.00, 7208.26.00.30, 7208.26.00.60, 7208.27.00.30, 7208.27.00.60, 7208.36.00.30, 7208.36.00.60, 7208.37.00.30, 7208.37.00.60, 7208.38.00.15, 7208.38.00.30, 7208.38.00.90, 7208.39.00.15, 7208.39.00.30, 7208.39.00.90, 7208.40.60.30, 7208.40.60.60, 7208.53.00.00, 7208.54.00.00, 7208.90.00.00, 7211.14.00.90, 7211.19.15.00, 7211.19.20.00, 7211.19.30.00, 7211.19.45.00, 7211.19.60.00, 7211.19.75.30, 7211.19.75.60, and 7211.19.75.90. Certain hot–rolled carbon steel covered by this order, including: vacuum–degassed fully stabilized; high–strength low–alloy; and the substrate for motor lamination steel may also enter under the following tariff numbers: 7225.11.00.00, 7225.19.00.00, 7225.30.30.50, 7225.30.70.00, 7225.40.70.00, 7225.99.00.90, 7226.11.10.00, 7226.11.90.30, 7226.11.90.60, 7226.19.10.00, 7226.19.90.00, 7226.91.50.00, 7226.91.70.00, 7226.91.80.00, and 7226.99.00.00. Subject merchandise may also enter under 7210.70.30.00, 7210.90.90.00, 7211.14.00.30, 7212.40.10.00, 7212.40.50.00, and

7212.50.00.00. Although the HTSUS subheadings are provided for convenience and customs purposes, the Department's written description of the merchandise subject to this order is dispositive.

**Product Comparisons**

In accordance with section 771(16) of the Act, we considered all Indian Hot–Rolled produced by the respondent, covered by the scope of the order, and sold in the home market during the POR to be foreign like product for the purpose of determining appropriate product comparisons to Indian Hot–Rolled sold in the United States.

Where there were no sales in the ordinary course of trade of identical merchandise in the home market to compare to U.S. sales, we compared U.S. sales to the next most similar foreign like product on the basis of the characteristics listed in Appendix V of the Department's antidumping questionnaire. In making the product comparisons, we matched foreign like products based on the Appendix V physical characteristics reported by each respondent. Where sales were made in the home market on a different weight basis from the U.S. market (theoretical versus actual weight), we converted all quantities to the same weight basis, using the conversion factors supplied by the respondents, before making our fair–value comparisons.

**Fair Value Comparisons**

To determine whether sales of Indian Hot–Rolled by the respondents to the United States were made at less than NV, we compared the export price (''EP'') to the NV, as described in the ''Export Price'' and ''Normal Value'' sections of this notice. In accordance with section 777A(d)(2) of the Act, we calculated monthly weighted–average prices for NV and compared these to individual U.S. transactions, where there were sales made in the ordinary course of trade, as discussed in the ''Cost of Production (''COP'')'' section below. *See* the December 12, 2008, Preliminary Sales Calculation Memorandum for Essar (Calculation Memorandum for Essar); the public version of which is on file in the Central Records Unit (CRU), Room 1117 of the main Department building.

**Export Price**

Section 772(a) of the Act defines EP as ''the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under subsection (c) of this section.'' During the POR, Essar produced and sold subject merchandise to the first unaffiliated purchaser in the United States prior to importation. Therefore, we have applied the EP methodology.

We based EP on the packed price to unaffiliated purchasers in the United States. We made deductions, as appropriate, for billing adjustments. We also made deductions for movement expenses in accordance with section 772(c)(2)(A) of the Act. Accordingly, we made deductions for foreign inland freight, foreign inland insurance, foreign brokerage and handling, international freight, U.S. brokerage and handling, and U.S. customs duties. In addition, in accordance with section 772(c)(1)(C) of the Act, when appropriate, we increased EP, by an amount equal to the countervailing duty rate attributed to export subsidies in the most recently completed administrative review of the countervailing duty order applicable to the POR for Essar.

**Normal Value**

Based on a comparison of the aggregate quantity of home market and U.S. sales, we determined that the quantity of the foreign like product sold by each respondent in the exporting country was sufficient to permit a proper comparison with the sales of the subject merchandise to the United States, pursuant to section 773(a) of the Act. Therefore, in accordance with section 773(a)(1)(B)(i) of the Act, we based NV on the price at which the foreign like product was first sold for consumption in the home market, in the usual commercial quantities and in the ordinary course of trade.

Where appropriate, in accordance with section 773(a)(6)(B) of the Act, we deducted from the starting price inland freight (offset, where applicable, by freight revenue), inland insurance, and packing. Pursuant to 19 CFR 351.401(c), we deducted rebates and discounts. We also increased NV by U.S. packing costs in accordance with section 773(a)(6)(A) of the Act. For comparisons to EP, pursuant to section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410(b), we made circumstance–of-sale adjustments for credit expenses, bank charges and commissions. In accordance with section 773(a)(1)(B)(i) of the Act, we based NV on sales at the same level of trade as the EP. *See* the ''Level of Trade'' section below.

For purposes of calculating NV, section 771(16) of the Act defines ''foreign like product'' as merchandise which is either (1) identical or (2) similar to the merchandise sold in the United States. When there are no identical products sold in the home market, the products which are most similar to the product sold in the United States are identified. For the non–identical or most similar products which are identified based on the Department's product matching criteria, an adjustment is made to the home market sales price to account for the actual physical differences between the products sold in the United States and the home market. *See* section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411.

**Level of Trade**

In accordance with section 773(a)(1)(B) of the Act, we determined NV based on sales in the comparison market at the same level of trade (''LOT'') as the EP sales, to the extent practicable. When there were no sales at the same LOT, we compared U.S. sales to comparison market sales at a different LOT.

Pursuant to 19 CFR 351.412, to determine whether EP sales and NV sales were at different LOTs, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the customers. If the comparison market sales are at a different LOT and the differences affect price comparability, as manifested in a pattern of consistent price differences between sales at different LOTs in the country in which NV is determined, we will make an LOT adjustment under section 773(a)(7)(A) of the Act.

Essar reported different channels of distribution in the home market; however, based on our analysis of the selling functions performed for each channel, we found one level of trade for Essar. In the U.S. market, Essar reported one channel of distribution and one LOT for EP sales. We evaluated the core selling function categories in the U.S. and home market LOTs and found that each of the core selling functions (*i.e.*, sales promotion, order processing, and warranty and technical support) were performed in both the U.S. and home markets. Although there are differences in the type of sales and marketing services provided for each market, we did not find this to be a material selling function distinction significant enough to warrant a separate LOT. Therefore, after analyzing the selling functions performed in each market, we find that the distinctions in selling functions are not material and thus, that the home market and U.S. LOTs are the same.

Accordingly, there is no basis for making a LOT under section 773(a)(7)(A) of the Act and 19 CFR 351.412(e). For a detailed description of our LOT methodology and a summary of company–specific LOT findings for these preliminary results, *see* Calculation Memorandum for Essar.

**Cost of Production (''COP'')**

*A. Calculation of COP*

In the most recently completed administrative review in which Essar participated, the Department determined that Essar sold foreign like product at prices below the cost of producing the merchandise and excluded such sales from the calculation of NV. *See Certain Hot–Rolled Carbon Steel Flat Products From India: Preliminary Results of Antidumping Duty Administrative Review*, 72 FR 74267 (December 3, 2007) unchanged in the final results, *Certain Hot–Rolled Carbon Steel Flat Products From India: Notice of Final Results of Antidumping Duty Administrative Review*, 73 FR 31961 (June 5, 2008). As a result, the Department determined that there are reasonable grounds to believe or suspect that during the instant POR, Essar sold foreign like product at prices below the cost of producing the merchandise. See section 773(b)(2)(A)(ii) of the Act. Therefore, the Department initiated a sales–below-cost inquiry with respect to Essar.

We calculated a company–specific COP for Essar based on the sum of Essar's cost of materials and fabrication for the foreign like product, plus amounts for home–market selling expenses, selling, general and administrative expenses (''SG&A''), and packing costs in accordance with section 773(b)(3) of the Act. We adjusted Essar's reported costs to reflect the actual cost of iron ore pellets obtained from its Hygrade Pellets division, but have denied the claimed offset to the reported costs for profits allegedly earned by its Steelco Gujarat division on services provided during the cost reporting period.

*B. Test of Home–Market Prices*

In determining whether to disregard home market sales made at prices below the COP, as required under sections 773(b)(1)(A) and (B) of the Act, we compared the weighted–average COP to home market sales of the foreign like product and examined whether (1) within an extended period of time, such sales were made in substantial quantities, and (2) such sales were made at prices which permitted the recovery of all costs within a reasonable period of time. On a product–specific basis, we compared the COP to the home market prices (not including Value Added Tax), less any applicable movement charges, discounts, and rebates.

*C. Results of COP Test*

Pursuant to section 773(b)(1) of the Act, we may disregard below–COP sales in the determination of NV if these sales have been made within an extended period of time in substantial quantities and were not at prices which permit recovery of all costs within a reasonable period of time. Where 20 percent or more of a respondent's sales of a given product during the POR were at prices less than the COP for at least six months of the POR, we determined that sales of that model were made in ''substantial quantities'' within an extended period of time, in accordance with sections 773(b)(2)(B) and (C) of the Act. Where prices of a respondent's sales of a given product were below the per–unit COP at the time of sale and below the weighted–average per–unit costs for the POR, we determined that sales were not at prices which would permit recovery of all costs within a reasonable period of time, in accordance with section 773(b)(2)(D) of the Act. In such cases, we disregarded the below–cost sales in accordance with section 773(b)(1) of the Act.

Pursuant to section 773(b)(2)(C) of the Act, where less than 20 percent of a respondent's sales of a given product were at prices less than the COP, we did not disregard any below–cost sales of that product because we determined that the below–cost sales were not made in ''substantial quantities.''

We tested and identified below–cost home market sales for Essar. We disregarded individual below–cost sales of a given product and used the remaining sales as the basis for determining NV, in accordance with section 773(b)(1) of the Act. *See* Calculation Memorandum for Essar.

**Arm's–Length Sales**

Essar reported that it made sales of the foreign like product in the home market to affiliated parties. The Department calculates NV based on a sale to an affiliated party only if it is satisfied that the price to the affiliated party is comparable to the price at which sales are made to parties not affiliated with the producer or exporter, *i.e.*, sales at arm's length. *See* 19 CFR 351.403(c).

To test whether these sales were made at arm's length, we compared the starting prices of sales to affiliated and unaffiliated customers net of all movement charges, direct selling expenses, discounts and packing. In accordance with the Department's current practice, if the prices charged to an affiliated party were, on average, between 98 and 102 percent of the prices charged to unaffiliated parties for merchandise identical or most similar to that sold to the affiliated party, we considered the sales to be at arm's–length prices. *See Notice of Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review: Ninth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy*, 71 FR 45017, 45020 (August 8, 2006), and unchanged in the final results; *see also Notice of Final Results of the Ninth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy*, 72 FR 7011 (February 14, 2007); and 19 CFR 351.403(c). Conversely, where we found sales to the affiliated party that did not pass the arm's–length test, all sales to that affiliated party have been excluded from the NV calculation. *See Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 FR 69186, 69187 (November 15, 2002).

**Currency Conversion**

For purposes of these preliminary results, we made currency conversions in accordance with section 773A(a) of the Act, based on the official exchange rates published by the Federal Reserve Bank.

**Preliminary Results of the Review**

As a result of this review, we preliminarily find that the following weighted–average dumping margin exists:

| Producer/Manufacturer | Weighted–Average Margin |
|---|---|
| Essar | 2.10 % |

The Department will disclose calculations performed within five days of the date of publication of this notice to the parties of this proceeding in accordance with 19 CFR 351.224(b). Interested parties may submit case briefs and/or written comments no later than 30 days after the date of publication of these preliminary results of review. *See* 19 CFR 351.309(c)(ii). Rebuttal briefs are limited to issues raised in such briefs or comments and may be filed no later than five days after the time limit for filing the case briefs or comments. *See* 19 CFR 351.309(d). Parties submitting arguments in this proceeding are requested to submit with the argument: 1) a statement of the issue, 2) a brief summary of the argument, and 3) a table

of authorities. *See* 19 CFR 351.309(c)(2) and (d)(2). Case and rebuttal briefs and comments must be served on interested parties in accordance with 19 CFR 351.303(f). Further, parties submitting written comments are requested to provide the Department with an additional copy of the public version of any such comments on a diskette.

An interested party may request a hearing within 30 days of publication of these preliminary results. *See* 19 CFR 351.310(c). A hearing, if requested, ordinarily will be held two days after the due date of the rebuttal briefs. The Department will issue the final results of this administrative review, which will include the results of its analysis of issues raised in the written comments, or at a hearing, if requested, within 120 days of publication of these preliminary results.

**Assessment Rate**

Pursuant to 19 CFR 351.212(b), 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 the publication of the final results of this review. For assessment purposes, where possible, we calculated importer–specific assessment rates for certain hot–rolled carbon steel flat products from India via ad valorem duty assessment rates based on the ratio of the total amount of the dumping margins calculated for the examined sales to the total entered value of those same sales. We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review if any assessment rate calculated in the final results of this review is above de minimis. The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of these reviews and for future deposits of estimated duties, where applicable.

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) (''*Assessment Policy Notice*''). This clarification will apply to entries of subject merchandise during the POR produced by companies included in these final results of review for which the reviewed companies did not know that the merchandise they sold to the intermediary (*e.g.*, a reseller, trading company, or exporter) was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all–others rate if there is no rate for the intermediary involved in the transaction. *See* Assessment Policy Notice for a full discussion of this clarification.

**Cash Deposit Requirements**

To calculate the cash deposit rate for the producer and/or exporter included in this administrative review, we divided the total dumping margins for each company by the total net value for that company's sales during the review period.

The following deposit rates will be effective upon publication of the final results of this administrative review for all shipments of hot–rolled carbon steel from India entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rates for the companies listed above will be the rates established in the final results of this review, except if the rate is less than 0.5 percent and, therefore, *de minimis*, the cash deposit will be zero; (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company–specific rate published for the most recent final results in which that manufacturer or exporter participated; (3) if the exporter is not a firm covered in these reviews, a prior review, or the original less–than-fair–value (''LTFV'') investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent final results for the manufacturer of the merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered in this or any previous review or the LTFV conducted by the Department, the cash deposit rate will be 38.72 percent, the all–others rate established in the LTFV. *See Amended Final Determination*. These cash deposit 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 preliminary results of review are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 10, 2008.

**Stephen J. Claeys,**

*Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.*

[FR Doc. E8–30268 Filed 12–18–08; 8:45 am]

**BILLING CODE 3510–DS–S**

## DEPARTMENT OF COMMERCE

### National Institute of Standards and Technology

### National Conference on Weights and Measures 94th Interim Meeting

**AGENCY:** National Institute of Standards and Technology, Commerce.

**ACTION:** Notice.

**SUMMARY:** The Interim Meeting of the 94th National Conference on Weights and Measures (NCWM) will be held January 11 to 14, 2009. Publication of this notice on the NCWM's behalf is undertaken as a public service; NIST does not endorse, approve, or recommend any of the proposals contained in this notice or in the publications of the NCWM mentioned below. The meetings are open to the public but registration is required. Registration information is stated in the **FOR FURTHER INFORMATION CONTACT** section below.

**DATES:** The meeting will be held on January 11–14, 2009.

**ADDRESSES:** The meeting will be held at the Hilton Daytona Beach Oceanfront Resort, 100 North Atlantic Avenue, Daytona Beach, Florida 32118.

**FOR FURTHER INFORMATION CONTACT:** Carol Hockert, Chief, NIST, Weights and Measures Division, 100 Bureau Drive, Stop 2600, Gaithersburg, MD 20899–2600 or by telephone (301) 975–5507 or by e-mail at *Carol.Hockert@nist.gov*. Please see the NCWM Publication 15, which contains detailed meeting agendas, registration forms and hotel reservation information, at *http://www.ncwm.net* or *http://www.nist.gov/owm* on the Internet.

**SUPPLEMENTARY INFORMATION:** The NCWM is an organization of weights and measures officials of the states, counties, and cities of the United States, federal agencies, and private sector representatives. These meetings bring together government officials and representatives of business, industry, trade associations, and consumer organizations on subjects related to the field of weights and measures technology, administration and enforcement. NIST participates to

promote uniformity among the states in laws, regulations, methods, and testing equipment that comprise the regulatory control of commercial weighing and measuring devices and other practices used in trade and commerce.

The following are brief descriptions of some of the significant agenda items that will be considered along with other issues at the NCWM Interim Meeting. Comments will be taken on these and other issues during several public comment sessions. At this stage, the items are proposals. This meeting also includes work sessions in which the Committees may also accept comments and where they will finalize recommendations for NCWM consideration and possible adoption at its Annual Meeting to be held July 12 to 16, 2009, in San Antonio, Texas. The Committees may withdraw or carryover items that need additional development.

The Specifications and Tolerances Committee (S&T Committee) will consider proposed amendments to NIST Handbook 44, ''Specifications, Tolerances, and other Technical Requirements for Weighing and Measuring Devices (NIST Handbook 44).'' Those items address weighing and measuring devices used in commercial applications, that is, devices that are normally used to buy from or sell to the public or used for determining the quantity of product sold among businesses.

Issues on the agenda of the NCWM Laws and Regulations Committee (L&R Committee) relate to proposals to amend NIST Handbook 130, ''Uniform Laws and Regulations in the area of legal metrology and engine fuel quality'' and NIST Handbook 133 ''Checking the Net Contents of Packaged Goods.''

This notice contains information about significant items on the NCWM Committee agendas, but does not include all agenda items. As a result, the following items are not consecutively numbered.

**NCWM Specifications and Tolerances Committee**

The following items are proposals to amend NIST Handbook 44:

*General Code*

*Item 310–1.* G–S.8. Provision for Sealing Electronic Adjustable Components, G–S.8.1. Access to Calibration and Configuration Adjustments, and G–S.8.2.—The S&T Committee will consider a proposal to add new requirements to G–S.8. intended to improve the security of access to the calibration and other configuration features on weighing or measuring devices. The purpose of the proposal is to ensure that prohibited features cannot be activated or that the accuracy of the device is altered after an official applies security seals or approved means of providing security.

*Item 310–5.* G–T.1. Acceptance Tolerances—The S&T Committee will consider a proposal to amend regulations that specify when officials are to apply acceptance tolerances to weighing and measuring devices after service personnel or users have made metrological adjustments and resealed the instrument. The proposed amendment would require that officials apply acceptance tolerances if they test the device within 30 days following any adjustment that relates to the accuracy or other performance characteristic of a device.

*Scales Code*

*Item 320–3.* S.1.7. Automatic Zero-Setting Mechanism (AZSM)—The S&T Committee will consider a proposal to define the acceptable operating parameters of the zero-setting functions used on some electronic weighing devices. These functions automatically maintain a scale's indications at zero when no load is on the device. Existing NIST Handbook 44 requirements prohibit some of the zero-setting functions found on weighing devices designed and sold for use in other countries when those devices are used in commercial applications in the U.S. marketplace. The proposal will closely align the U.S. requirements with international recommendations published by the International Organization for Legal Metrology (OIML).

*Liquid-Measuring Devices Code*

*Item 330–1.* Temperature Compensation for Liquid-Measuring Devices Code.—This is a proposal to add provisions to Handbook 44 to allow retail motor-fuel dispensers to be equipped with the automatic means to deliver product with the volume compensated to a reference temperature. (See also Item 232–1 below under the Laws and Regulations Committee)

**NCWM Laws and Regulations Committee**

The following items are proposals to amend NIST Handbook 130:

*Method of Sale of Commodities Regulation*

*Item 232–1.* Automatic Temperature Compensation for Petroleum Products.—The L&R Committee will consider several proposals that would allow temperature compensation to be made on sales of engine fuels at the retail level. Most of the proposals would allow compensation to be performed only if certain information is provided to consumers and other conditions are met by the seller.

*Developing Item 270–7.* Method of Sale and Engine Fuel Quality Requirements for Hydrogen.—The L&R Committee will consider a proposal to establish a uniform method of sale for hydrogen when it is offered for sale at the retail level as a vehicle fuel. A separate proposal to identifying preliminary minimum fuel quality standards will also be reviewed.

*Developing Item 270–8.* Wood Flavoring Chips.—The L&R Committee will consider a proposal to revise the current method of sale regulation on flavoring chips by adding guidance on the appropriate units of measure to be used on small packages.

*Uniform Engine Fuel and Automotive Lubricants Regulation*

*Item 237–1.* Gasoline and Gasoline Oxygenate Blends.—The Fuel and Lubricants Subcommittee of the L&R Committee will present a proposed revision to the requirements that certain blends must meet under NIST Handbook 130.

The following item is a proposal to amend NIST Handbook 133 ''Checking the Net Contents of Packaged Goods'':

*Item 260–1.* Wet Tare Testing.—The L&R Committee will review a proposed editorial revision to the tare procedures in NIST Handbook 133 to advise handbook users that effective October 9, 2008, the USDA regulations no longer permit wet tare procedures to be used in verifying the net quantity of contents of packages of meat and poultry that bear a USDA inspection seal.

Dated: December 15, 2008.

**Patrick Gallagher,**

*Deputy Director.*

[FR Doc. E8–30247 Filed 12–18–08; 8:45 am]

**BILLING CODE 3510–13–P**

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XL67**

### Incidental Takes of Marine Mammals During Specified Activities; On-ice Marine Geophysical and Seismic Operations in State/OCS Waters of the U.S. Beaufort Sea off Alaska

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

**ACTION:** Notice of a proposed marine mammal incidental take authorization; request for comments.

**SUMMARY:** NMFS has received an application from CGGVeritas (Veritas) for an Incidental Harassment Authorization (IHA) to take small numbers of marine mammals, by Level B harassment, incidental to conducting an on-ice marine geophysical research and seismic survey in the U.S. Beaufort Sea from February to May, 2009. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposed IHA for these activities.

**DATES:** Comments and information must be received no later than January 20, 2009.

**ADDRESSES:** Comments on the application should be addressed to P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225. The mailbox address for providing email comments is *PR1.0648–XL67@noaa.gov*. NMFS is not responsible for e-mail comments sent to addresses other than the one provided here. Comments sent via e-mail, including all attachments, must not exceed a 10–megabyte file size.

A copy of the application containing a list of the references used in this document may be obtained by writing to the address specified above, telephoning the contact listed below (see **FOR FURTHER INFORMATION CONTACT**), or visiting the internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm*.

Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

**FOR FURTHER INFORMATION CONTACT:** Howard Goldstein or Ken Hollingshead, NMFS, (301) 713–2289.

**SUPPLEMENTARY INFORMATION:**

## Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

An authorization shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses, and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth to achieve the least practicable adverse impact. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''...an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' in 16 USC 1362(18)(A) as:

> any act of pursuit, torment, or annoyance which (I) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Section 101(a)(5)(D) establishes a 45–day time limit for NMFS review of an application followed by a 30–day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny issuance of the authorization.

## Summary of Request

On October 6, 2008, NMFS received a letter from Veritas requesting an IHA. The requested IHA would authorize the take, by Level B harassment, of small numbers of ringed seals (*Phoca hispida*) incidental to conducting on-ice seismic surveys, north and northwest of Thetis Island in State/OCS waters in the Beaufort Sea. The energy source for the proposed activity will be Vibroseis. Data acquisition will begin mid-February and continue until the end of May. During late February and early March, ice checking activities and aerial scouting may take place to determine survey and safe access to locate a temporary field camp location and access to the program area to conduct operations. Additional information on the on-ice seismic project is contained in the application, which is available upon request (see **ADDRESSES**).

## Specified Activities

Veritas plans to conduct a three-dimensional (3D) seismic survey north and northwest of Thetis Island in OCS waters in the Beaufort Sea using Vibroseis. As presently scheduled, the seismic surveys will occur from approximately February 15th to May 31st, 2009, although surveys are likely to end earlier in May. With the Vibroseis technique, activity on the surveyed seismic line begins with the placement of sensors. All sensors are connected to the recording vehicle by multi-pair cable sections. The Vibrators move to the beginning of the line, and recording begins. The Vibrators move along a source line, which will be at some angle to a sensor line. The Vibrators begin vibrating in synchrony via a simultaneous radio signal to all vehicles.

In a typical survey, each vibrator will vibrate up to four times at each location. The entire formation of vibrators subsequently moves forward to the next energy input point (e.g., 220 ft or 67 m in most applications) and repeats the process. In a typical 16–18–hour day, a survey will complete 4 to 10 linear miles (6 to 16 km) in 2D seismic operations and 15 to 40 linear miles (24 to 64 km) in a 3D seismic operation.

The seismic survey activities will require a temporary field camp located near the work site. A Cat Train facility on skis or rubber tracks that is fully contained and self sufficient will be located on grounded ice beside the access route out to the program site. Camp locations will be chosen based on ice conditions and safety of access to ice. Camp will generally consist of 35–40 sled trailers which includes: crew housing, office units, kitchen and dining facilities, laundry and medical facilities, generators, fuel storage and mechanical work spaces.

Camp locations will be chosen based on access trail conditions and grounded ice forecasting near to the prospect. It is highly likely that Veritas' camp locations will be near and south of Thetis Island to support the camp. Re-supply for fuel and provisions to the camp will be supported out of Oliktok Pt. The route between the camp and Oliktok Pt. is on grounded ice or areas with less than 10 ft (3 m) of water below the ice; of which neither condition is expected to support ringed seals.

The seismic survey will consist of either laying recording cables with geophones on the frozen sea ice or placing receivers (hydrophones) below the ice surface through drilled holes in

attempts to provide the best mitigation of seismic noise (i.e., a 'flex wave') in a shallow marine environment; using Vibroseis techniques as the source of energy to acquire the seismic data. If ice depths are greater than 7 ft (2.1 m), receivers will be laid on the frozen sea ice but if ice depths are less, then holes will be drilled and hydrophones will be located in the water.

Seismic operations will be conducted utilizing 5–10 wheeled/tracked vibrators supported by Trucker SnoCats and Veritas' Challenger 95 recording cable transport vehicles. A Challenger 95 or Trucker SnoCat vehicle will travel along a pre-surveyed and groomed route and lay receiver cable lines that extend between 3–10 miles long (4.8–16 km). Receiver (i.e., geophone) lines will be spaced approximately 984–1,312 ft (approximately 300 to 400 m) apart; geophones/hydrophones would be located every 98–180 ft (30–55 m) along each of these lines. Ten to fifteen receiver lines will be placed on the ground at any one time all interconnected to a recording device known as a ''recorder.'' Vibrators will include a 14,400 lb (6,545 kg) GVW wheeled mini-vibrator (capable of 12,000 ft-lbs of force). Mini-Vibe (Vibroseis) vehicles will then move along a pre-determined groomed route most often nearly perpendicular to the recording lines. Positioning of the cables, Vibroseis, and recording vehicles all use Tiger Nav technology; a specialized navigation and positioning software. The Tiger Nav system integrates with GPS and Inertial Technology with Real Time Positioning, Stake-less Source, Receiver Surveying, and Vehicle Tracking. The Vibrators (usually 3 to 4 that travel together) move to a pre-determined GPS point location and begin vibrating in a synchrony via a radio signal. The Vibrators will vibrate the usual 2 to 4 times at each location, move up to the next location about 98–180 ft (30–55 m) and continue the vibrating technique until the end of the line. This activity will occur two lines at a time.

Veritas utilizes satellite imagery, existing bathymetry, drill grids, and ground penetrating radar (GPR) to interpret ice integrity for proper planning. It should be noted that while GPR data are extremely accurate on fresh water it does have limitations on sea ice. To offset any inefficiency of these systems on sea ice, Veritas utilizes a grid system of drilled holes to verify and/or replace GPR data that may be questionable. To support Vibroseis and recording vehicle units, an ice thickness of at least 4–6 ft (1.2–1.8 m) is required. The 3D program area will exist within the boundary map in Figure 1 of Veritas' application.

**Proposed Dates, Duration, and Location of Specified Activity**

Veritas' proposed survey would occur for a period of three months (February 15 through May 31, 2009). On-ice seismic operations are ordinarily confined to this three month period since ice is sufficiently thick (4–6 ft or 1.2–1.8 m) to safely support the equipment. The geographic region of activity on ice encompasses a 141 square mile (366 $km^2$) program area extending across the Beaufort Sea from point of entry from the northwest corner at approximately N 70°44.149, W 150°53.010 to the northeast corner at approximately N 70°46.138, W 150°06.865 to the southeast corner at approximately N 70°33.400, W 149°36.272 to the southwest corner at N 70°31.699, W 150°19.417 (see Figure 1 of Veritas' application). Water depths range from 4–60 ft (1.2–18 m) in the proposed program area. Depths of water extending south of the islands are less than 10 ft (3 m) based on bathymetry charts.

**Description of Marine Mammals and Habitat Affected in the Activity Area**

Several marine mammal species are known to or could occur in the Beaufort Sea off the Alaska coastline (see Table 1 below). The ringed seal is the only species of marine mammal managed by NMFS that may be present in the project area during the on-ice seismic program. Ringed seals are not listed under the Endangered Species Act (ESA) or designated as depleted under the MMPA. Other marine mammal species managed by NMFS that seasonally inhabit the Beaufort Sea, but are not anticipated to occur in the project area during the on-ice seismic program, include the bowhead whale, gray whale, beluga whale, narwhal, bearded seal, and spotted seal. Polar bears and infrequently Pacific walrus also occur in the Beaufort Sea, but they are not addressed further, since they are under the jurisdiction of the U.S. Fish and Wildlife Service (USFWS). Veritas has initiated consultation and requested a Letter of Authorization from USFWS regarding polar bears. The bowhead whale is listed as Endangered and the polar bear is listed as Threatened under the U.S. ESA. The bearded, spotted, and ringed seals are candidates for listing under the ESA and status reviews have been initiated for each species. Bowhead and beluga whales migrate considerably north of the project area in east-west oriented lead systems during spring (Moore and Reeves, 1993). A very small number of bearded seals may inhabit the Beaufort Sea in spring, mainly in the offshore pack ice (Moulton *et al.*, 2001; Moulton and Elliott, 2000; and Moulton *et al.*, 2000; Burns, 1981; Burns and Frost, 1979; Burns and Harbo, 1972). Since bearded seals are normally found over 20–100 nmi (37–185 km) from shore in broken ice (Angliss and Outlaw, 2008) that is unstable for on-ice seismic operations, bearded seals are not expected to be encountered during on-ice seismic operations. Some spotted seals arrive in the Beaufort Sea from the Chukchi Sea from July until September where they haul out on land part of the time, but also spend extended periods at sea (Rugh *et al.*, 1997; Lowry *et al.*, 1998). The marine mammals that occur in the proposed on-ice seismic survey area belong to four taxonomic groups: mysticetes (baleen whales), odontocetes (toothed whales), phocids (seals), and carnivores (polar bears). Table 1 below outlines the marine mammal species and their habitat in the region of the proposed project area.

TABLE 1. THE HABITAT AND CONSERVATION STATUS OF MARINE MAMMALS INHABITING THE PROPOSED STUDY AREA IN THE U.S. BEAUFORT SEA OFF OF ALASKA.

| Species | Habitat | ESA[1] |
|---|---|---|
| **Mysticetes** | | |
| Bowhead whale (*Eubalaena glacialis*) | Pack ice and coastal | EN |
| Gray whale (*Eschrichtius robustus*) | Coastal, lagoons | NL |
| **Odontocetes** | | |

TABLE 1. THE HABITAT AND CONSERVATION STATUS OF MARINE MAMMALS INHABITING THE PROPOSED STUDY AREA IN THE U.S. BEAUFORT SEA OFF OF ALASKA.—Continued

| Species | Habitat | ESA[1] |
|---|---|---|
| Beluga whale (*Delphinapterus leucas*) | Offshore, coastal, and ice edges | NL |
| Narwhal (*Monodon monceros*) | Offshore, ice edge | NL |
| **Pinnipeds** | | |
| Bearded seal (*Erignathus barbatus*) | Pack ice | NL |
| Spotted seal (*Phoca largha*) | Pack ice | NL |
| Ringed seal (*Phoca hispida*) | Landfast and pack ice | NL |
| Pacific Walrus (*Odobenus rosmarus divergens*) | Ice, coastal | NL |
| **Carnivora** | | |
| Polar bear (*Ursus maritimus marinus*) | Ice, coastal | T |

[1] U.S. Endangered Species Act: EN = Endangered, T = Threatened, NL = Not listed

*Ringed Seal*

Ringed seals have a circumpolar distribution, which is closely associated with sea ice. Ringed seals are found throughout the Bering, Chukchi, and Beaufort Seas (Angliss and Outlaw, 2008). They are the most abundant and widely distributed seal in the Beaufort Seas (King, 1983).

Ringed seals occupy fast ice and offshore pack ice during winter and spring (Burns, 1970; Stirling *et al.*, 1982; Finley *et al.*, 1983; Frost *et al.*, 2004). Frost *et al.* (2004) conducted aerial surveys of ringed seals on fast and pack ice during late May and early June 1996–1999 between Pt. Barrow and Kaktovik (156°30' and 143°42' W) in the Beaufort Sea within 25 miles (40 km) of shore. The survey area was divided into four east west sectors (B1–B4) with one sector (B2) encompassing the project area. Seal densities ranged from 0.81 seals/km$^2$ in 1996 to 1.17 seals/km$^2$ in 1999 across all sectors. Densities were generally lower in the fast ice (0.57–1.14 seals/km$^2$) than the pack ice (0.92–1.33 seals/km$^2$). Seal densities in sector B2 ranged from 0.61 to 1.10 seals/km$^2$, indicating seal use in the project area vicinity was below the average; however the sample size (n=3) for the upper end of the range of the estimate was too small to be reliable. Seal use of the fast ice and pack ice were similar (0.69–0.68 seals/km$^2$) in the project vicinity for the one year (1999) both ice types were surveyed and there was sufficient sample size. In addition, the estimates were below the average estimate for the overall area indicating seal density is lower in the region of the project area on average. In all cases, ringed seal densities were much lower than in the eastern Chukchi Sea, where ringed seal densities averaged 1.91 seals/km$^2$ (range 037–16.32) in 1999 and 1.62 seals/km$^2$ (range 0.42–19.4) in 2000 (Bengston *et al.*, 2005). No recent data are available for seal densities during the proposed time of the on-ice seismic program during March or April.

Ringed seals maintain breathing holes in the ice and occupy lairs in accumulated snow (Smith and Stirling, 1975). Pups are born in late March and April in lairs that seals excavate in snowdrifts and pressure ridges. During the breeding and pupping season, adults on fast ice (floating fast-ice zone) usually move less than individuals in other habitats; they depend on a relatively small number of holes and cracks in the ice for breathing and foraging. During nursing (4–6 weeks), pups usually stay in the birth lair. Alternate snow lairs provide physical and thermal protection when the pups are being pursued by their primary predators, polar bears and Arctic foxes (Smith *et al.*, 1991 cited in USDI MMS, 2003). As the day length and temperature increase in spring, increasing numbers of ringed seals haul out on the surface of the ice near breathing holes or lairs (Frost *et al.*, 2004). This hauling out or basking is associated with the annual molt, which occurs in May to July. During summer, ringed seals are found on ice remnants dispersed throughout open water areas of the Beaufort Sea (Burns *et al.*, 1980 cited in USDI MMS, 2003); Smith, 1987). The primary prey of ringed seals is Arctic cod, saffron cod, shrimps, amphipods, and euphausiids (Kelly, 1988; and Reeves *et al.*, 1992 cited in USDI MMS 2003). Ringed seals are a major resource that subsistence hunters harvest in Alaska (USDI MMS, 2003).

A reliable estimate for the entire Alaska stock of ringed seals is currently not available. A minimum estimate for the eastern Chukchi and Beaufort Sea is 249,000 seals, including 18,000 for the Beaufort Sea (Angliss and Outlaw, 2008). The actual numbers of ringed seals are substantially higher, since the estimate did not include much of the geographic range of the stock, and the estimate for the Alaska Beaufort Sea has not been corrected for animals missed during the surveys used to derive the abundance estimate (Angliss and Outlaw, 2008). Estimates could be as high or approach the past estimates of 1–3.6 million ringed seals in the Alaska stock (Frost, 1985; Frost *et al.* 1988).

NMFS anticipates that no ringed seals will be injured or killed during the on-ice seismic surveys with incorporation of the described proposed mitigation and monitoring measures. Seals are expected to avoid the immediate area around the proposed on-ice seismic operations and are not expected to be subject to potential hearing damage from exposure to underwater or in-air sounds. The specific objective of Veritas' monitoring and mitigation plan is to ensure that no seals are in the immediate area during the proposed on-ice seismic activities. Because of the circumstances and the proposed mitigation and monitoring requirements discussed in this document, NMFS believes it highly unlikely that the proposed activities would result in injury (Level A harassment), serious injury or mortality of ringed seals, however, they may temporarily avoid the area where the proposed seismic activities may occur. Veritas has requested the incidental take of 76 ringed seals for the proposed action.

The requested take is approximately 0.42 percent of the estimated Beaufort Sea population, and 0.03 and 0.008 percent of the estimated minimum Chukchi and Beaufort Sea population and Alaska stock, respectively. NMFS has determined that the number of requested incidental takes for the proposed action is small relative to population estimates, of ringed seals.

Further information on the biology and local distribution of these species and others in the region can be found in Veritas' application, which is available upon request (see **ADDRESSES**), and the NMFS Marine Mammal Stock Assessment Reports, which are available online at: *http://www.nmfs.noaa.gov/pr/species/*

**Potential Effects of Activities on Marine Mammals**

All anticipated takes would be ''takes by harassment,'' involving short term, temporary changes in behavior. The mitigation measures to be applied will minimize the possibility of injurious takes. The estimates of take are based on the most recent data obtained during ringed seal surveys conducted within the geographic area of the planned operations by Frost *et al.* (2004). The actual density during the on-ice seismic program may be lower, since surveys conducted by Frost *et al.* (2004) were in May and June when seals may have been more concentrated on fast ice and pack ice remnants than in March or April, when most of the on-ice seismic program will occur.

Several aspects of the on-ice seismic program that were considered to not cause a take are briefly discussed below. Seismic activities in water depths below 10 ft (3 m) (south of Thetis and Flaxman Islands) were excluded from the estimated take since few if any seals inhabit water less than 10 ft during winter-spring. The water typically freezes to or near the bottom at this depth and supports few food resources (Miller *et al.*, 1998; Link *et al.* 1999). In addition, helicopter flights were excluded from the estimated take, since they would occur when seals would be using lairs and not basking on the ice, and altitude (1,000 ft or 304 m) should reduce any disturbance to ringed seals in lairs. The insulating capacity of snow used to build the lair adds another level of protection to seals from helicopter noise even if a helicopter has to fly at a lower altitude due to weather conditions. As has been reported (Amstrup,1993; Blix and Lentifer, 1992) for polar bear dens, snow sufficiently attenuates the sound of helicopter to a level not likely to disturb ringed seals in lairs.

There is a remote chance that pup mortality could occur if any of these animals were nursing and displacement was protracted. However, it is highly unlikely that a nursing female would abandon her pup given the normal levels of disturbance from the proposed activities and the typical movement patterns of ringed seal pups among different holes as reported by Lydersen and Hammill (1993). Similarly, Kelly and Quakenbush (1990) observed that radio-tagged seals used as many as four lairs spaced as far as 11,273 ft (3,437 m) apart, with mean distances for males equaling 6,550 ft (1,997 m) and for females 2,079 ft (634 m). In addition, seals have multiple breathing holes. Pups may use more holes than adults (mean 8.7), but the holes are generally closer together (Lydersen and Hammill, 1993). Holes have been found as far apart as 0.56 miles (0.9 km). The pattern of use indicates that adult seals and pups can move away from seismic activities, particularly since the seismic equipment does not remain in any specific area for a prolonged time. Given these considerations combined with the small proportion (less than 1 percent) of the population potentially disturbed by the proposed activity, impacts are expected to be negligible for the ringed seal population.

The anticipated impact of seismic activities on the species or stock of ringed seals is expected to be negligible for the following reasons:

- The activity area supports a small proportion (less than 1 percent) of the ringed seal population in the Beaufort Sea.
- Seismic operators will avoid moderate and large pressure ridges, where seal and pupping lairs are likely to be most numerous, for reasons of safety and because of normal operational constraints.
- The sounds from energy produced by Vibrators used during on-ice seismic programs typically are at frequencies well below (1,000 Hz) those used by ringed seals to communicate. Thus, ringed seal hearing is not likely to be very good at those frequencies and seismic sounds are not likely to have strong if any masking affects on ringed seal calls. This effect is further moderated by the quiet intervals between seismic energy transmissions.
- There has been no reported major displacement of seals away from on-ice seismic operations (Frost and Lowry, 1988; Frost *et al.*, 2004). Further confirmation of this lack of major response to industrial activity is illustrated by the fact that there has been no major displacement of seals after the 2004 on-ice seismic operations in Harrison Bay or near Northstar development. Studies at Northstar have shown a continued presence of ringed seals through winter and creation of new seal structures (Williams *et al.*, 2001; Moulton *et al.*, 2003). The scale of activities at the Northstar development is magnitudes greater than the proposed on-ice seismic operations.
- Although seals may abandon structures near seismic activity, studies have not demonstrated a cause and effect relationship between abandonment and seismic activity or biologically significant impact on ringed seals. Studies by Williams *et al.* (2001), Kelley *et al.* (1986, 1988) and Kelly and Quackenbush (1990) have shown that abandonment of holes and lairs and establishment or re-occupancy of new ones in an ongoing natural occurrence, with or without human presence. Link *et al.* (1999) compared ringed seal densities between areas with and without Vibroseis activity and found densities were highly variable within each area and inconsistent between areas (densities were lower for 5 days, equal for 1 day, and higher for 1 day in Vibroseis' area), suggesting other factors beyond the seismic activity likely influenced seal use patterns. Consequently, a wide variety of natural factors influence this pattern of seal use including time of day, weather, season, ice deformation, ice thickness, accumulation of snow, food availability, and predators, as well as ring seal behavior and population dynamics.

Consequently, the effects of on-ice seismic are expected to be limited to short-term and localized behavioral changes involving relatively small numbers of seals. NMFS came to a similar finding in an Environmental Assessment of on-ice seismic activity in the Beaufort Sea, where it was concluded that effects of behavioral changes are expected to be negligible (NMFS, 1998). The effects of the proposed on-ice seismic operations fall within the MMPA definition of Level B harassment.

**Possible Effects of Activities on Marine Mammal Habitat**

The proposed seismic operation will not cause any permanent impact on habitats and the prey used by ringed seals. All surface activities will be on the sea ice, which will break-up and drift away following spring break-up and reform in the fall. Any spills on the ice would be small in size and cleaned up before completing the operations. Similarly, all materials from the camp and seismic activities will be removed from the site before completion of operations. Areas containing ice

conditions suitable for lairs will be avoided by the seismic crews to prevent any destruction of the habitat. Seismic survey crews do not place energy sources over observed seal hoes or lairs, nor do they typically operate along pressure ridges or near the edge of the land fast ice where seal structures are often located. The operation should have no effect on the prey of ringed seals, since physical disturbances will be on the sea ice and not the ocean bed. Consequently, there will be no need for restoration of the habitat used by ringed seals.

The only losses of or modifications to ringed seal habitat from on-ice seismic operations are the temporary change of the surface ice associated with removal of ice and snow along survey lines and camps. In all cases, the modification involves a very small proportion of the total area of habitat available to ringed seals. Because seismic operations tend to avoid rough, deformed and broken ice, cracks, and areas near the edge of the landfast ice, they also avoid the preferred habitat of ringed seals. Disturbed habitat is often restored by periodic storms. Furthermore, since the ice and snow are restored annually by the melting and reformation of sea ice, no impact to habitat would last beyond spring breakup. Consequently, on-ice seismic activities will have a negligible impact on the local ringed seal population and their habitat.

**Number of Marine Mammals Expected to be Incidentally Taken by the Proposed Activity**

NMFS estimates the incidental take of ringed seals could be up to 76 animals for (0.42 percent of the estimated population in the Beaufort Sea) the proposed action, including all sex and ages, while in or near lairs or breathing holes. The estimate was derived by multiplying the density estimate (0.69 per $km^2$ in fast ice, which is where the proposed seismic operation will occur) by the size of the project area (141.3 $miles^2$ or 366 $km^2$) and then reducing the estimate by 70 percent to account for the percentage of time ringed seals spend in lairs. Kelly (1988) reported that ringed seals spend 12–30 percent of their time in lairs from March to early June. The estimate reflects the design of the seismic program relative to reported distances seals respond to on-ice seismic activities. Burns and Kelly (1982) and Kelly *et al.* (1988) concluded that localized displacement of ringed seals in close proximity (within 492 ft or 150 m) to seismic lines does occur, but the overall displacement was insignificant. The design of the program is to space the lines 984 ft (300 m) apart which would presumably expose all seals between the lines to on-ice seismic operations. However, localized displacement would likely be temporary and short-term as reported by Burns and Kelly, particularly since on-ice seismic operations are not stationary, but highly mobile and noise levels are below the primary hearing range of seals (Richardson *et al.*, 1995). Moreover, disturbance is not likely to have any effect on the population as a whole because of: (1) limited area of seismic surveys relative to the total ringed seal habitat in the Arctic Ocean; (2) avoidance by seismic operators of optimal seal habitat (areas of extensive pressure ridging and snow accumulation) due to safety and operational constraints; (3) the relatively large size of the ringed seal population in the Beaufort Sea and throughout Alaska; and (4) the lack of scientific evidence of on-ice seismic activity negatively affecting the reproductive viability or distribution of the ringed seal population.

In addition, NMFS expects that the actual take by Level B harassment from the proposed on-ice seismic survey will be much lower than the estimates due to the implementation of the proposed mitigation and monitoring measures discussed below. Therefore, NMFS believes that any potential impacts to ringed seals to the proposed on-ice seismic operations would be insignificant, and would be limited to distant and transient exposure.

**Potential Impact of the Proposed Activity on Subsistence Uses**

Under the MMPA, NMFS must determine that an activity would not have an unmitigable adverse impact on the subsistence needs for marine mammals. While this includes usage of both cetaceans and pinnipeds, the primary impact by seismic activities is expected to be impacts from seismic operations on ringed seals. In 50 CFR 216.103, NMFS has defined unmitigable adverse impact as:

> An impact resulting from the specified activity: (1) That is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by: (i) causing the marine mammals to abandon or avoid hunting areas, (ii) directly displacing subsistence users, or (iii) placing physical barriers between the marine mammals and subsistence hunters; and (2) That cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

The on-ice seismic survey is not expected to cause seals to abandon/avoid hunting areas, directly displace subsistence users, or place physical barriers between the seals and the subsistence hunters. The proposed action should have a negligible impact on the availability of ringed seals since hunting for subsistence purposes occurs primarily south of the planned project area and mainly during the summer open water season. No physical barriers will be placed between the seals and subsistence hunters during Veritas' proposed activities. See below for more information on Veritas' proposed activities and Plan of Cooperation that is anticipated to have a negligible effect on subsistence users and seals. This determination may require that the IHA contain additional mitigation and monitoring measures in order for this decision to be made.

The number of individual ringed seals likely to be exposed to on-ice seismic operations is expected to be relatively low. Effects on most individual seals are expected to be limited to localized and temporary displacement (Level B harassment). No greater than a negligible impact is anticipated on the species or stock or the availability of the species for subsistence uses. Moreover, any effects on ringed seal habitat are expected to be temporary and localized. No rookeries, areas of concentrated feeding or mating, or other areas of special significance to marine mammals occur in or near the planned seismic operation area.

Nevertheless, all activities will continue to be conducted to assure the least practical adverse impact on the species, habitat, and availability for subsistence uses. For example, as required under current regulations, all activities will be conducted as far as practicable from any observed ringed seal or ringed seal lair and no energy source will be placed over an observed ringed seal lair as per 50 CFR 216.113. Similarly, only Vibrator-type energy-source equipment shown to have similar or lesser effects will be used as per 50 CFR 216.113(a)(1). Veritas will also provide training for the seismic crews so they can recognize potential areas of ringed seal lairs and adjust the seismic operations accordingly. There have been no injuries or deaths of seals, and no more than temporary displacement of seals by on-ice seismic operations since NMFS instituted regulations. Consequently, the history of the industry has been one of responsible operations of on-ice seismic activities relative to seals, their habitat, and use by subsistence hunters in Alaska.

To further ensure that on-ice seismic operations have the least practicable impact on the species, habitat and subsistence use, Veritas will continue to work with NMFS, other Federal

agencies, the State of Alaska, Native communities of Barrow and Nuiqsut, and Inupiat Community of the Arctic Slope (ICAS) to assess measures to further minimize any impact from seismic activity. In addition, a Plan of Cooperation will be developed between Veritas and Nuiqsut to assure that seismic activities do not interfere with subsistence harvest of ringed seals. Furthermore a survey using trained dogs will be completed to identify active seal holes/ birthing lairs or hole/lair habitats so they can be avoided by seismic operations to the greatest extent practicable. If trained dogs are not available, potential habitat will be identified by trained marine mammal biologists based on the characteristics of the ice (i.e., deformation, cracks, etc.).

*Plan of Cooperation*

Where the proposed activity would take place in or near a traditional Arctic subsistence hunting area and/or may affect the availability of a species or stock or marine mammal for Arctic subsistence uses, regulations at 50 CFR 216.104(a)(12) require the IHA applicant to submit a plan of cooperation or information that identifies what measures have been taken and/or will be taken to minimize any adverse effects on the availability of marine mammals for subsistence uses.

Veritas will be working with the village of Nuiqsut and the Kuukpik Subsistence Oversight Panel to develop a proposed plan for circulation prior to their community meetins. Veritas will also be working with the Alaska Eskimo Whaling Commission, the North Slope Borough Wildlife Department and Planning Department during this process. The ICAS and the Native Village of Barrow (NVB) will receive a visit to address each board of Veritas' activities. Veritas will conduct a community meeting in Nuiqsut during the month of December to hear comments from the community. Veritas will be using subsistence representatives to help with monitoring prior to operations and during their operations as subsistence observers. Subsistence representatives/observers on the crew will be responsible for communicating directly with the Village of Nuiqsut.

Residents of the Village of Nuiqsut are the primary subsistence users in the activity area. Nuiqsut subsistence hunters may hunt year-round (including the winter and spring); however in more recent years most of the harvest of ringed seals has been in the summer during the open water period instead of the more difficult hunting of seals using holes and lairs during winter and spring (McLaren, 1958; Nelson, 1969). The most important area for Nuiqsut hunters is off the Colville River Delta in Harrison Bay, between Fish Creek and Pingok Island, which is largely south of the project area. Seal hunting occurring in this area before spring break-up is by snow machine, and by boat during summer. Subsistence patterns are reflected in the harvest data collected in 1992 where Nuiqsut hunters harvested 22 of 24 (92 percent) ringed seals during the open water season from July to October (Fuller and George, 1997). Harvest data for 1994 and 1995 show 17 of 23 (74 percent) ringed seals were taken from June to August (Brower and Opie, 1997). Consequently, on-ice seismic operations should have a negligible effect on the availability of ringed seals since hunting occurs primarily south of the project area and mainly during summer.

Crews, and the helicopter pilot will be required by Veritas to avoid hunters and locations of any seals being hunted in the activity area, whenever possible, to further minimize any effect of seismic operations on the availability of seals for subsistence. For the reasons stated above and with the proposed mitigation and monitoring measures described below, the on-ice seismic survey is not expected to cause seals to abandon/ avoid subsistence hunting areas, directly displace subsistence users, and place physical barriers between the marine mammals and the subsistence hunters.

**Proposed Mitigation and Monitoring**

Ringed seal pupping occurs in lairs from late March to mid-to-late April (Smith and Hammill, 1981). The following mitigation and monitoring measures are proposed for the subject on-ice seismic operations. A survey using experienced field personnel and trained seal lair sniffing dogs will be conducted by Veritas in areas where water depths exceed 10 ft (3 m) to locate and map (GPS) potential seal structures along the planned survey routes. Few, if any, seals inhabit ice-covered waters below 10 ft due to water freezing to the bottom or poor prey availability caused by the limited amount of ice-free water. The seal structure survey will be conducted to ensure that seals, particularly pups, are not injured by equipment. If possible, structures will be categorized by size, structure, and odor to ascertain whether structure is a birth lair, resting lair, resting lair of rutting male seals, or a breathing hole. The locations of all seals and seal structures will be plotted and mapped using GPS and will be used to assist seismic survey crews in avoiding seal structures. Surveys will be conducted 492 ft (150 m) to each side of the survey routes so that locations of marked seals and seal structures are protected by a conservative distance (exclusion zone). Actual width of route may vary depending on wind speed and direction, which strongly influence the efficiency and effectiveness of dogs locating seal structures. During active seismic Vibrator source operations, the 492 ft exclusion zone will be monitored for entry by any marine mammals. As mentioned previously, potential seal structures will be identified by trained marine mammal biologists based on the characteristics of the ice (i.e., deformation, cracks, etc.) if trained dogs are not available. Activities will be conducted as far as practicable from any observed ringed seal lair or breathing hole and no energy source will be placed over the seal structure. In addition, NMFS proposes to require applicant's vehicles to avoid any pressure ridges, ice ridges, and ice deformation areas where seal structures are likely to be present.

If additional activities will be ongoing in the Beaufort Sea during the 2009 spring season, Veritas will coordinate its monitoring programs with other industries if applicable. Monitoring and reporting of the on-ice seismic operations will follow the requirements listed under 50 CFR 216.114.

On-ice operations have been conducted in the Beaufort Sea region for over 25 years and, during this time, there have been no noticeable adverse impacts on the ringed seal population or the availability of the species for subsistence uses. Moreover, any effects on seal habitat have been temporary and localized. However, to further ensure that there will be no adverse effects resulting from on-ice operations, Veritas will continue to cooperate with NMFS, MMS, other appropriate federal agencies, the State of Alaska, the North Slope Borough, ICAS, and Nuiqsut community to coordinate research opportunities and assess all measures than can be taken to eliminate or minimize any impacts from these activities.

**Proposed Reporting**

NMFS proposes to require an annual draft report that must be submitted to NMFS within 90 days of completing the year's activities. The monitoring report would contain a summary of information gathered pursuant to the monitoring requirements set forth in the IHA, including detailed descriptions of observations of any marine mammal, by species, number, age class, and sex if possible, that is sighted in the vicinity

of the proposed project area; description of the animal's observed behaviors, and the activities occurring at the time. A final report must be submitted to the Regional Administrator and Chief of the Permits, Conservation, and Education Division within 30 days after receiving comments from NMFS on the draft final report. If no comments are received from NMFS, the draft final report will be considered to be the final report.

**ESA**

For the reasons already described in this **Federal Register** Notice, NMFS has determined that the described proposed on-ice seismic activities and the accompanying IHA are not anticipated to have the potential to adversely affect species under NMFS jurisdiction and protected by the ESA. Since ESA-listed species are not expected to be adversely affected by the proposed activities and the issuance of an IHA by NMFS under section 101(a)(5)(D) of the MMPA to Veritas, NMFS has determined that a section 7 consultation is not necessary. The ringed seal, which is the only species of marine mammal under NMFS jurisdiction likely to occur in the proposed action area, is a candidate species for consideration for listing under the ESA and a status review has been initiated.

**National Environmental Policy Act (NEPA)**

The information provided in the Final Programmatic Environmental Assessment (EA) on the Arctic Ocean Outer Continental Shelf Seismic Surveys 2006 prepared by the Minerals Management Service (MMS) in June 2006 led NMFS to conclude that implementation of either the preferred alternative or other alternatives identified in the Environmental Assessment (EA) would not have a significant impact on the human environment. Therefore, an Environmental Impact Statement was not prepared. The proposed action discussed in this document is different from the previous actions and new NEPA documentation will be prepared by NMFS for the proposed action. A copy of the EA will be available upon request (see **ADDRESSES**).

**Preliminary Determinations**

Based on Veritas' application, as well as the analysis contained herein, NMFS has preliminarily determined that the impact of the described on-ice seismic operations will result, at most, in a temporary modification in behavior by small numbers of ringed seals. The effect of the proposed on-ice seismic surveys is expected to be limited to short-term and localized behavioral changes.

Due to the infrequency, short time-frame, and localized nature of these activities, the number of marine mammals, relative to the population size, potentially taken by harassment is small. In addition, no take by injury or death is anticipated, and take by Level B harassment will be at the lowest level practicable due to incorporation of the proposed monitoring and mitigation measures mentioned previously in this document. NMFS has further preliminarily determined that the anticipated takes will have a negligible impact on the affected species or stock of marine mammals. No injury (Level A harassment), serious injury, and/or mortality will be authorized for marine mammals. Also, the potential effects of the proposed on-ice seismic survey project during 2009 will not have an unmitigable adverse impact on subsistence uses of this species due to the Plan of Cooperation and mitigation and monitoring measures.

**Proposed Authorization**

As a result of these preliminary determinations, NMFS proposes to issue an IHA to Veritas for the harassment of small numbers (based on populations of the species and stock) of ringed seals incidental to conducting on-ice seismic surveys in the U.S. Beaufort Sea, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

**Information Solicited**

NMFS requests interested persons to submit comments and information concerning this proposed project and NMFS' preliminary determination of issuing an IHA (see **ADDRESSES**). Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of this application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: December 15, 2007.

**James H. Lecky,**

*Director, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. E8–30256 Filed 12–18–08; 8:45 am]

**BILLING CODE 3510–22–S**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XM26**

### Marine Mammals; File No. 14186

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

**ACTION:** Notice; receipt of application.

**SUMMARY:** Notice is hereby given that Sea World Inc., 9205 South Park Center Loop, Suite 400, Orlando, FL 32819 [Brad Andrews, Responsible Party], has applied in due form for a permit take two non-releasable Guadalupe fur seals (Arctocephalus townsendi) with the option of holding up to six non-releasable furs seals at any given time for purposes of enhancement.

**DATES:** Written, telefaxed, or e-mail comments must be received on or before January 20, 2009.

**ADDRESSES:** The application and related documents are available for review by selecting ''Records Open for Public Comment'' from the Features box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov/index.cfm*, and then selecting File No. 14186 from the list of available applications.

These documents are also available upon written request or by appointment in the following office(s):

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)427–2521; and

Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213.

Written comments or requests for a public hearing on this application should be mailed to the Chief, Permits, Conservation and Education Division, F/PR1, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular request would be appropriate.

Comments may also be submitted by facsimile at (301)427–2521, provided the facsimile is confirmed by hard copy submitted by mail and postmarked no later than the closing date of the comment period.

Comments may also be submitted by e-mail. The mailbox address for providing e-mail comments is *NMFS.Pr1Comments@noaa.gov*. Include in the subject line of the e-mail comment the following document identifier: File No. 14186.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Skidmore or Amy Sloan, (301)713–2289.

**SUPPLEMENTARY INFORMATION:** The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended

(MMPA; 16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226).

The applicant requests authorization to permanently maintain two non-releasable Guadalupe fur seals at Sea World of California (and other Sea World facilities if relocation is necessary) for enhancement purposes. These animals were taken into captivity by the Marine Mammal Health and Stranding Network and were deemed nonreleasable. Thus, release of either of these animals would not be in the best interest of their individual welfare and that of the wild population. Furthermore, the applicant has agreed to provide additional space for future non-releasable Guadalupe fur seals should placement be necessary (up to 6 total animals). These animals would be provided with daily husbandry care and treatment for current medical conditions, routine veterinary care, and would be made available for opportunistic research. The applicant has requested a five-year permit.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of this application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: December 12, 2008.

**P. Michael Payne,**

*Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. E8–30243 Filed 12–18–08; 8:45 am]

**BILLING CODE 3510–22–S**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XM25**

### Marine Mammals

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

**ACTION:** Notice of Availability.

**SUMMARY:** NMFS has developed a policy and guidance document for implementation of the Steller sea lion (*Eumetopias jubatus*) and northern fur seal (*Callorhinus ursinus*) research permits and grants programs. This document establishes policy for implementation of the preferred alternative and recommendations in Chapter 5 of the 2007 Final Programmatic Environmental Impact Statement (EIS) for Steller Sea Lion and Northern Fur Seal Research.

**DATES:** Written, telefaxed, or e-mail comments must be received on or before January 20, 2009.

**ADDRESSES:** The document is available for review on the EIS project webpage at *http://www.nmfs.noaa.gov/pr/permits/eis/steller.htm*. To receive a hard copy, contact:

Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910–3226; phone (301)713–2289.

Written comments should be mailed to: P. Michael Payne, Chief, at the address above. Comments may also be submitted by facsimile at 301–427–2583 or email at ssleis.comments@noaa.gov. For email comments, use ''SSL EIS policy document'' in the subject line.

**FOR FURTHER INFORMATION CONTACT:** Tammy Adams or Kate Swails, (301)713–2289.

**SUPPLEMENTARY INFORMATION:** In 2007 NMFS completed the programmatic EIS and issued a Record of Decision (ROD) which identified the preferred alternative. NMFS limited implementation of the preferred alternative by limiting duration of research permits to span three summer field seasons, through July 2008. Full implementation of the preferred alternative is being phased in, upon completion of action items in the ROD and Chapter 5 of the EIS. The policy and guidance document is one item. Additional information about the EIS, ROD, and research permits issued in 2007 is available on the EIS project webpage (See **ADDRESSES**).

Dated: December 15, 2008.

**P. Michael Payne,**

*Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. E8–30239 Filed 12–18–08; 8:45 am]

**BILLING CODE 3510–22–S**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XM07**

### Taking and Importing Marine Mammals; Undersea Warfare Training Range Activities

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

**ACTION:** Notice; receipt of application for letter of authorization; request for comments and information.

**SUMMARY:** NMFS has received a request from the U.S. Navy (Navy) for authorization for the take of marine mammals incidental to Navy training activities conducted in the Undersea Warfare Training Range (USWTR) off the east coast of the United States. Pursuant to the implementing regulations of the Marine Mammal Protection Act (MMPA), NMFS is announcing our receipt of the Navy's request for the development and implementation of regulations governing the incidental taking of marine mammals and inviting information, suggestions, and comments on the Navy's application and request.

**DATES:** Comments and information must be received no later than January 20, 2009.

**ADDRESSES:** Comments on the application should be addressed to Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910-3225. The mailbox address for providing email comments is *PR1.0648-XM07@noaa.gov*. NMFS is not responsible for e-mail comments sent to addresses other than the one provided here. Comments sent via e-mail, including all attachments, must not exceed a 10-megabyte file size.

**FOR FURTHER INFORMATION CONTACT:** Jolie Harrison, Office of Protected Resources, NMFS, (301) 713-2289, ext. 166.

**SUPPLEMENTARY INFORMATION:**

### Availability

A copy of the Navy's application may be obtained by writing to the address specified above (See **ADDRESSES**), telephoning the contact listed above (see **FOR FURTHER INFORMATION CONTACT**), or visiting the internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm*. On September 12, 2008, the Navy made available to the public,

the Draft Overseas Environmental Impact Statement (OEIS) / Environmental Impact Statement (EIS) for USWTR. The Draft OEIS/EIS is available at *http://projects.earthtech.com/USWTR/EIS/DOEIS-EIS__2008/DOEIS__2008.htm*. During the 45-day public comment period, the Navy hosted four public hearings on the proposed action and the potential environmental impact of the construction and operation of an USWTR.

**Background**

In the case of military readiness activities, sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing), during periods of not more than five consecutive years each, if certain findings are made and regulations are issued or, if the taking is limited to harassment of no more than one year, The Secretary shall issue a notice of proposed authorization for public review.

Authorization for incidental takings may be granted if NMFS finds that the taking will have no more than a negligible impact on the affected species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses, and that the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such taking are set forth.

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as:

an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

With respect to military readiness activities, the MMPA defines ''harassment'' as:

(i) any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A Harassment]; or (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B Harassment].

**Summary of Request**

In February 2008, NMFS received an application from the Navy requesting authorization for the take of 20 species of marine mammals incidental to upcoming Navy training activities to be conducted in the USWTR located in an area offshore of northeast Florida. These training activities will occur over the course of 5 years and are classified as military readiness activities. The Navy states that USWTR training activities may expose some of the marine mammals present in the area to sound from various mid-frequency and high-frequency active tactical sonar sources. The Navy requests authorization to take individuals of 20 species of marine mammals by Level B behavioral harassment.

**Specified Activities**

In the application submitted to NMFS, the Navy requests authorization for take of marine mammals incidental to antisubmarine warfare (ASW) training activities conducted in the USWTR, located within a 500-square-nautical mile ($NM^2$) (1,713 square-kilometer ($km^2$)) area offshore of northeast Florida. The edge of the range would be approximately 94 km (51 NM) from shore. The depth of water at the proposed site ranges from 37 to 366 meters (m) (120 to 1,200 feet (ft)).

ASW training would involve up to three vessels and two aircraft using the range for any one training event, although events would typically involve fewer units. The proposed action would require logistical support for ASW training, including the handling (launch and recovery) of exercise torpedoes (non-explosive) and submarine target simulators. Table 1-1 in the Navy's application lists the activity types and the equipment and platforms involved in USWTR activities.

**Information Solicited**

Interested persons may submit information, suggestions, and comments concerning the Navy's request (see **ADDRESSES**). All information, suggestions, and comments related to the Navy's USWTR request and NMFS' potential development and implementation of regulations governing the incidental taking of marine mammals by the Navy's USWTR activities will be considered by NMFS in developing, if appropriate, the most effective regulations governing the issuance of letters of authorization.

Dated: December 16, 2008.

**James H. Lecky,**

*Director, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. E8–30240 Filed 12–18–08; 8:45 am]

**BILLING CODE 3510–22–S**

## DEPARTMENT OF EDUCATION

### Notice of Proposed Information Collection Requests

**AGENCY:** Department of Education.

**SUMMARY:** The Leader, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

**DATES:** Interested persons are invited to submit comments on or before February 17, 2009.

**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 Leader, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: December 15, 2008.

**Angela C. Arrington,**

*Leader, Information Collections Clearance Division, Regulatory Information Management Services, Office of Management.*

**Institute of Education Sciences**

*Type of Review:* New Collection.

*Title:* Evaluation of Secondary Math Teachers from Two Highly Selective Routes to Alternative Certification.

*Frequency:* One time.

*Affected Public:* Individuals or household.

*Reporting and Recordkeeping Hour Burden:*

*Responses:* 1,254.

*Burden Hours:* 1,350.

*Abstract:* The Evaluation of Secondary Math Teachers from Two Highly Selective Routes to Alternative Certification will examine the relative effectiveness of secondary math achievement who obtain certification through the two largest highly selective routes to alternative. The submission is for the recruitment of schools and districts, a teacher background form, the pilot of a teach math content knowledge. This submission includes the justification and plan for the data collection of information and statistical methods for the evaluation. The package also provides an overview of the study, including its design and data collection procedures.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 3921. 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. E8–30211 Filed 12–18–08; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

### President's Board of Advisors on Historically Black Colleges and Universities

**AGENCY:** U.S. Department of Education, President's Board of Advisors on Historically Black Colleges and Universities.

**ACTION:** Notice of an open meeting.

**SUMMARY:** The notice sets forth the schedule and agenda of the meeting of the President's Board of Advisors on Historically Black Colleges and Universities. The notice also describes the functions of the Board. Notice of the meeting is required by Section 10 (a) (2) of the Federal Advisory Committee Act and intended to notify the public of its opportunity to attend. Due to scheduling difficulties, this notice is appearing in the **Federal Register** less than 15 days prior to the meeting date.

**DATES:** Tuesday, January 13, 2009.

*Time:* 9:00 a.m.–3:30 p.m.

**ADDRESSES:** The Board will meet on the campus of Fisk University, Jubilee Hall, Appleton Room, 1000 17th Avenue, North, Nashville, TN 37208, Phone: 615–329–8500; Fax: 615–329–8576.

**FOR FURTHER INFORMATION, CONTACT:** Leonard L. Haynes III, Ph.D., Executive Director, White House Initiative on Historically Black Colleges and Universities, 1990 K Street, NW., Washington, DC 20006; telephone: (202) 502–7549; fax: 202–502–7852.

**SUPPLEMENTARY INFORMATION:** The President's Board of Advisors on Historically Black Colleges and Universities is established under Executive Order 13256, dated February 12, 2002 and Executive Order 13316 dated September 17, 2003. The Board is established (a) to report to the President annually on the results of the participation of historically black colleges and universities (HBCUs) in federal programs, including recommendations on how to increase the private sector role in strengthening these institutions, with particular emphasis given to enhancing institutional planning and development; strengthening fiscal stability and financial management; and improving institutional infrastructure, including the use of technology, to ensure the long-term viability and enhancement of these institutions; (b) to advise the President and the Secretary of Education (Secretary) on the needs of HBCUs in the areas of infrastructure, academic programs, and faculty and institutional development; (c) to advise the Secretary in the preparation of an annual Federal plan for assistance to HBCUs in increasing their capacity to participate in Federal programs; (d) to provide the President with an annual progress report on enhancing the capacity of HBCUs to serve their students; and (e) to develop, in consultation with the Department of Education and other Federal agencies, a private sector strategy to assist HBCUs.

*Agenda:*

The meeting will provide the Board a forum to receive presentations regarding the status of the 2006 and 2007 annual reports and to discuss other related pertinent issues involving implementation of Presidential Executive Order 13256. The meeting will be open to the public.

*Additional Information:*

Individuals who will need accommodations for a disability in order to attend the meeting (*e.g.*, interpreting services, assistive listening devices, or material in alternative format) should notify ReShone Moore at (202) 502–7893, no later than Wednesday, January 7, 2009. We will attempt to meet requests for accommodations after this date, but cannot guarantee their availability. The meeting site is accessible to individuals with disabilities.

An opportunity for public comment is available on Tuesday, January 13, 2009 between 3:00 p.m.–3:30 p.m. Individuals who wish to provide comments will be allowed three to five minutes to speak. Those members of the public interested in submitting written comments may do so by submitting it to the attention of Leonard L. Haynes, 1990 K Street NW., Washington, DC, by Wednesday, January 7, 2009.

Records are kept of all Board proceedings and are available for public inspection at the office of the White House Initiative on Historically Black Colleges and Universities, U.S. Department of Education, 1990 K Street, NW. Washington, DC 20006, Monday—Friday during the hours of 8:00 a.m. to 5:00 p.m.

*Electronic Access to this Document:* You may view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF), on the internet at the following site: *www.ed.gov/news/fedregister/index.html.*

To use PDF, you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free at 1–888–293–6498; or in the Washington, DC area at 202–512–1530.

**Note:** The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at *www.gpoaccess.gov/nara/index.html.*

**Cheryl L. Oldham,**

*Acting Assistant Secretary for Postsecondary Education.*

[FR Doc. E8–30254 Filed 12–18–08; 8:45 am]

**BILLING CODE 4000–01–P**

## UNITED STATES ELECTION ASSISTANCE COMMISSION

## Notice of Request for Public Comment on Proposed Strategic Plan

**AGENCY:** United States Election Assistance Commission.

**ACTION:** Notice: Request for Public Comment.

**SUMMARY:** The EAC seeks public comment on a ''U.S. Election Assistance Commission Draft Strategic Plan Fiscal Years: 2009 Through 2014.'' The EAC developed a strategic plan that lays out an approach to create a receptive and productive agency fully capable of the unique leadership role it has been given as a national clearinghouse, a manager of Federal financial assistance, a certifier of voting systems, and a resource for election officials throughout the country regarding the administration of Federal elections. EAC issues this notice according to a policy adopted on September 18, 2008 that requires EAC to provide notice and an opportunity for public comment on, among other things, advisories being considered for adoption by the U.S. Election Assistance Commission.

**DATES:** Comments must be received by 5 p.m. EST on January 20, 2009.

**ADDRESSES:** Comments may be submitted: Via e-mail at *havainfo@eac.gov*, via mail addressed to the U.S. Election Assistance Commission, 1225 New York Ave, NW., Suite 1100, Washington, DC 20005, or by fax at 202/566–3127. Commenters are encouraged to submit comments electronically and include ''Strategic Plan'' in the subject line, to ensure timely receipt and consideration.

*Person To Contact for Information:* Bryan Whitener, Telephone: (202) 566–3100.

**SUPPLEMENTARY INFORMATION:** The following is the complete text of the proposed Strategic Plan the EAC is seeking public comment on. The proposed strategic plan may also be viewed on the EAC Web site at *http://www.eac.gov.*

U.S. ELECTION ASSISTANCE COMMISSION DRAFT STRATEGIC PLAN

[Fiscal Years: 2009 Through 2014]



### Background

In October 2002, Congress, with the leadership and overwhelming bipartisan support of the members of the U.S. House Committee on House Administration, passed the Help America Vote Act (HAVA). HAVA represents an unprecedented effort by Congress to enhance the administration of Federal elections through funding, guidance and policies.

HAVA was not contemplated as a short-term or partial solution to the issues and problems with the administration of Federal elections that came to the forefront during the 2000 elections. The law recognized the need to invest in our election infrastructure and set out a comprehensive program of funding, guidance, and ongoing research that spans the course of many years.

*Funding State Improvements to Elections*

The Congress initially appropriated approximately $3 billion for payments to states during fiscal years 2003 and 2004. These funds were authorized under three separate sections of HAVA. Section 101 funds may be used to improve the administration of elections for Federal office. Section 102 funds may be used to replace punch-card and lever-action voting systems. Section 251 funds may be used to (1) improve voting systems, (2) establish and implement statewide voter registration databases, (3) implement provisional voting, (4) provide information to the voting public in the polling place, and (5) otherwise improve the administration of elections for Federal office. Congress appropriated an additional $115 million of Section 251 funds in fiscal year 2008. Generally, the funds are available to states until expended.

*Standards for Voting Systems*

A major provision of HAVA established minimum requirements for voting systems used in Federal elections. Each voting system must:

- Permit the voter to verify the selections made prior to casting the ballot;
- Permit the voter to change a selection prior to casting the ballot;
- Notify the voter when an overvote (making more than the permissible

number of selections in a single contest) occurs;

- Notify the voter of the ramifications of an overvote;
- Produce a permanent paper record that can be used in a recount or audit of an election;
- Provide accessibility to disabled voters;
- Provide foreign language accessibility in jurisdictions covered by Section 203 of the Voting Rights Act; and
- Meet the error rate standard established in the 2002 Voting System Standards.

*Election Assistance Commission*

To foster those programs and to promote and enhance voting for United States citizens, HAVA established the Election Assistance Commission (EAC). EAC is an independent bipartisan commission. Four full-time commissioners, appointed by the President and confirmed by the U.S. Senate, guide the EAC. Through the agency, the Federal government has assumed a role in the administration of Federal elections. Specifically, EAC is statutorily required to:

- Create a clearinghouse of information for election officials and the public.
- Distribute and monitor HAVA funds to states for election administration improvements.
- Conduct periodic studies of election administration issues.
- Establish best practices and guidelines on election administration for state and local election officials.
- Issue, and periodically review and modify, as necessary, voluntary voting system guidelines.
- Accredit voting system test labs and test and certify voting equipment.
- Develop requirements for voter registration form design for states.
- Provide Congress with a bi-annual report to assess the impact of the National Voter Registration Act (NVRA).

HAVA also set up a Standards Board and the Board of Advisors to counsel EAC. In addition, the law established a Technical Guidelines Development Committee (TGDC) to assist EAC in the preparation of the voluntary voting system guidelines.

EAC has 39 full-time employees and four part-time employees, including the four commissioners and their four special assistants. EAC is located in Washington, D.C., is managed by an Executive Director, and is organized (Appendix 1) to provide responsive service to its stakeholders (Attachment 2). Its budget for internal operations in fiscal year 2008 was $13,280,000.

*Guiding Principles*

EAC is committed to:

- Bipartisan collaboration to serve the best interests of the American voters.
- Transparency in its work.
- Professionalism, excellence, and adherence to the highest level of performance standards for EAC staff and contractors.
- Accountability and integrity in the management and conduct of all EAC activities and programs.
- Careful stewardship of taxpayer dollars and overall fiscal responsibility.
- Timely performance of its duties.
- Performance and public service without regard to race, sex, religion, national origin, age, special needs, sexual orientation, gender identification, or political affiliation in everything it does.
- Thorough and efficient distribution of appropriate election administration information it gathers.

*The Planning Process*

To meet the challenge of supporting the states and local governments in implementing HAVA reforms, EAC developed a strategic plan that provides the framework for how it will use its resources effectively. The plan lays out an approach to create a receptive and productive agency fully capable of the unique leadership role it has been given as a national clearinghouse, a manager of Federal financial assistance, a certifier of voting systems, and a resource for election officials throughout the country regarding the administration of Federal elections.

The plan is a valuable opportunity for EAC to work together as a team to consider a collective strategic outlook. With the help of the Commissioners, a vision and mission were reconfirmed. EAC's senior management team then took on the task of identifying the critical issues facing EAC in the coming years and determined how best to meet them. The plan focuses on these issues and is intended to be the foundation from which to address issues that arise during fiscal years 2009 through 2014. EAC is committed to thinking both critically about its niche and strategically at how to make improvements in crucial areas, and this plan embraces the next steps to further that effort. The senior management team identified five strategic goals which are described in detail in this document and summarized in Appendix 3.

**Vision and Mission**

*Vision*

Lead election reform that reaffirms the right to vote and to have all eligible votes counted accurately.

*Mission*

Assist the effective administration of Federal elections.

**Goals and Objectives**

*Goal 1: Communicate*

*Communicate timely and accurate information on the effective administration of elections for Federal office and on the operations and services offered EAC.*

Increased interest in elections, new Federal funding, the rapid pace of change in election administration, and Congressional direction has led EAC to operate a national clearinghouse of election information. EAC obtains election information through in-house research and chartered studies and from other credible sources. EAC presents this information to the election community, the public, the media, and EAC employees principally through its Web site. Also, EAC must be responsive to valid inquiries about its programs and operations.

Outcome

The Congress, Federal agencies, state and local election officials, and the public receive reliable, accurate, and non-partisan information about administering, conducting, and participating in Federal elections and how, where, and when Americans vote.

*Objective 1:* Operate the EAC clearinghouse effectively.

Means and strategies for accomplishing objective:

(a) Set EAC policy for a Web-based clearinghouse that will (i) establish the physical description of the clearinghouse and (ii) describe the contents to be presented to the public.

(b) Launch a public information initiative about the contents and uses of the EAC Clearinghouse.

(c) Maintain current and relevant information on the EAC Web site.

(d) Conduct regular information audits of all EAC divisions to update the Clearinghouse and Web site with EAC input.

Performance Measure

- Issue clearinghouse policy within 6 months.
- Post applicable information on the Web-based clearinghouse within 24 business hours of receipt.
- Distribute at least one e-mail update per month to stakeholders about the Web-based clearinghouse.

*Objective 2:* Respond to outside requests about the EAC timely and accurately.

Means and strategies for accomplishing objective:

(a) Establish and implement policies and procedures for tracking requests, gathering information from EAC, responding to requests, verifying and documenting responses, and updating information for stakeholders.

(b) Coordinate Commissioner and staff briefings for Members of Congress and Congressional staffers.

(c) Maintain and make available to EAC staff an electronic Freedom of Information Act (FOIA) reading room and a database of media and Congressional inquiries and responses.

(d) Maintain a physical FOIA reading room.

(e) Provide (FOIA) training to EAC staff to improve response rates.

Performance Measure

- Issue policies and procedures concerning request process within 6 months.
- Distribute media and Congressional inquiry and response log to the EAC staff on a daily basis.
- Respond to FOIA requests in accordance with requirements.
- Respond to 75 percent of non-FOIA requests within 72 hours.

*Objective 3:* Convey the results of EAC operations and accomplishments.

Means and strategies for accomplishing objective:

(a) Identify technologies and other communication opportunities that will ensure rapid delivery of information to a wide variety of stakeholders.

(b) Actively promote the EAC electronic newsletter to expand the stakeholder database.

(c) Inform Members of Congress and Congressional staffers about EAC initiatives and programs in general and in their districts.

(d) Edit EAC materials and deliverables to ensure their accuracy and consistency.

(e) Produce speeches and talking points for commissioners and EAC staff that accurately capture EAC activities and output.

(f) Create an atmosphere of creativity and customer service.

Performance Measure

- Provide regular updates about EAC activities and election administration issues to EAC employees.
- Produce an annual report that accurately captures EAC activities during the respective time period.
- Produce an annual FOIA report to chronicle requests and responses.
- Issue quarterly press releases summarizing EAC accomplishments.
- Provide regular briefings regarding EAC activities to Congressional staffers.
- Produce the annual report to the Congress by January 1 of each year for the preceding year ending September 30.
- Issue at least 12 EAC newsletters per year.

Program Evaluation

To evaluate the program:

- Establish feedback mechanism to gain public input on effectiveness and relevance of Web-based clearinghouse.
- Conduct monthly information audits on Web-based clearing house to ensure content is accurate and updated.

*Goal 2: Fund and Oversee*

*Deliver and manage Federal funds effectively.*

For the first time, the Federal government has funded improvements to the voting process. EAC is responsible for the distribution and oversight of approximately $3 billion in payments to states and for other grant programs to improve Federal elections and gather election data. Most of the funding to States was used for purchasing new voting equipment that meets the standards in HAVA; establishing a computerized statewide voter registration list; educating voters about voting procedures, rights, and technology; training election officials, poll workers, and election volunteers; improving the accessibility and quantity of polling places; and otherwise improving the administration of elections for Federal office. EAC is responsible for the administration of these funds.

Outcome

States and other recipients promptly and accurately receive Federal funds administered by EAC and use the funds appropriately to improve the administration of elections for Federal office.

*Objective 1:* Accurately and timely disburse Federal financial assistance administered by EAC.

Means and strategies for accomplishing objective:

(a) Develop program manual, including rules of general applicability, for each Federal financial assistance program administered by the EAC.

(b) Thoroughly review all grant applications to select appropriate recipients.

(c) Thoroughly review requests for payments/state plans under all programs to help assure recipients use funds for appropriate purposes.

(d) Timely publish state plans and amendments to state plans.

(e) Timely disburse funds on the basis of requests for reimbursement, certifications, and/or amendments to state plans.

(f) Recoup and redistribute unspent Section 102 funds.

Performance Measure

- Publish program manual by January 2009.
- Award grants within established timeframes.
- Submit state plans for publication in the **Federal Register** within 30 days of receipt of the plan.
- Submit payment requests to GSA with 10 days of receipt of acceptable requests/certifications.
- Recoup and redistribute unspent Section 102 funds by May 2009

*Objective 2:* Effectively monitor Federal financial assistance administered by the EAC.

Means and strategies for accomplishing objective:

(a) Include in Program Manual reporting requirements and monitoring procedures.

(b) Timely review all financial and narrative reports submitted.

(c) Follow up on anomalies in reports or on non-reporting entities.

(d) Prepare a timely annual report to the Congress on State use of HAVA Section 251 funds (requirements payments).

(e) Review audit reports to identify internal control weaknesses and questionable uses of Federal funds administered by the EAC.

(f) Conduct sight visits of recipients for whom EAC has found significant problems in financial and/or narrative reports and/or in audit reports.

(g) Timely negotiate indirect cost rates with state election agencies..

Performance Measures

- Send follow up letters to recipients regarding reporting anomalies or failure to file within 30 days of knowledge of such conditions.
- Resolve 100 percent of audit findings within established timeframes.
- Conduct site visits to at least three high priority grantees each year.
- Negotiate indirect cost rates within 30 days of receipt of acceptable indirect cost proposals.
- Issue the annual report to Congress on the expenditure of HAVA funds by July 15 of each year.

*Objective 3:* Provide technical assistance and guidance on the management of Federal financial assistance administered by EAC to reduce the risk of inappropriate use of funds and accounting errors.

Means and strategies for accomplishing objective:

(a) Include in Program Manual guidance/references on use of funds, allowable costs, and managing funds.

(b) Offer workshops and training sessions on management, use and reporting of Federal financial assistance administered by EAC.

Performance Measures

- Submit to the Commissioners all recommended policy and guidance concerning the administration of Federal financial assistance administered by the EAC within established timeframes.
- Offer at least one workshop per year.
- Respond to all inquires by recipients about the use and administration of funds in accordance with EAC requirements.

Program Evaluation

Assess the results of (1) audits (EAC Office of Inspector General and State) of recipient expenditure of Federal financial assistance administered by EAC, (2) EAC monitoring visits, and (3) EAC reviews of recipient annual financial reports. Implement additional controls over EAC administration of Federal financial assistance, as appropriate, on the basis of the assessments.

*Goal 3: Study, Guide, and Assist*

*Identify and develop information on areas of pressing concern regarding the administration of elections for Federal office and issue recommended improvements, guidance, translations, and best practices as required by HAVA, and carry out responsibilities under the National Voter Registration Act (NVRA).*

HAVA mandates that the EAC conduct research on current election administration issues with the aim of promoting methods of voting and administering elections which will be the most ''convenient, accessible, and easy to use;'' ''will yield the most accurate, secure, and expeditious system for voting and tabulating election results;'' ''will be nondiscriminatory;'' and ''will be efficient and cost-effective.'' HAVA also requires that EAC produce guidelines and best practices for state use in implementing HAVA. HAVA also transfers from the Federal Election Commission to the EAC the responsibility for updating and maintaining the national mail voter registration application and for reporting on the impact of the NVRA on elections for Federal office.

Outcome

As a result of this goal (1) the election community and other key stakeholders improve the administration of elections for Federal office on the bases of pertinent, impartial, timely, and high-quality information, recommendations, guides and other tools on election and voting issues and (2) eligible citizens use the mail voter registration application to register to vote, register with a political party, or report a change of name, address, or other information.

*Objective 1:* Complete research on relevant issues that improve the administration of elections for Federal office and expeditiously report on critical administration subjects and election data.

Means and strategies for accomplishing objective:

(a) Analyze unfinished research mandated by HAVA, and develop and prioritize an inventory of ideas for potential new projects internally and on the basis of input from stakeholders.

(b) Establish, based on the inventory, annual research plans for completing research projects by EAC and by contractors in order of priority. Present plan to Board of Advisors and Standards Board for information and comments only. Obtain Commissioners approval for the plan and inform the Congress of any mandated research that is no longer useful.

(c) Monitor research projects; tracking progress, checking the accuracy of results, and preparing reports.

(d) Prepare, on the basis of data collected, recommendations for improvements for the election community.

Performance Measures

- Complete inventory of potential projects by July 2009.
- Start 100 percent of annual planned and funded projects.
- Meet the milestones for the completion of contracted research projects in accordance with contract schedules and deliverables.
- Disseminate all completed research project reports to stakeholders.
- Establish, in fiscal year 2009, a baseline for measuring stakeholder use of EAC research products to improve the administration of elections for Federal office. In subsequent years, increase the percentage of stakeholder use of EAC research products.

*Objective 2:* Identify and collect required and useful data on election administration practices and on voting methods and demographics and make recommendations for improving the quality of practices, methods, and data.

Means and strategies for accomplishing objective:

(a) Identify data required to be collected by law and data needed by the Congress, election officials, and other stakeholders.

(b) Interact with state and local election data collection agencies and election associations to exchange information on data collection practices and identify ways to ensure data quality.

(c) Amend EAC's Election Day survey to include the collection of data on new election administration topics and on changes in required and desirable data elements.

(d) Recommend improvements to the data collection process to the Congress and issue reports presenting data required by the Uniformed and Overseas Citizens Absentee Voting Act and EAC's Election Day Survey.

Performance Measure

- Establish a baseline in fiscal year 2009 on the accuracy and completeness of data reported by states in response to EAC surveys. Increase the accuracy and completeness of reported data in each of the succeeding years.
- Include recommendations to improve election administration and data to the Congress in the annual report on the Election Day survey.
- Issue required reports to the Congress by the dates required by law.

*Objective 3:* Issue guides, translations and other tools that are timely and useful.

Means and strategies for accomplishing objective:

(a) Provide guidance to states concerning the proper implementation of the HAVA Title III requirements.

(b) Develop and administer the EAC Language Accessibility Program to assist election officials in meeting the needs of limited English proficiency voters.

(c) Develop guidelines in Native American Languages.

(d) Develop and maintain *A Voter's Guide to Federal Elections* in Spanish, Chinese, Japanese, Korean, Vietnamese, and Tagalog.

(e) Create interactive versions of the various Glossaries of Key Election Terminology on the EAC Web site.

(f) Coordinate with the Department of Justice Voting Section to provide EAC language resources to jurisdictions required to meet the language minority requirements in Sections 203 and 404 of the Voting Rights Act.

(g) Develop election management guidelines that can be easily adapted to suit an election jurisdiction's needs.

Performance Measures

- Complete guidance on HAVA Title III requirements by October 2010.
- Complete the *Voters Guide to Federal Elections* in Spanish, Chinese, Japanese, Korean, Vietnamese, and Tagalog by September 2009.

• Complete guidance for Native Americans by October 2010.

• Complete interactive glossaries and management guidelines by October 2011.

*Objective 4:* Update and maintain a national mail voter registration application and report to the Congress as required by NVRA

Means and strategies for accomplishing objective:

(a) Implement procedures to improve and maintain the national mail voter registration application and to govern state requests for changes to the application.

(b) Provide guidance to states concerning the proper implementation of the NVRA.

(c) Translate the form into Spanish, Chinese, Japanese, Korean, Vietnamese, and Tagalog.

Performance Measures

• Publish regulations governing the administration of the application by December 2009.

• Process all accepted requests to change the mail voter registration form within prescribed timeframes.

• Issue the bi-annual report on the impact of NVRA by June 30 of each odd-numbered year.

Program Evaluation

Develop an assessment tool to monitor election community acceptance of EAC recommendations and guides.

*Goal 4: Test and Certify*

*Build public confidence in elections by testing and certifying voting systems to improve system security, operation, and accessibility.*

Before the passage of HAVA, the Federal government was not involved in the testing of voting systems used in Federal elections. EAC's first step in instituting a Testing and Certification Program was to work with its advisory committees and the National Institute of Standards and Technology (NIST) to develop voluntary voting system guidelines against which voting systems will be evaluated. EAC completed the first iteration of the VVSG in 2005, and will regularly update the VVSG. In addition, EAC works with NIST to accredit laboratories to test voting equipment. Based on the tests of equipment and software conducted by laboratories, EAC will certify, decertify, or recertify voting systems, as appropriate.

Outcome

Voting equipment operates more reliably and securely and is more accessible to the disabled. States use the EAC testing and certification program to ensure voting systems meet standards.

*Objective 1:* Develop and update the voluntary voting system guidelines.

Means and strategies for accomplishing objective:

(a) Develop updated voluntary voting system guidelines in plain English that adequately address accuracy and reliability of voting systems and that are cost effective.

(b) Develop and maintain testable, objective, and repeatable voluntary voting system test suites and (or) test methods.

(c) Submit an updated draft of VVSG, prepared by the TGDC, to the **Federal Register** for public comment and hold public meetings with stakeholders on the proposed guidelines.

(d) Consider comments on the draft TGDC version of the VVSG and prepare an EAC draft VVSG. Publish the EAC draft in the **Federal Register** for public comment.

(e) Prepare, after consideration of comments, a final version of guidelines and present them at a public meeting for a vote of the Commissioners.

Performance Measure

• Produce updates to the VVSG no later than 2009 and 2012.

*Objective 2:* Provide for the accreditation and revocation of accreditation of independent, non-federal laboratories qualified to test voting systems to Federal standards.

Means and strategies for accomplishing objective:

(a) Develop, implement, and maintain policies and procedures for the accreditation and revocation of accreditation of voting system test laboratories (VSTLs).

(b) Collaborate with NIST's National Voluntary Laboratory Accreditation Program (NVLAP) to accredit laboratories and ensure compliance with accreditation requirements.

(c) Implement a monitoring program to ensure the integrity of laboratories which test voting systems for Federal certification.

Performance Measure

• Complete accreditation reviews for all laboratories recommended to EAC by NIST and for all emergency actions within 90 days.

• Test and document the results of the review of compliance with procedures by at least 100 percent of accredited laboratories every 2 years.

*Objective 3:* Administer the testing, certification, decertification, and recertification of voting system hardware and software by accredited laboratories.

Means and strategies for accomplishing objective:

(a) Develop, implement, and maintain policies and procedures for the testing, certification, decertification, and recertification of voting system hardware and software by accredited VSTLs.

(b) Implement the most recent voluntary voting system guidelines into the EAC's testing and certification program and all of its components.

(c) Monitor, in accordance with Chapter 8 of the *Voting System Testing and Certification Program Manual*, EAC-certified voting systems to ensure that the systems continue to meet the requirements of the Federal standards to which they were certified.

(d) Conduct field reviews in state and local jurisdictions of EAC certified voting systems to ensure the systems fielded (i) match the system certified by the EAC and (ii) meet the requirements of the Federal standards to which they were certified.

Performance Measure

• Test 100 percent of systems qualifying for testing.

• Conduct at least one review of a manufacturing facility of a registered manufacturer a least once every 4 years.

• Conduct field reviews for at least 50 percent of jurisdictions that volunteer for reviews. (Measures may be modified after EAC determines average number of volunteers.)

• Respond to requests for interpretations of voting system standards with 45 days. (Measures may be modified after EAC determines average number of requests.)

Program Evaluation

Assess comments to **Federal Register** publications and results of EAC oversight reviews of laboratory testing and election system compliance with standards.

*Goal 5: Manage*

*Achieve organizational and management excellence.*

HAVA established the EAC to help implement mandated improvements to Federal elections. To that end, EAC will employ a variety of plans, resources, skills, processes, and technologies to ensure effective and efficient agency management.

Outcome

EAC Commissioners and staff of the testing and certification, payments and grants, election administration improvement, research, administration, and legal programs proficiently carry out EAC's strategic objectives.

*Objective*—Implement a high performance organization

Means and strategies for accomplishing goal:

(a) Foster a leadership environment that inspires, motivates and guides employees toward the strategic goals; coaches, mentors, and challenges staff; provides needed training and sharing of knowledge; and, models high standards of honesty, integrity, trust, and respect for all individuals.

(b) Establish an organization structure, management systems, and decision-making processes that improve coordination and cooperation across the EAC and that support the efficient accomplishment of goals and priorities.

(c) Clarify roles and responsibilities of commissioners and staff.

(d) Attract and maintain a high-performing workforce that is diverse and that includes those with disabilities through outreach, competitive compensation, meaningful training, pleasant work space, flexible work schedules, telework, and state-of-the-art equipment.

(e) Obtain sufficient funds, plan activities, and budget resources to accomplish the goals and objectives of EAC.

(f) Provide effective financial management to programs.

(g) Provide effective legal support to program operations.

(h) Monitor EAC division progress in meeting goals and objectives.

Performance Measure

- Meet annual performance measures.
- Obtain a clean audit opinion on agency financial statements within 2 years of the initial statement preparation.
- Institute an internal integrated budget and financial management system within 6 months.
- Implement 90 percent of OIG audit recommendations within agreed upon timeframes.

Program Evaluation

Implement an effective internal control assessment process that meets the requirements of Office of Management and Budget Circular A–123, Management's Responsibility for Internal Controls. Promptly implement agreed upon recommendations contained in EAC's annual audit of its Performance and Accountability Report.

**External Factors That Impact Accomplishment of the Goals and Objectives**

EAC has an opportunity to remain a leader in the election community and have positive name recognition outside of the Federal government. However, the agency's ability to accomplish such an end is dependent upon a number of external factors that are not all within the agency's control.

*Acceptance by the Election Community*

HAVA strictly limits EAC's regulatory authority to that held by the Federal Election Commission (FEC) over the NVRA. As such, a significant number of EAC's research and guidance is voluntary. It is critical to have state and local election officials adopt and apply these voluntary principles if EAC's efforts are to succeed.

*Budget*

Adequate funding for the maintenance of staff and support functions is essential for attainment of EAC goals and strategic objectives.

*Legislative Changes*

Statutory changes to either the agency's enabling legislation or to other statutes that directly impact the agency could affect the EAC's ability to meet its goals and strategic objectives.

*Technology*

Developments in technology that are rapidly changing our world could provide both new opportunities and new risks for EAC.

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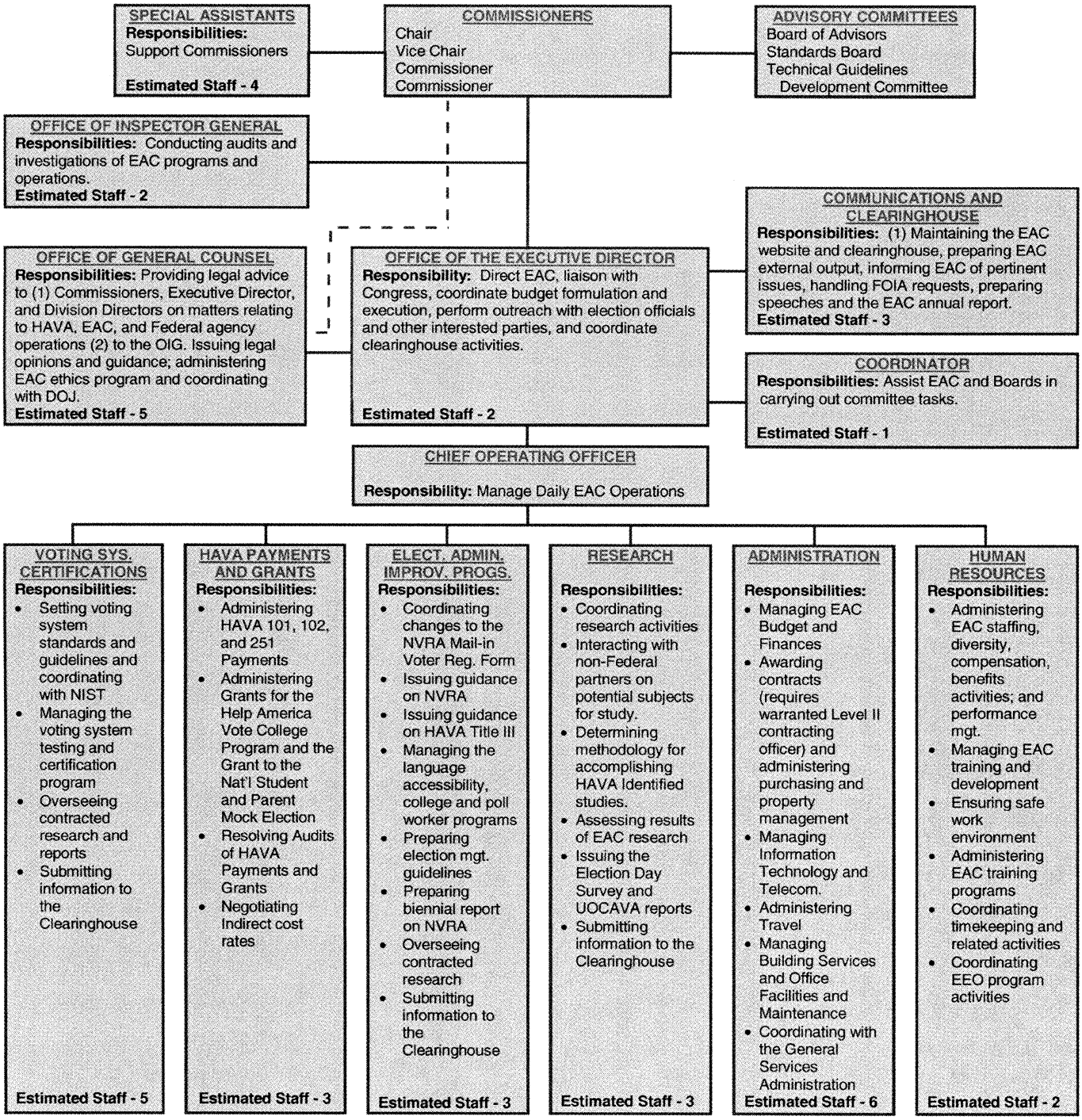
# APPENDIX 1
# ORGANIZATION CHART



**Appendix 2 Stakeholders**

**Government Entities With Oversight & Decision-Making Authority Regarding EAC**

White House Staff
Members of Congress
Office of Management & Budget

**Groups Directly Affected by EAC Activities That Also Impact EAC Decision-Making**

Chief Election Authorities in Each State
Local Election Officials
EAC Standards Board
EAC Board of Advisors
EAC Technical Guidelines Development Committee

**Other Government Entities With HAVA Implementation Responsibilities or Interest in HAVA**

Federal Agencies
Governors (Mayor in Washington, DC)
State Legislatures (City Council in Washington, DC)

**Non-Government Groups Affected by HAVA Implementation**

Professional Groups for Election Officials
Professional Groups Representing State & Local Government
Election Equipment & Services Vendors
National Political Parties

**Other Groups Interested in EAC Activities & HAVA Implementation**

U.S. Citizens here and abroad
Voter Advocacy Groups
Universities and Academics
Think Tanks
International Organizations/Interests
State and Local Election Officials

# APPENDIX 3
# GOALS, OBJECTIVES, & MEASURES

| GOAL 1: COMMUNICATE - Communicate timely and useful information on the effective administration of elections for Federal office and on the operations of EAC | |
|---|---|
| **Objectives** | **Measures** |
| 1. Operate the EAC clearinghouse effectively. | ▪ Issue clearinghouse policy within 6 months.<br>▪ Post applicable information on the Web-based clearinghouse within 24 business hours of receipt.<br>▪ Distribute at least one email update per month to stakeholder about the Web-based clearinghouse. |
| 2. Respond to outside requests about the EAC timely and accurately. | ▪ Issue procedures concerning request responses within 6 months.<br>▪ Distribute media and Congressional inquiry and response log to EAC staff on a daily basis.<br>▪ Respond to FOIA requests in accordance with requirements.<br>▪ Respond to 75 percent of non-FOIA requests within 72 hours |
| 3. Convey the results of EAC operations and accomplishments. | ▪ Provide regular updates about EAC activities and election administration issues to EAC employees.<br>▪ Issue quarterly press releases summarizing EA accomplishments.<br>▪ Produce the annual report of EAC activities by January 1 of each year for the preceding year ending September 30.<br>▪ Produce an annual FOIA report to chronicle requests and responses.<br>▪ Provide regular briefings regarding EAC activities to Congressional staffers<br>▪ Issue at least 12 EAC newsletters per year. |
| **GOAL 2: FUND AND OVERSEE - Deliver and manage Federal funds effectively** | |
| **Objectives** | **Measures** |
| 1. Accurately and timely disburse Federal financial assistance administered by EAC. | ▪ Publish program manual by January 2009.<br>▪ Award grants within established timeframes.<br>▪ Submit state plans for publication in the Federal Register within 30 days of receipt.<br>▪ Submit payment requests to GSA within 10 days of receipt of acceptable request/certification.<br>▪ Recoup and distribute unspent Section 102 funds by May 2009. |
| 2. Effectively monitor Federal financial assistance administered by EAC. | ▪ Send follow up letters to recipients regarding reporting anomalies or failure to file within 30 days of knowledge of such conditions.<br>▪ Resolve 100 percent of audit findings within established timeframes.<br>▪ Conduct site visits to at least three high priority grantees each year.<br>▪ Negotiate indirect cost rates within 30 days of receipt of acceptable indirect cost proposals.<br>▪ Issue the annual report to Congress on the expenditure of HAVA funds by July 15 of each year. |
| 3. Provide technical assistance and guidance on the management of Federal financial assistance administered by EAC | ▪ Offer at least on workshop per year.<br>▪ Respond to all inquiries in accordance with EAC requirements. |

| | |
|---|---|
| | ▪ Submit to the Commissioners all recommended policy and |

# APPENDIX 3
# GOALS, OBJECTIVES, & MEASURES

| | |
|---|---|
| to reduce the risk of inappropriate use of funds and accounting errors. | guidance concerning the administration of Federal financial assistance administered by EAC within established timeframes. |
| **GOAL 3: STUDY, GUIDE, AND ASSIST - Identify and develop information on areas of pressing concern regarding the administration of elections for Federal office and issue recommended improvements, guidance, translations, and best practices as required by HAVA and carry out responsibilities under the National Voter Registration Act.** | |
| **Objectives** | **Measures** |
| 1. Complete research on relevant issues that improve the administration of elections for Federal office and expeditiously report on critical election administration subjects and election data. | ▪ Complete inventory of potential research projects by July 2009.<br>▪ Start 100 percent of planned and funded projects.<br>▪ Meet the milestones for the completion of contracted research projects in accordance with contract schedules and deliverables.<br>▪ Disseminate all completed research project reports to stakeholders.<br>▪ Establish, in fiscal year 2009, a baseline for measuring stakeholder use of EAC research products to improve the administration of elections for Federal office. In subsequent years, increase the percentage of stakeholder use of EAC research products. |
| 2. Identify and collect required and useful data on election administration practices and on voting methods and demographics make recommendations for improving the quality of practices, methods, and data. | ▪ Establish a baseline in fiscal year 2009 on the accuracy and completeness of data reported by states in response to EAC surveys. Increase the accuracy and completeness of reported data in each of the succeeding years.<br>▪ Include recommendations to improve election administration and data to the Congress in the annual report on the Election Day survey.<br>▪ Issue required reports to the Congress by the dates required by law |
| 3. Issue guides, translations and other tools that are timely and useful. | ▪ Complete guidance on HAVA Title III requirements by October 2010.<br>▪ Complete the Voters Guide to Federal elections in Spanish, Chinese, Japanese, Korean, Vietnamese, and Tagalog by September 2009.<br>▪ Complete guidance for Native Americans by October 2011. |
| 4. Update and maintain a national mail voter registration application and report to the Congress as required by NVRA. | ▪ Publish regulations governing the administration of the application by September 2009.<br>▪ Process all accepted requests to change the mail in voter registration application within prescribed timeframes.<br>▪ Issue the bi-annual report on the impact of NVRA by June 30 of each odd-numbered year. |
| **GOAL 4: TEST AND CERTIFY - Build public confidence in elections by testing and certifying voting systems to improve system security, operation, and accessibility.** | |
| 1. Develop and update the voluntary voting system guidelines. | ▪ Produce updates to the VVSG in 2009 and 2012. |
| 2. Provide for the accreditation and revocation of accreditation of independent, non-federal laboratories | ▪ Complete accreditation reviews for all laboratories recommended to EAC by NIST and for all emergency actions within 90 days.<br>▪ Test and document the results of the review of compliance with |

# APPENDIX 3
# GOALS, OBJECTIVES, & MEASURES

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|---|---|
| qualified to test voting systems to Federal standards. | procedures by at least 50 percent of accredited laboratories annually. |
| 3. Administer the testing, certification, decertification, and recertification of voting system hardware and software by accredited laboratories. | ▪ Test 100 percent of systems presented for testing.<br>▪ Conduct at least one review of a manufacturing facility of a registered manufacturer a least once every 4 years.<br>▪ Conduct field reviews for at least 50 percent of jurisdictions that volunteer for reviews.<br>▪ Respond to requests for interpretations of voting system standards with 45 days. |
| **GOAL 5: Manage - Achieve organizational and management excellence.** | |
| **Objectives** | **Measures** |
| 1. Implement a high performance organization | ▪ Meet annual performance measures.<br>▪ Obtain a clean audit opinion on agency financial statements within 2 years.<br>▪ Institute an internal integrated budget and financial management system within 6 months.<br>▪ Implement 90 percent of OIG audit recommendations within agreed upon timeframes. |

**Thomas R. Wilkey,**

*Executive Director, U.S. Election Assistance Commission.*

[FR Doc. E8–30195 Filed 12–18–08; 8:45 am]

**BILLING CODE 6820–KF–C**

## DEPARTMENT OF ENERGY

### Record of Decision for the Complex Transformation Supplemental Programmatic Environmental Impact Statement—Operations Involving Plutonium, Uranium, and the Assembly and Disassembly of Nuclear Weapons

**AGENCY:** National Nuclear Security Administration, U.S. Department of Energy.

**ACTION:** Record of decision.

**SUMMARY:** The National Nuclear Security Administration (NNSA), a separately organized agency within the U.S. Department of Energy (DOE), is issuing this Record of Decision (ROD) for the continued transformation of the nuclear weapons complex (Complex). This ROD is based on information and analyses contained in the *Complex Transformation Supplemental Programmatic Environmental Impact Statement* (SPEIS) (DOE/EIS–0236–S4) issued on October 24, 2008 (73 FR 63460); comments received on the SPEIS; other NEPA analyses as noted; and other factors, including cost, technical and security considerations, and the missions of NNSA. The SPEIS analyzes the potential environmental impacts of alternatives for transforming the nuclear weapons complex into a smaller, more efficient enterprise that can respond to changing national security challenges and ensure the long-term safety, security, and reliability of the nuclear weapons stockpile.

The alternatives analyzed in the SPEIS are divided into two categories: programmatic and project-specific. Programmatic alternatives involve the restructuring of facilities that use or store significant (i.e., Category I/II) quantities of special nuclear material (SNM).[1] These facilities produce plutonium components (commonly called pits[2]), produce highly enriched uranium (HEU) components (including secondaries[3]), fabricate high explosives (HE) components, and assemble and disassemble nuclear weapons. The decisions announced in this ROD relate to the programmatic alternatives analyzed in the SPEIS. NNSA is issuing a separate ROD relating to the project-specific alternatives.

NNSA has decided to implement its preferred programmatic alternative as described in the SPEIS and summarized in this ROD. This decision will transform the plutonium and uranium manufacturing aspects of the complex into smaller and more efficient operations while maintaining the capabilities NNSA needs to perform its national security missions. The three major elements of the decisions announced in this ROD are:

(1) Manufacturing and research and development (R&D) involving plutonium will remain at the Los Alamos National Laboratory (LANL) in New Mexico. To support these activities, NNSA will construct and operate the Chemistry and Metallurgy Research Replacement–Nuclear Facility (CMRR–NF) at LANL as a replacement for portions of the Chemistry and Metallurgy Research (CMR) facility, a structure that is more than 50 years old

[1] As defined in section 11 of the *Atomic Energy Act of 1954,* special nuclear material is: (1) Plutonium, uranium enriched in the isotope 233 or in the isotope 235 and any other material which the U.S. Nuclear Regulatory Commission determines to be special nuclear material; or (2) any material artificially enriched by any of the foregoing. Special nuclear material is separated into Security Categories I, II, III, and IV based on the type, attractiveness level, and quantity of the material. Categories I and II require the highest level of security.

[2] A pit is the central core of a nuclear weapon, principally made of plutonium or enriched uranium.

[3] A secondary is the component of a nuclear weapon that contains elements needed to initiate the fusion reaction in a thermonuclear explosion.

and faces significant safety and seismic challenges to its continued operation.

(2) Manufacturing and R&D involving uranium will remain at the Y–12 National Security Complex in Tennessee. NNSA will construct and operate a Uranium Processing Facility (UPF) at Y–12 as a replacement for existing facilities that are more than 50 years old and face significant safety and maintenance challenges to their continued operation.

(3) Assembly and disassembly of nuclear weapons and high explosives production and manufacturing will remain at the Pantex Plant in Texas.

These decisions will best enable NNSA to meet its statutory mission while minimizing technical risks, risks to mission objectives, costs, and environmental impacts. These decisions continue the transformation begun following the end of the Cold War and the cessation of nuclear weapons testing, particularly decisions announced in the 1996 ROD for the *Programmatic Environmental Impact Statement for Stockpile Stewardship and Management* (SSM PEIS) (DOE/EIS–0236) (61 FR 68014; Dec. 26, 1996). This ROD explains why NNSA is making these programmatic decisions, why it is appropriate to make them at this time, and the flexibility NNSA has to adapt these decisions as needed in response to any changes in national security requirements that may occur in the near term.

**FOR FURTHER INFORMATION CONTACT:** For further information on the Complex Transformation SPEIS or this ROD, or to receive copies of these, contact: Ms. Mary E. Martin, NNSA NEPA Compliance Officer, Office of Environmental Projects and Operations, NA–56, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, toll free 1–800–832–0885 ext. 69438. A request for a copy of the SPEIS or this ROD may be sent by facsimile to 1–703–931–9222, or by e-mail to *complextransformation@nnsa.doe.gov*. The SPEIS, this ROD, the project-specific ROD, and additional information regarding complex transformation are available at *http://www.ComplexTransformationSPEIS.com* and *http://www.nnsa.doe.gov*.

For information on DOE's NEPA process, contact: Ms. Carol M. Borgstrom, Director, Office of NEPA Policy and Compliance (GC–20), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, 202–586–4600, or leave a message at 800–472–2756. Additional information regarding DOE NEPA activities and access to many DOE NEPA documents are available through the DOE NEPA Web site at: *http://www.gc.energy.gov/NEPA*.

**SUPPLEMENTARY INFORMATION:**

## Background

NNSA prepared this ROD pursuant to the regulations of the Council on Environmental Quality (CEQ) for implementing the *National Environmental Policy Act* (NEPA) (40 CFR Parts 1500–1508) and DOE's NEPA Implementing Procedures (10 CFR Part 1021). This ROD is based on information and analyses contained in the *Complex Transformation Supplemental Programmatic Environmental Impact Statement* (SPEIS) (DOE/EIS–0236-S4) issued on October 24, 2008 (73 FR 63460); comments received on the SPEIS; other NEPA analyses as noted; other factors, including cost, technical and security considerations, and the missions of NNSA. NNSA received approximately 100,000 comment documents on the Draft SPEIS from Federal agencies; state, local, and tribal governments; public and private organizations; and individuals. In addition, during the 20 public hearings that NNSA held, more than 600 speakers made oral comments.

National security policies require DOE, through NNSA, to maintain the United States' nuclear weapons stockpile, as well as the nation's core competencies in nuclear weapons. Since completing the SSM PEIS and associated ROD in 1996, DOE has pursued these objectives through the Stockpile Stewardship Program. This program emphasizes development and application of greatly improved scientific and technical capabilities to assess the safety, security, and reliability of existing nuclear warheads without nuclear testing. Throughout the 1990s, DOE also took steps to consolidate the Complex to its current configuration of three national laboratories (and a flight test range operated by Sandia National Laboratories), four industrial plants, and a nuclear test site. This Complex enables NNSA to design, develop, manufacture, maintain, and repair nuclear weapons; certify their safety, security, and reliability; conduct surveillance on weapons in the stockpile; store Category I/II SNM; and dismantle and disposition retired weapons. Sites within the Complex and their current weapons program missions are described in the following paragraphs.

*Lawrence Livermore National Laboratory (LLNL), Livermore, California*—LLNL conducts research, design, and development of nuclear weapons; designs and tests advanced technology concepts; provides safety, security, and reliability assessments and certification of stockpile weapons; conducts plutonium and tritium R&D, hydrotesting, HE R&D and environmental testing; and stores Category I/II quantities of SNM. LLNL also conducts destructive and nondestructive surveillance evaluations on pits to evaluate their reliability. NNSA is currently removing Category I/II SNM from the site and by 2012 LLNL will not maintain these categories of SNM. NNSA is constructing the National Ignition Facility (NIF) at LLNL, which will allow a wide variety of high-energy-density investigations. NIF is scheduled to begin operations in 2009.

*Los Alamos National Laboratory (LANL), Los Alamos, New Mexico*—LANL conducts research, design, and development of nuclear weapons; designs and tests advanced technology concepts; provides safety, security, and reliability assessments and certification of stockpile weapons; maintains production capabilities for limited quantities of plutonium components (i.e., pits) for delivery to the stockpile; manufactures nuclear weapon detonators for the stockpile; conducts plutonium and tritium R&D, hydrotesting, HE R&D and environmental testing; and stores Category I/II quantities of SNM. LANL also conducts destructive and nondestructive surveillance evaluations on pits to assess their reliability.

*Nevada Test Site (NTS), 65 miles northwest of Las Vegas, Nevada*—NTS maintains the capability to conduct underground nuclear testing; conducts high hazard experiments involving nuclear material and high explosives; provides the capability to process and dispose of a damaged nuclear weapon or improvised nuclear device; conducts non-nuclear experiments; conducts hydrodynamic testing and HE testing; conducts research and training on nuclear safeguards, criticality safety, and emergency response; and stores Category I/II quantities of SNM.

*Pantex Plant (Pantex), Amarillo, Texas*—Pantex dismantles retired weapons; fabricates HE components, and performs HE R&D; assembles HE, nuclear, and non-nuclear components into nuclear weapons; repairs and modifies weapons; performs nonintrusive pit modification;[4] and evaluates and performs surveillance of weapons. Pantex stores Category I/II

[4] Nonintrusive pit modification involves changes to the external surfaces and features of a pit.

quantities of SNM for the weapons program and stores other SNM in the form of surplus plutonium pits pending transfer to SRS for disposition.

*Savannah River Site (SRS), Aiken, South Carolina*—SRS extracts tritium and performs loading, unloading, and surveillance of tritium reservoirs, and conducts tritium R&D. SRS does not store Category I/II quantities of SNM for NNSA's weapons activities, but does store Category I/II quantities for other DOE activities. SRS is currently receiving Category I/II surplus, non-pit plutonium from LLNL for storage pending its disposition.

*Y–12 National Security Complex (Y–12), Oak Ridge, Tennessee*—Y–12 manufactures uranium components for nuclear weapons, cases, and other nuclear weapons components; evaluates and tests these components; stores Category I/II quantities of HEU; conducts dismantlement, storage, and disposition of HEU; and supplies HEU for use in naval reactors.

The following two sites are part of the Complex but would not be affected by decisions announced in this ROD.

*Kansas City Plant (KCP), Kansas City, Missouri*—KCP manufactures and procures non-nuclear components for nuclear weapons and evaluates and tests these components. KCP has no SNM. The General Services Administration, as the lead agency, and NNSA, as a cooperating agency, prepared an Environmental Assessment (DOE/EA–1592, Apr. 2008) regarding the potential environmental impacts of modernizing the facilities and infrastructure for the non-nuclear production activities conducted by the KCP as well as moving these activities to other locations. The agencies issued a Finding of No Significant Impact (73 FR 23244; Apr. 29, 2008) regarding an alternative site in the Kansas City area. The SPEIS does not assess alternatives for the activities conducted at the KCP.

*Sandia National Laboratories (SNL), Albuquerque, New Mexico; Livermore, California; and other locations*—SNL conducts systems engineering of nuclear weapons; conducts research, design, and development of non-nuclear components; manufactures non-nuclear components, including neutron generators, for the stockpile; provides safety, security, and reliability assessments of stockpile weapons; and conducts HE R&D, tritium R&D, and environmental testing. The principal laboratory is located in Albuquerque, New Mexico (SNL/NM); a division of the laboratory (SNL/CA) is located in Livermore, California. SNL also operates the Tonopah Test Range (TTR) near Tonopah, Nevada, for flight testing of gravity weapons (including R&D and testing of nuclear weapons components and delivery systems). In 2008, NNSA completed the removal of SNL/NM's Category I/II SNM. SNL/NM no longer stores or uses these categories of SNM on an ongoing basis, although it may use Category I/II SNM for limited periods in the future. No SNM is stored at TTR, although some test operations have involved SNM.

**Alternatives Considered**

NNSA has been considering how to continue the transformation of the Complex since the Nuclear Posture Review [5] was transmitted to Congress by the Department of Defense in early 2002. NNSA considered the Stockpile Stewardship Conference in 2003, the Department of Defense Strategic Capabilities Assessment in 2004, the recommendations of the Secretary of Energy Advisory Board Task Force on the Nuclear Weapons Complex Infrastructure in 2005, and the Defense Science Board Task Force on Nuclear Capabilities in 2006 as to how transformation should continue. Based on these studies and other information, NNSA developed the range of reasonable alternatives for the Complex that could reduce its size, reduce the number of sites with Category I/II SNM (and storage locations for these categories of SNM within sites), eliminate redundant activities, and improve the responsiveness of the Complex. The following programmatic capabilities involving SNM are evaluated in the SPEIS:

- Plutonium operations, including pit manufacturing; Category I/II SNM storage; and related R&D;
- Enriched uranium operations, including canned subassembly manufacturing, assembly, and disassembly; Category I/II SNM storage; and related R&D; and
- Weapons assembly and disassembly and HE production (collectively, A/D/HE).

The programmatic alternatives analyzed in the SPEIS are discussed in the following paragraphs.

*No Action Alternative.* NNSA evaluated a No Action Alternative, which represents continuation of the status quo including implementation of past decisions. Under the No Action Alternative, NNSA would not make additional major changes to the SNM missions now assigned to its sites.

*Programmatic Alternative 1: Distributed Centers of Excellence*. This alternative would locate the three major SNM functional capabilities (plutonium, uranium, and weapons assembly and disassembly) involving Category I/II quantities of SNM at two or three separate sites. This alternative would create a consolidated plutonium center (CPC) for R&D, storage, processing, and manufacture of pits. Production rates of up to 125 pits per year for single shift operations and up to 200 pits annually for multiple shifts and extended work weeks are assessed for a CPC in this alternative. A CPC could consist of new facilities, or modifications to existing facilities at LANL, NTS, Pantex, SRS, or Y–12. The SPEIS also evaluated an option under this alternative that would upgrade facilities at LANL to produce up to 80 pits per year. This option would involve the construction and operation of the CMRR-NF. Highly-enriched uranium storage and uranium operations would continue at Y–12. Under this alternative, NNSA analyzed two options—construction of a new UPF and an upgrade of existing facilities at Y–12. The weapons A/D/HE mission would remain at Pantex under this programmatic alternative.

*Programmatic Alternative 2: Consolidated Centers of Excellence*. NNSA would consolidate the three major SNM functions (plutonium, uranium, and weapons assembly and disassembly) involving Category I/II quantities of SNM at one or two sites under this alternative. Two options were assessed: (1) The single site option (referred to as the consolidated nuclear production center [CNPC] option); and (2) the two-site option (referred to as the consolidated nuclear centers [CNC] option). Under the CNPC option, a new CNPC could be established at LANL, NTS, Pantex, SRS, or Y–12. Under the CNC option, the plutonium and uranium component manufacturing missions would be separate from the A/D/HE mission. The Consolidated Centers of Excellence Alternative assumed production rates of up to 125 weapons per year for single shift operations and up to 200 weapons annually for multiple shifts and extended work weeks.

*Programmatic Alternative 3: Capability-Based Alternative*. Under this alternative, NNSA would maintain a basic capability for manufacturing components for all stockpile weapons, as well as laboratory and experimental capabilities to support stockpile stewardship, but would reduce production facilities in-place such that NNSA would produce only a nominal level of replacement components (approximately 50 components per year). Within this alternative, NNSA

[5] The Nuclear Posture Review is a comprehensive analysis that lays out the direction for the United States' nuclear forces.

also evaluated a No Net Production/Capability-Based Alternative, in which NNSA would maintain capabilities to continue surveillance of the weapons stockpile, produce limited life components, and dismantle weapons, but would not add new types or increased numbers of weapons to the stockpile. This alternative involves minimum production (i.e., production of 10 sets of components or assembly of 10 weapons per year) within facilities with a larger manufacturing capability. Both options of this alternative would involve the construction and operation of a CMRR–NF.

**Preferred Alternative**

The Final SPEIS identified the following preferred alternatives for restructuring facilities that use significant quantities of SNM:

• Plutonium R&D and manufacturing: LANL would provide a consolidated plutonium research, development, and manufacturing capability within TA–55 (the Technical Area at LANL containing plutonium processing facilities) enabled by construction and operation of the CMRR-NF. The CMRR-NF would replace the existing CMR facility (a 50-year-old facility that has significant safety issues that cannot be addressed in the existing structure), to support transfer of plutonium R&D and Category I/II quantities of SNM from LLNL, and consolidation of weapons-related plutonium operations, including plutonium R&D and storage of Category I/II quantities of SNM, at LANL. Until completion of a new Nuclear Posture Review in 2009 or later, the net production at LANL would be limited to a maximum of 20 pits per year. Other national security actinide missions (e.g., emergency response, material disposition, nuclear energy) would continue at TA–55.

• Uranium manufacturing and R&D: Y–12 would continue as the uranium center, producing components and canned subassemblies, and conducting surveillance and dismantlement. NNSA completed construction of the Highly Enriched Uranium Materials Facility (HEUMF) in 2008 and will consolidate HEU storage in that facility.[6] NNSA would build a UPF at Y–12 to provide a smaller and modern highly-enriched uranium production capability, replacing 50-year-old facilities.

• Assembly/disassembly/high explosives production and manufacturing: Pantex would remain the assembly/disassembly/high explosives production and manufacturing center. NNSA would consolidate non-destructive weapons surveillance operations at Pantex.

• Consolidation of Category I/II SNM: NNSA would continue ongoing actions to transfer Category I/II SNM from LLNL under the No Action Alternative and phase out Category I/II operations at LLNL by the end of 2012.

**Environmentally Preferable Alternative**

Section 101 of NEPA (42 U.S.C. 4331) establishes a policy of federal agencies having a continuing responsibility to improve and coordinate their plans, functions, programs, and resources so that, among other goals, the nation may fulfill its responsibilities as a trustee of the environment for succeeding generations. The CEQ, in its ''Forty Most Asked Questions Concerning CEQ's NEPA Regulations'' (46 FR 18026; Mar. 23, 1981), defines the ''environmentally preferable alternative'' as the alternative ''that will promote the national environmental policy expressed in NEPA's Section 101.''

The analyses in the SPEIS of the environmental impacts associated with the programmatic alternatives indicated that the No Net Production/Capability-Based Alternative is environmentally preferable. This alternative would result in the minimum infrastructure demands (e.g., electricity and water use would be reduced by almost 50 percent at some sites); produce the least amount of wastes (radioactive wastes would be reduced by approximately 33–50 percent compared to the No Action Alternative); reduce worker radiation doses (by approximately 33–50 percent compared to the No Action Alternative); and require the fewest employees (up to 40 percent fewer at some sites). Almost all of these reductions in potential impacts result from the reduced production levels assumed for this alternative.

**Alternatives Considered but Eliminated From Detailed Study**

NNSA considered programmatic alternatives other than those described above, but concluded that these alternatives were not reasonable and eliminated them from detailed analysis. As discussed in the SPEIS, the following alternatives were considered but eliminated from detailed study: (1) Consolidate the Three Nuclear Weapons Laboratories (LLNL, LANL and SNL); (2) Curatorship Alternative; (3) Smaller CNPC Alternative; (4) New CPC with a Smaller Capacity; (5) Purchase Pits; (6) Upgrade Building 332 at LLNL to enable pit production; (7) Consider Other Sites for the CPC; (8) Redesign Weapons to Require Less or No Plutonium; and (9) Do Not Produce New Pits (see Section 3.15, Volume I of the SPEIS).

**Decisions**

With respect to the three major SNM functional capabilities (plutonium, uranium, and weapons assembly and disassembly) involving Category I/II quantities of SNM, NNSA has decided to keep these functional capabilities at three separate sites:

• Plutonium manufacturing and R&D will remain at LANL, and NNSA will construct and operate the CMRR-NF there to support these activities;

• Uranium manufacturing and R&D will remain at Y–12 and NNSA will construct and operate a UPF there to support these activities;

• Assembly/disassembly/high explosives production and manufacturing will remain at Pantex.

With respect to SNM consolidation, NNSA will continue ongoing activities[7] to transfer Category I/II SNM from LLNL under the No Action Alternative and phase out Category I/II operations at LLNL by the end of 2012.

**Bases for Decisions**

*Overview*

NNSA's decision locates the three major functional capabilities involving Category I/II quantities of SNM at three separate sites where these missions are currently performed. The selected alternative, which is a combination of the Distributed Centers of Excellence and Capability-Based Alternatives, has the least cost and lowest risk. Consolidation or transfer of uranium and plutonium operations to other sites (as analyzed in several options under the Distributed and Consolidated Centers of Excellence Alternatives) could result in lower operational costs and other benefits if and when such an alternative were fully implemented. However, movement of any of these three major capabilities to another site poses unacceptable programmatic risks and would cost far more than the selected alternative for an extended period of time. Moving one or more of these capabilities would take years to achieve and might be unsuccessful; in the interim, NNSA would need to build some new facilities at the sites where these capabilities are currently located

[6] The environmental impacts of HEUMF and its alternatives are analyzed in the *Site-wide Environmental Impact Statement for the Y–12 National Security Complex* (DOE/EIS–0309, 2001); NNSA announced its decision to construct and operate HEUMF on March 13, 2002 (67 FR 11296).

[7] In regard to surplus, non-pit, weapons-usable plutonium currently at LLNL, transfer to SRS for storage pending disposition is being undertaken consistent with decisions announced on September 11, 2007, in an Amended ROD (72 FR 51807) based on the *Storage and Disposition of Weapons-Usable Fissile Materials Programmatic EIS.*

simply to maintain those capabilities during the relocation process.

Similarly, the No Action Alternative is unacceptable because it would require NNSA to continue operations in facilities that are outdated, too costly to operate, and not capable of meeting modern environment, health and safety (ES&H) or security standards. These facilities cannot be relied upon much longer, and must be replaced or closed.

Under NNSA's decision, plutonium operations remain at LANL. It will not construct a new pit manufacturing facility such as a CPC or a CNPC because it appears unlikely there will be a need to produce more than 10–80 pits per year in the future and because constructing these facilities would be very expensive. Instead, NNSA will upgrade the existing plutonium facilities at the laboratory and will construct a CMRR–NF.[8] Construction of this facility is a needed modernization of LANL's plutonium capabilities—continued use of the existing CMR facility is inefficient and poses ES&H and security issues that cannot be addressed by modifying the CMR. Uranium operations remain at Y–12, and NNSA will construct a UPF because the existing uranium production facilities are also beyond their useful lives, inefficient, and present ES&H and security issues similar to those at CMR. CMRR–NF and UPF will be safer, seismically robust, and easier to defend from potential terrorist attacks. Their size will support production rates appropriate for a reasonable range of future stockpile sizes, and would not be much smaller if future production rates were much lower than currently anticipated.[9]

[8] NNSA prepared an *Environmental Impact Statement for the Chemistry and Metallurgy Research Building Replacement Project at Los Alamos National Laboratory, Los Alamos, New Mexico* (CMRR EIS) (DOE/EIS–0350). The CMRR EIS evaluates potential impacts of the proposed relocation of analytical chemistry and materials characterization activities and associated R&D to a new CMRR. The proposed CMRR consists of a nuclear facility—CMRR–NF—and a separate radiological laboratory, administrative office, and support building. See also the 2008 *Site-Wide Environmental Impact Statement for Los Alamos National Laboratory* (2008 LANL SWEIS, DOE/EIS–0380). In deciding to construct the CMRR–NF at LANL, NNSA considered the analyses in the CMRR EIS and the 2008 LANL SWEIS, as well as those in the SPEIS.

[9] NNSA evaluated various sizes for facilities analyzed in the SPEIS to determine if smaller facilities should be considered in detail for the Distributed and Consolidated Centers of Excellence Alternatives. NNSA evaluated the programmatic risk, cost effectiveness, and environmental impacts of smaller facilities and concluded that smaller facilities were not reasonable for some of these alternatives (see Section 3.15 of the SPEIS). Smaller facilities were considered for the Capability-Based Alternative.

*Plutonium Operations*

With respect to plutonium manufacturing, NNSA is not making any new decisions regarding production capacity until completion of a new Nuclear Posture Review in 2009 or later. NNSA does not foresee an imminent need to produce more than 20 pits per year to meet national security requirements. This production level was established almost 10 years ago in the ROD (64 FR 50797, Sept. 20, 1999) based on the *Site-wide Environmental Impact Statement for Continued Operation of the Los Alamos National Laboratory* (1999 LANL SWEIS; DOE/EIS–0238). The ROD based on the 2008 LANL SWEIS (DOE/EIS–0380) continued this limit on production (73 FR 55833; Sept. 26, 2008). NNSA will continue design of a CMRR–NF that would support a potential annual production (in LANL's TA–55 facilities) of 20–80 pits. The design activities are sufficiently flexible to account for changing national security requirements that could result from a new Nuclear Posture Review, further changes to the size of stockpile, or future Federal budgets. Furthermore, because NNSA's sensitivity analyses have shown that there is little difference in the size of a facility needed to support production rates between 1 and 80 components per year, the future production capacity is not anticipated to have a significant impact on the size of the CMRR–NF.[10] With a new CMRR–NF providing support, the existing plutonium facility at LANL will have sufficient capability to produce between 1 and 80 pits per year. A new CMRR–NF will also allow NNSA to better support national security missions involving plutonium and other actinides (including, e.g., the plutonium-238 heat source program undertaken for the National Aeronautics and Space Administration (NASA); non-proliferation programs, including the sealed source recovery program; emergency response; nuclear counter-terrorism; nuclear forensics; render safe program (program to disable improvised nuclear devices); material disposition; and nuclear fuel research and development).

*Uranium Operations*

With respect to uranium manufacturing, NNSA will maintain the current capacity in existing facilities at Y–12 as discussed in Section 3.5 of the SPEIS and within the planning basis discussed in Section 3.1.2 of the 2001 *Site-wide Environmental Impact Statement for the Y–12 National Security Complex* (2001 Y–12 SWEIS; DOE/EIS–0309). NNSA is preparing a new SWEIS for Y–12 (*Site-wide Environmental Impact Statement for the Y–12 National Security Complex, Oak Ridge, Tennessee* (Y–12 SWEIS; DOE/EIS–0387)), which will evaluate site-specific issues associated with continued production operations at Y–12, including issues related to construction and operation of a UPF such as its location and size. The Y–12 SWEIS will consider any new information (such as a new Nuclear Posture Review or further changes to the stockpile) that becomes available during the preparation of that document.

[10] *See* note 9 *supra.*

Assembly and Disassembly of Weapons and High Explosives Production

NNSA will continue to conduct these operations at Pantex as announced in the ROD (62 FR 3880; Jan. 27, 1997) for the *Environmental Impact Statement for the Continued Operation of the Pantex Plant and Associated Storage of Nuclear Weapon Components* (DOE/EIS–0225, 1996).

*Production Rates and New Facilities*

While NNSA is not making any new decisions regarding the production rates of plutonium or uranium components, it has decided that a CMRR–NF and UPF are essential to its ability to meet national security requirements regarding the nation's nuclear deterrent. The existing facilities where these operations are now conducted cannot be used much longer and cannot be renovated in a manner that is either affordable or acceptable (from ES&H, security, and production perspectives). As NNSA continues the design and, in the case of a UPF, NEPA analysis of these facilities, it can modify them to reflect changing requirements such as those resulting from a new Nuclear Posture Review, further changes to stockpile size, and future federal budgets. In short, a CMRR–NF and UPF are needed for NNSA to maintain its basic nuclear weapons capabilities because they would replace outdated and deteriorating facilities. These facilities are needed regardless of how many or what types of weapons may be called for in the future.

*National Security Requirements and Stockpile Size*

In making these decisions, NNSA considered its statutory responsibilities to support the nuclear weapons stockpile as determined by the President and the Congress. President Bush's goal is to achieve a credible nuclear deterrent with the lowest possible number of nuclear warheads consistent with

national security needs. In 2002, he and Russia's President Putin signed the Moscow Treaty, under which the United States and Russia will each reduce the number of operationally deployed strategic nuclear weapons to 1,700–2,200 by 2012. In 2004, President Bush issued a directive to cut the entire U.S. stockpile—both deployed and reserve warheads—in half by 2012. This goal was later accelerated and achieved in 2007, five years ahead of schedule. At the end of 2007, the total stockpile was almost 50 percent below what it was in 2001. On December 18, 2007, the White House announced the President's decision to reduce the entire nuclear weapons stockpile by another 15 percent by 2012. This means the U.S. nuclear stockpile will be less than one-quarter its size at the end of the Cold War—the smallest stockpile since the Eisenhower Administration.

NNSA's analyses in the SPEIS are based on current national policy regarding stockpile size (1,700–2,200 operationally deployed strategic nuclear warheads by 2012) with flexibility to respond to future Presidential direction to make further changes in the numbers of weapons. Maintaining a stockpile requires the ability to detect aging effects and other changes in weapons (a surveillance program), the ability to fix identified problems without nuclear testing (the stockpile stewardship program), and the ability to produce replacement components and reassemble weapons (a fully capable set of production facilities).

NNSA understands that at least two major reviews of the requirements for the future nuclear weapons program are expected during the next year. These reviews may influence the size and composition of the future nuclear weapons stockpile, and the nuclear infrastructure required to support that stockpile. First, the Congress has established the Congressional Commission on the Strategic Posture of the United States. This commission is to conduct a review of the strategic posture of the United States, including a strategic threat assessment and a detailed review of nuclear weapons policy, strategy, and force structure. Its recommendations, currently scheduled for completion in the spring of 2009, are expected to address the size and nature of the future nuclear weapons stockpile, and the capabilities required to support that stockpile. Second, Congress has directed the Administration to conduct another Nuclear Posture Review in 2009 to clarify the United States' nuclear deterrence policy and strategy for the near term (i.e., the next 5–10 years). A report on this Nuclear Posture Review is due on December 1, 2009.

NNSA has structured its programs and plans in a manner that allows it to continue transforming the complex and to replace antiquated facilities while retaining the flexibility to respond to evolving national security requirements, which is essential for a truly responsive infrastructure. The decisions in this ROD allow NNSA to continue to rely on LANL facilities (with a new CMRR–NF) to provide maximum flexibility to respond to future changes in plutonium requirements.

*Costs, Technical Risks, and Other Factors*

NNSA prepared detailed business case studies of the programmatic alternatives. These studies are available at *http://www.ComplexTransformationSPEIS.com*. They provide a cost comparison of the alternatives and include costs associated with construction, transition, operations, maintenance, security, decontamination and decommissioning, and other relevant factors.[11] Based on these studies, NNSA determined that the costs through 2030 for the consolidation alternatives would be approximately 20–40 percent greater than for the alternatives that would maintain the three major capabilities—plutonium operations, uranium operations, and A/D/HE operations—at their current sites. Additionally, NNSA's analysis found that, through 2060, the costs for the consolidation alternatives would be greater than those for the alternatives that maintain the three capabilities where they are currently located.

With respect to technical risk, as part of the business case studies, NNSA evaluated five types of risk: (1) Engineering and construction; (2) implementation; (3) program; (4) safety and regulatory; and (5) security. These analyses balance nearer-term risks incurred while transitioning to an alternative with longer-term operational risks. For example, consolidation alternatives would have higher risks during the transition due to the challenges associated with mission relocations, but could have lower long-term operational risks because of reduced safety, regulatory, or security risks. All risk criteria were rated equally (20 percent each); a sensitivity analysis determined that the conclusions were not significantly affected by adjustments of plus or minus five percent in risk rating criteria.

The risk assessment was performed by a group of NNSA and contractor employees who are subject-matter experts, site experts, or both. The least risky options are those where the sites have previous experience with the mission or the nuclear material used in that mission. Alternatives that would locate the plutonium mission at LANL or SRS, the uranium mission at Y–12, and the weapons assembly and disassembly mission at Pantex, were determined to pose the lowest risk. Overall, the consolidation alternatives were judged to have 25–160 percent more technical risk than alternatives that would not consolidate or relocate missions.

With respect to plutonium R&D and manufacturing, the cost and risk analyses showed that keeping this mission at LANL has the least cost and poses the lowest risk. This results primarily from the fact that plutonium facilities are very expensive to construct and LANL has existing facilities, infrastructure, and trained personnel that can be used for this mission.

The CMRR–NF was analyzed in the *Environmental Impact Statement for the Chemistry and Metallurgy Research Building Replacement Project at Los Alamos National Laboratory, Los Alamos, New Mexico* (DOE/EIS–0350, Nov. 2003). The CMRR EIS evaluated potential environmental impacts of the proposed relocation of analytical chemistry and materials characterization activities and associated R&D to a new CMRR. Following completion of that EIS, NNSA announced its decision to construct and operate a CMRR consisting of two main buildings, one of which was the CMRR–NF (69 FR 6967; Feb. 12, 2004). The second building—providing laboratory, administrative, and support functions—currently is under construction at LANL. However, NNSA decided to defer a decision regarding construction and operation of the CMRR–NF until it completed the Complex Transformation SPEIS (see Section 1.5.2.1, Volume 1 of the SPEIS).

Analyses of the potential impacts of constructing and operating the CMRR–NF were updated in the *Site-Wide Environmental Impact Statement for Continued Operation of Los Alamos National Laboratory, Los Alamos, New Mexico* (2008 LANL SWEIS; DOE/EIS–0380, May 2008) as part of the Expanded Operations and the No Action Alternatives. In a ROD based on the 2008 LANL SWEIS, NNSA announced its decision to continue to implement the No Action Alternative with the

[11] The cost analyses considered both life-cycle costs (i.e., the cumulative costs over an approximately 50-year life) and discounted cash flows (i.e., a net present value in which all future costs are reduced by a common factor (generally the cost of capital)).

addition of some elements of the Expanded Operations Alternative. NNSA did not make any decision related to the CMRR–NF. It explained in the SWEIS ROD that it would not make any decisions regarding proposed actions analyzed in the SPEIS prior to completion of the SPEIS (73 FR 55833; Sept. 26, 2008). NNSA considered the analyses in the CMRR EIS and the 2008 LANL SWEIS, as well as those in the SPEIS in deciding to construct the CMRR–NF.

With respect to uranium manufacturing and R&D, the cost analyses indicated that building a UPF at Y–12, eliminating excess space, and shrinking the security area at the site will significantly reduce annual operational costs. The UPF at Y–12 will replace 50-year-old facilities, providing a smaller and modern production capability. It will enable NNSA to consolidate enriched uranium operations from six facilities at Y–12, and to reduce the size of the protected area at that site by as much as 90 percent. A new UPF will also allow NNSA to better support broader national security missions. These missions include providing fuel for Naval Reactors; processing and down-blending incoming HEU from the Global Threat Reduction Initiative; down-blending HEU for domestic and foreign research reactors in support of nonproliferation objectives; providing material for high-temperature fuels for space reactors (NASA); and supporting nuclear counter-terrorism, nuclear forensics, and the render safe program (program to disable improvised nuclear devices).

The life cycle cost analysis predicts an average annual savings over the 50-year facility life of approximately $200 million in FY 2007 dollars. The risk analysis found that moving the uranium mission to a site other than Y–12 would more than double the technical risks. The site-specific impacts for a UPF, including issues such as its location and size, will be analyzed in a new SWEIS for Y–12 that NNSA is currently preparing.

With respect to weapons assembly and disassembly and high explosives production, NNSA's decision to keep that mission at Pantex will result in the least cost and pose the lowest programmatic risk because the facilities necessary to conduct this work safely and economically already exist. Although no further NEPA analysis is required to continue these missions at Pantex, NNSA will continue to evaluate and update site-specific NEPA documentation as required by DOE regulations (10 CFR Part 1021).

With respect to SNM removal from LLNL, transferring Category I/II SNM to other sites and limiting LLNL operations to Category III/IV SNM will achieve a security savings of approximately $30 million per year at LLNL.

*Potential Environmental Impacts*

As described in greater detail in the following paragraphs, NNSA considered potential environmental impacts in making these decisions. It analyzed the potential impacts of each alternative on land use; visual resources; site infrastructure; air quality; noise; geology and soils; surface and groundwater quality; ecological resources; cultural and paleontological resources; socioeconomics; human health impacts; environmental justice; and waste management. NNSA also evaluated the impacts of each alternative as to irreversible or irretrievable commitments of resources, the relationship between short-term uses of the environment and the maintenance and enhancement of long-term productivity, and cumulative impacts. In addition, it evaluated impacts of potential accidents on workers and surrounding populations. The SPEIS includes a classified appendix that assesses the potential environmental impacts of a representative set of credible terrorist scenarios.

The environmental impacts of the alternatives are analyzed in Chapter 5 of the SPEIS. The impacts of the alternatives NNSA has decided to pursue are summarized as follows:

*Land Use*—Minor land disturbance during construction of new facilities (approximately 6.5 acres at LANL for a CMRR–NF and 35 acres at Y–12 for a UPF); less area would be disturbed after construction is complete. At Y–12, construction of a UPF will allow NNSA to reduce the protected area by as much as 90 percent, which will improve security and reduce costs. At all sites, land uses will remain compatible with surrounding areas and with land use plans. At LANL and Y–12, the land required for operations will be less than 1 percent of the sites' total areas.

*Visual Resources*—Changes consistent with currently developed areas, with no changes in the Visual Resource Management classification. All sites will remain industrialized.

*Infrastructure*—Existing infrastructure is adequate to support construction and operating requirements at all sites. During operations, any changes to power requirements would be less than 10 percent of the electrical capacity at each site.

*Air Quality*—During construction, temporary emissions will result, but National Ambient Air Quality Standards will not be exceeded as a result of this construction. Operations will not introduce any significant new emissions and will not exceed any standards.

*Water Resources*—Water use will not change significantly compared to existing use and will remain within the amounts of water available at the NNSA sites. Annual water use at each site will increase by less than 5 percent.

*Biological Resources*—No adverse effects on biota and endangered species. Consultations with the U.S. Fish and Wildlife Service have been completed for the CMRR–NF. Consultations with the Fish and Wildlife Service will be conducted for a UPF during preparation of the Y–12 SWEIS.

*Socioeconomics*—Short-term employment increases at LANL and Y–12 during construction activities. The selected alternatives will have the least disruptive socioeconomic impacts at all sites. At Y–12, the total workforce will be reduced by approximately 750 workers (approximately 11 percent of the site's workforce) after UPF becomes operational. Employment at all other sites will change by less than 1 percent compared to any changes expected under the No Action Alternative.

*Environmental Justice*—No disproportionately high and adverse effects on minority or low-income populations will occur at any affected site; therefore, no environmental justice impacts will occur.

*Health and Safety*—Radiation doses to workers and the public will remain well below regulatory limits at all facilities and at all sites. Doses to the public and workers will cause less than one latent cancer fatality annually at all sites. Conducting future operations in the CMRR–NF and UPF will reduce the dose to workers compared to the doses they receive in existing facilities.

*Accidents*—The risk of industrial accidents is expected to be low during construction of the new facilities. Radiological accident risks will be low (i.e., probabilities of less than one latent cancer fatality) at all sites. The CMRR–NF and a UPF are expected to reduce the probability and impacts of potential accidents.

*Intentional Destructive Acts*—Construction of a UPF and CMRR–NF will provide better protection to the activities conducted in these facilities, as it is generally easier and more cost-effective to protect new facilities because modern security features can be incorporated into their design. Although the results of the intentional destructive acts analyses cannot be disclosed, the following general conclusion can be drawn: The potential consequences of

intentional destructive acts are highly dependent upon distance to the site boundary and size of the surrounding population—the closer and higher the surrounding population, the higher the potential consequences. Removal of SNM from LLNL will reduce the potential impacts of intentional destructive acts at that site.

*Waste Management*—Waste generation will remain within existing and planned management capabilities at all sites. Existing waste management facilities are sufficient to manage these wastes and maintain compliance with regulatory requirements.

*Cumulative Impacts*—The cumulative environmental impacts of the alternatives are analyzed in Chapter 6 of the SPEIS. The impacts of the alternatives when added to past, present, and reasonably foreseeable future actions will be within all regulatory standards and not result in significant new impacts.

**Mitigation Measures**

As described in the SPEIS, NNSA operates in compliance with environmental laws, regulations, and policies within a framework of contractual requirements; many of these requirements mandate actions to control and mitigate potential adverse environmental effects. Examples include site security and threat protection plans, emergency plans, Integrated Safety Management Systems, pollution prevention and waste minimization programs, cultural resource and protected species programs, and energy and water conservation programs (e.g., the Leadership in Energy and Environmental Design (LEED) Program). Any additional site-specific mitigation actions would be identified in site-specific NEPA documents.

**Comments Received on the Final SPEIS Related to the Programmatic Alternatives**

During the 30-day period following the EPA's notice of availability for the Final SPEIS (73 FR 63460; Oct. 24, 2008), NNSA received written comments from the following groups: Alliance for Nuclear Accountability, Project on Government Oversight, National Radical Women, Physicians for Social Responsibility, Oak Ridge Environmental Peace Alliance, Tri-Valley CAREs, the Union of Concerned Scientists, Nuclear Watch New Mexico, the Arms and Security Initiative of the New America Foundation, Concerned Citizens for Nuclear Safety, Embudo Valley Environmental Group, Ecology Ministry, Loretto Community, Aqua es Vida Action Team, Citizens for Alternatives to Radioactive Dumping, and Tewa Women United. Written comments were also received from approximately 30 individuals. The comments NNSA received related to the programmatic alternatives and NNSA's responses follow.

Some commenters substantively reiterated comments that they had provided earlier on the Draft SPEIS, including comments that suggested:

1. NNSA should make no decisions on Complex Transformation until a new Nuclear Posture Review has been completed by the newly elected administration and the report issued by the Congressional Commission on the Strategic Posture of the United States.

*Response:* NNSA believes the SPEIS analysis is consistent with and supports national security requirements and policies. It is unreasonable to assume that nuclear weapons would not be a part of this nation's security requirements over the time period analyzed in the SPEIS and beyond. The range of alternatives analyzed in the SPEIS covers the range of national security requirements that NNSA believes could reasonably evolve from any changes to national policy with regard to the size and number of nuclear weapons in the foreseeable future. Accordingly, there is no reason to delay the decisions announced in this ROD on complex transformation pending a new Nuclear Posture Review or the recommendations of the Bipartisan Panel reevaluating the United States' Nuclear Strategic Posture (see Comment Response 1.C, Volume III, Chapter III of the SPEIS). This ROD fully explains why NNSA is making these programmatic decisions, why it is appropriate to make these decisions at this time, and the flexibility NNSA has to adapt to any changes in national security requirements that may occur in the near term.

2. The United States does not need nuclear weapons or the infrastructure that produces and maintains them and should pursue disarmament consistent with the Nuclear Non-Proliferation Treaty.

*Response:* Decisions on whether the United States should possess nuclear weapons and the type and number of those weapons are made by the President and the Congress. As long as this nation has nuclear weapons, a Complex must exist to ensure their safety, security and reliability. NNSA believes the SPEIS analysis is consistent with and supports national security requirements and policies (see Comment Responses 1.0, 2.K.12, and 3.0, Volume III, Chapter III of the SPEIS).

3. There is no need to produce new pits (or no need for certain production rates).

*Response:* While pits may have extremely long lifetimes and there may ultimately be no need to produce many additional ones, prudence requires that the nation have the capability to produce pits should the need arise. NNSA is not proposing to manufacture any pits unless they are needed to meet national security requirements. A need to produce pits could arise due to the effects of aging on existing pits or changes to our national security policies that could require more pits than the few NNSA is currently manufacturing for stockpile surveillance (see Comment Responses 2.K.16, 2.K.22, and 5.C.1, Volume III, Chapter III of the SPEIS). Until completion of a new Nuclear Posture Review in 2009 or later, the net production at LANL will be limited to a maximum of 20 pits per year.

4. NNSA should undertake further efforts at compliance with Article VI of the Nuclear Non-proliferation Treaty (NPT) (or, Complex Transformation violates this treaty).

*Response:* The United States has made significant progress toward achieving the nuclear disarmament goals set forth in the NPT, and is in compliance with its Article VI obligations. The NPT does not mandate disarmament or specific stockpile reductions by nuclear states, and it does not address actions they take to maintain their stockpiles. NNSA disagrees with the assertion that Complex Transformation violates the NPT (see Comment Response 1.F, Volume III, Chapter III of the SPEIS).

5. NNSA should have included Stockpile Curatorship as a reasonable alternative fully considered in the SPEIS.

*Response:* The Curatorship Alternative as proposed by comments on the Draft SPEIS would have required NNSA to give up the capabilities to design and develop replacement nuclear components and weapons, forcing it to rely solely on the surveillance and non-nuclear testing program to maintain weapons and identify when they need repairs. NNSA believes it is unreasonable to give up these capabilities in light of the uncertainties concerning the aging of weapons and changing national security requirements. As explained in the SPEIS in Section 3.15, this would impair NNSA's ability to assess and, if necessary, address issues regarding the safety, security, and reliability of nuclear weapons (see Comment

Responses 2.H.2, 5.H.2, and 7.O, Volume III, Chapter III of the SPEIS).

6. The transformed complex should not support design or production of new design or modified nuclear weapons.

*Response:* NNSA is required to maintain nuclear weapons capabilities, including the capability to design, develop, produce, and certify new warheads. Maintenance of the capability to certify weapons' safety and reliability requires an inherent capability to design and develop new weapons. NNSA has not been directed to produce newly designed weapons (see Comment Responses 1.B, Volume III, Chapter III of the SPEIS).

7. NNSA should provide additional information on epidemiological studies of radiation health of workers and communities.

*Response:* Many of the workers at DOE's 20 major sites have been studied epidemiologically, some for decades. The National Institute for Occupational Safety and Health continues to update these studies as warranted by public health and scientific considerations. As more powerful epidemiological study designs become available, new studies of these workers may provide better information about health risks associated with radiation exposure (see Comment Responses 14.K.5 and 14.K.6, Volume III, Chapter III of the SPEIS). Many of the epidemiological studies and other related studies are available at *http://cedr.lbl.gov.*

8. NNSA should focus on clean-up of its sites rather than building new facilities to make weapons.

*Response:* DOE has a large remediation program and is aggressively addressing past contamination issues at each of its sites. This program is conducted in accordance with federal and state regulatory requirements and includes administrative and engineered controls to minimize releases, as well as surveillance monitoring of the environment and reporting of exposure assessments. These remediation activities are directed by federal and state regulators, have their own schedule and funding, and are separate from actions proposed in the SPEIS (see Comment Responses 7.J and 9.B, Volume III, Chapter III of the SPEIS). It is inaccurate to suggest that cleanup and transformation are mutually exclusive.

9. NNSA should consolidate special nuclear material from LLNL faster than its current schedule.

*Response:* NNSA has begun the removal of Category I/II SNM from LLNL, and plans to complete it by 2012. NNSA will continue to give this action the high priority requested by the commenter. Safety, security, and logistical issues associated with preparing SNM for shipment; shipping the materials; and storage at the receiving sites determine the schedule for completing this removal (see Comment Response 5.N.4, Volume III, Chapter III of the SPEIS).

10. The modernization of the Kansas City Plant should have been included in the SPEIS.

*Response:* The activities of the Kansas City Plant were not included in the SPEIS because NNSA concluded that decisions regarding the consolidation and modernization of the Kansas City Plant's activities (the production and procurement of electrical and mechanical non-nuclear components) would not affect or limit the programmatic alternatives analyzed in the SPEIS, or the decisions NNSA makes regarding these alternatives (see Comment Response 12.0, Volume III, Chapter III of the SPEIS).

11. The SPEIS is not written in plain language and lacks a clear format.

*Response:* NNSA prepared the SPEIS in accordance with the requirements of NEPA and the DOE and CEQ NEPA regulations. NNSA believes that the SPEIS is clearly written and organized in light of the highly technical subject matter and complex nature of the alternatives (see Comment Response 2.A, Volume III, Chapter III of the SPEIS).

12. NNSA inadequately addressed the environmental impacts of intentional destructive acts. NNSA must disclose the potential impacts of successfully executed credible terrorist attack scenarios at sites in the nuclear weapons complex and make this information available to the public.

*Response:* A classified appendix to the Complex Transformation SPEIS evaluates the potential environmental impacts of credible terrorist attacks that NNSA assumed (for purposes of analysis pursuant to NEPA) were successful at specific existing and proposed facilities. The appendix is classified both because the scenarios evaluated contain classified information and because there is a risk that these scenarios and their potential impacts could be exploited by terrorists or others contemplating harmful acts. Therefore, the SPEIS provides limited information about these acts and their potential consequences (see ''Potential Environmental Impacts'' above and Comment Responses 13.B and 13.D, Volume III, Chapter III of the SPEIS).

13. NNSA failed to consider long-acting consequences of nuclear weapons production, including the impacts that result from every year of operation. NNSA also failed to consider the deployment or potential use of the nation's nuclear arsenal.

*Response:* The SPEIS assesses the direct, indirect, and cumulative environmental impacts of the No Action Alternative and reasonable alternatives for the proposed action. Impacts are assessed for both construction and operations. For operations, the SPEIS focuses on the steady-state impacts of operations. Those annual operational impacts are assumed to occur year-after-year. Now that NNSA has made decisions regarding programmatic alternatives, it may need to prepare additional NEPA documents such as site- or facility-level analyses (e.g., the ongoing Y–12 SWEIS for a UPF now that NNSA has decided to locate it at Y–12) (see Comment Response 11.0, Volume III, Chapter III of the SPEIS). NNSA does not make decisions concerning the size, deployment or potential use of the nation's nuclear arsenal, and therefore the consequences of these decisions are not appropriate for analysis in the SPEIS.

14. NNSA inadequately addressed the cumulative impacts of the alternatives, including a detailed and careful analysis of the cumulative impacts of major nuclear-related facilities in New Mexico. Additionally, Comment Response 14.J.4 incorrectly states that Appendix C and D include information about an analysis of cumulative impacts with an extended region of influence of 100 miles.

*Response:* NNSA addressed potential cumulative impacts resulting from Complex Transformation and ongoing and reasonably anticipated actions of NNSA, other agencies and private developers. In response to public comments, NNSA added a detailed analysis of the cumulative impacts of major nuclear-related facilities in New Mexico. NNSA thinks that analysis is appropriately detailed. The assessment of cumulative impacts is in Chapter 6 of Volume II of the SPEIS (see Comment Responses 2.I and 14.O, Volume III, Chapter III of the SPEIS). With respect to the analysis of cumulative impacts with an extended region of influence of 100 miles, NNSA agrees that the Final SPEIS incorrectly referred the reader to Appendix C and D. NNSA intended to refer the reader to the LANL SWEIS, which shows that extending the region of influence out another 50 miles increases the affected population by 300 percent, while the population dose increases by only 13 percent. NNSA regrets this error.

15. NNSA inadequately addressed Environmental Justice, including a more detailed analysis of transportation impacts and waste disposal.

*Response:* Under Executive Order 12898, NNSA is responsible for identifying and addressing potential disproportionately high and adverse human health and environmental impacts on minority or low-income populations. Based on the SPEIS's analyses, NNSA concluded that there would not be any disproportionately high and adverse human health and environmental impacts on minority or low-income populations. In response to public comments received, NNSA also included information regarding a ''special pathways analysis'' for operations at LANL for the purpose of assessing how impacts would change compared to standard modeling results. The special pathway analysis is identified in Volume II, Chapter 5, Section 5.1.10 of the SPEIS, and the results of that analysis are presented in Comment Response 14.J, Volume III, Chapter III of the SPEIS.

16. NNSA inadequately addressed the impacts associated with design and production of Reliable Replacement Warheads.

*Response:* The continuing transformation of the complex is independent of decisions regarding Reliable Replacement Warheads that the Congress and President may make. At present, the Congress has declined to provide additional funding for development of these warheads (see Comment Responses 2.K.19 and 8.0, Volume III, Chapter III of the SPEIS).

17. NNSA has provided an inadequate basis to decide to locate a UPF at Oak Ridge and there is insufficient information in the SPEIS to select a site for a UPF.

*Response:* Programmatic alternatives regarding a UPF are analyzed in the SPEIS. The SPEIS is the appropriate document to analyze and support programmatic decisions related to major uranium missions and facilities. The Y–12 SWEIS, currently under preparation, will evaluate site-specific issues associated with continued production operations at Y–12, including issues related to construction and operation of a UPF such as its location and size. NNSA will make decisions regarding the specific location and size based on the more detailed analysis that will be in the Y–12 SWEIS (see Comment Response 5.C.2, Volume III, Chapter III of the SPEIS).

18. Commenters said that NNSA should accelerate consolidation of excess SNM and down-blend hundreds of metric tons of excess HEU, which is highly desirable to nuclear terrorists who could use it to quickly and easily create a crude nuclear device.

*Response:* Disposal of excess SNM is addressed by the Material Disposition Program. NNSA has an ongoing program to down-blend HEU for disposition, as described in the ROD (61 FR 40619; August 5, 1996) for the *Disposition of Surplus Highly Enriched Uranium Environmental Impact Statement* (DOE/EIS–0240, 1996). The potential environmental impacts of an intentional destructive act, such as terrorism or sabotage, are addressed in a classified appendix to the SPEIS (see Comment Responses 5.M, 5.N, and 13.0, Volume III, Chapter III of the SPEIS).

19. NNSA should not move forward with the construction of the CMRR–NF at LANL because of problems with NNSA construction projects, the federal government's limited economic resources, and adequate existing space at the LANL PF–4. Another commenter asked why the CMRR–NF is needed.

*Response:* As explained in detail in this ROD, the CMRR–NF is a needed modernization of LANL's plutonium capabilities. Continued use of the existing CMR facility is inefficient and poses ES&H and security concerns that cannot be addressed by modifying the CMR. The CMRR–NF will be safer, seismically robust, and easier to defend from potential terrorist attacks (see Comment Responses 3.0, 5.C.1, 5.C.6, and 9.0, Volume III, Chapter III of the SPEIS).

20. The potential environmental impacts of postulated accidents are not adequately addressed in the SPEIS, including the potential impacts to air, land, and water resulting from postulated accidents.

*Response:* Accidents are addressed in the Health and Safety Sections for each site and include analyses for a full spectrum of accidents with both high and low probabilities (see Comment Response 14.N, Volume III, Chapter III of the SPEIS). The accident analysis focused on human health impacts, which NNSA decided was a reasonable metric for comparing the programmatic alternatives.

21. A new, more thorough, more transparent cost analysis needs to be done before Complex Transformation plans are allowed to proceed.

*Response:* The purpose and need for complex transformation result from NNSA's need for a nuclear weapons complex that can be operated less expensively. NNSA prepared business case analyses to provide cost information on the alternatives considered in the SPEIS. NNSA considered these studies, the analyses in the SPEIS, and other information to make these decisions regarding transforming the complex. The business case analyses are available to the public on the project Web site: *http://www.ComplexTransformationSPEIS.com* (see Comment Response 9.0, Volume III, Chapter III of the SPEIS). NNSA believes these studies are adequate for making programmatic and project-specific decisions.

22. NNSA failed to consider an alternative that truly consolidates the nuclear weapons complex.

*Response:* The SPEIS analyzes alternatives that would make the complex more efficient and responsive than it would be under the No Action Alternative. Consolidation alternatives were formulated with that purpose and need in mind. The SPEIS assesses a range of reasonable alternatives for the future weapons complex that includes alternatives that, if they had been selected, would have eliminated one or more nuclear weapons complex sites (see Comment Responses 7.A.5, 7.A.6, and 7.A.7, Volume III, Chapter III of the SPEIS). As this ROD explains, relocating uranium, plutonium, and A/D/HE capabilities would be too expensive and risky.

23. Complex Transformation endangers human health.

*Response:* New facilities would be designed and operated to minimize risk to both workers and the general public during normal operations and in the event of an accident. Benefiting from decades of experience, NNSA employs modern processes; manufacturing technologies; and safety, environmental, security, and management procedures to protect against adverse health impacts (see Comment Response 14.K, Volume III, Chapter III of the SPEIS).

24. NNSA has not adequately addressed public comments about water usage, radioactive and toxic air emissions, impacts to humans, and impacts to agricultural lands or prime farmlands surrounding LANL resulting from past, current, and future operations of LANL.

*Response:* The environmental impacts of operating LANL are described in Chapter 4, Section 4.1 of Volume 1 of the SPEIS. The analysis examined surrounding land uses, water availability and usage, air quality and airborne emissions, surface and groundwater quality and discharges, human health, waste management, visual resources, noise, and other impacts of operating LANL. Chapter 5, Section 5.1 of Volume II of the SPEIS analyzes the potential environmental impacts of the alternatives evaluated in the SPEIS in the same media areas. See Comment Responses 14.E.11 through 14.E.14, Volume III, Chapter III of the SPEIS. For example, comment response

14.E.11 states that ''due to concern expressed for the quality of agriculture in the LANL region, NMED (New Mexico Environment Department) collects and analyzes foodstuff samples as part of its surveillance program to ensure quality standards are met.'' The 2008 LANL SWEIS (DOE/EIS–0380), and the ROD (73 FR 55833; Sept. 26, 2008) based on the analyses in it, presented NNSA's responses to similar comments in more detail. NNSA based its programmatic decisions affecting LANL on both the SPEIS and the SWEIS.

25. Albuquerque will begin drinking water from the Rio Grande on December 5, 2008. The Albuquerque Water Utility Authority (WUA), which oversees the project, has detected long-lived alpha-emitting radionuclides in the river. Although the levels of these radionuclides are below regulatory concern, the research shows that the current EPA standards for long-lived alpha-emitting radionuclides are not protective of the fetus and the young child. The WUA has asked LANL to reveal the extent of the radiation on the plateau and canyons that contribute to the river to no avail.

*Response:* Water quality and use at LANL are addressed in the SPEIS at Section 4.1.5 of Volume I. Impacts of complex transformation on water resources at LANL are addressed in Section 5.1.5 of Volume II. There is no indication that contamination from LANL is affecting Albuquerque's drinking water supply. According to a 2007 water quality report, gross alpha particle activity, radium-228, radium-226, and uranium were among regulated substances that were monitored but not detected (Albuquerque Bernilillo County Water Utility Authority, 2007 Drinking Water Quality Report). The 2007 water quality report may be accessed at *http://www.abcwua.org/content/view/280/484/* (see Comment Response 14.E, Volume III, Chapter III of the SPEIS).

26. NNSA failed to address comments concerning elevated levels of radionuclides in the Rio Embudo Watershed.

*Response:* The levels of radionuclides from the fallout produced by atmospheric testing of nuclear weapons (e.g., cesium-137, strontium-90, and plutonium-239) are expected to be elevated at Trampas Lake and in the Sangre de Cristo Mountains in which the Embudo Valley lies. The Trampas Lake data agree with expectations for global fallout at this location and are not a result of LANL activities (see Comment Response 14.K.8, Volume III, Chapter III of the SPEIS).

27. Seismic fasteners, ties, and other protections should be used in the construction of the Radiological Laboratory, Utility, and Office Building (RLUOB) within the CMRR project.

*Response:* NNSA is building the RLUOB to the highest applicable seismic standards. Even though the structure is a radiological laboratory and would not normally be constructed to the same standards as a high hazard nuclear facility, NNSA is nevertheless constructing it to those higher standards (see Comment Response 14.K.7, Chapter III, Volume III of the SPEIS).

28. NNSA did not respond to the comment that it must expand air monitoring in downwind communities and should no longer hide under the grandfather clause for air emissions from its old facilities at LANL.

*Response:* Operating permits issued pursuant to Title V of the Clean Air Act at NNSA sites include requirements for monitoring emissions from sources and keeping records concerning those sources and their emissions. Monitoring of the environment in and around NNSA sites generally includes air, water, soil, and foodstuffs, and monitoring results are reported in annual environmental surveillance reports. Chapter 10 of Volume II of the SPEIS describes permits issued by regulatory authorities for NNSA facilities and operations. At LANL, NNSA complies with the Clean Air Act and its emissions are regulated by the New Mexico Environment Department (see Comment Response 14.D.2, Chapter III, Volume III of the SPEIS).

29. Will LANL become the second Waste Isolation Pilot Plant (WIPP) site in New Mexico under the Complex Transformation proposal?

*Response:* This comment concerns the disposal path for newly generated transuranic waste that could result from decisions made on complex transformation. The alternatives analyzed in the SPEIS could generate transuranic waste after WIPP's scheduled closure in 2035. At this time, DOE is not considering any legislative changes to extend WIPP's operation or to develop a second repository for transuranic waste. Any transuranic waste that is generated without a disposal pathway would be safely stored until disposal capacity becomes available (see Comment Response 14.M.4, Chapter III, Volume III of the SPEIS).

30. LANL has failed to install a reliable network of monitoring wells at the laboratory.

*Response:* LANL's groundwater monitoring program was discussed in the 2008 LANL SWEIS. Groundwater monitoring at LANL is conducted in compliance with the ''Order on Consent for Los Alamos National Laboratory'' (Consent Order), and consistent with the Interim Facility-wide Groundwater Monitoring Plan that was approved by the New Mexico Environment Department in June 2006. Some of the groundwater data at LANL are being reassessed due to potential residual drilling fluid effects. Drilling fluid effects are quantitatively assessed in LANL's Well-Screen Analysis Report, Rev. 2 (LA–UR–07–2852; May 2007). Fifty-two percent of the well screens evaluated in this report produce samples that are not significantly impacted by drilling fluids. LANL has initiated a program to better evaluate the wells and to rehabilitate wells that may be producing suspect results. LANL is using the results of a pilot study to develop a proposed course of action for approval by the New Mexico Environment Department. The process is established by and in compliance with the Consent Order (see Comment Responses 14.E.2 and 14.E.1, Chapter III, Volume III of the SPEIS).

31. The existing CMR facility is not safe and the seismic hazards at LANL are uncertain. The commenters assert that many of their specific comments concerning seismic issues at LANL were not properly addressed. The commenters also state that due to seismic risks, all plutonium operations at LANL should immediately cease.

*Response:* Section 4.1.6 of Volume I of the SPEIS addresses seismic issues at LANL and Comment Responses 7.0, 14.F.1, 14.K.12, 14.N.8 and 19.E provide additional information on the seismic issues at LANL and the Justification for Continued Operation under which the laboratory's facilities operate. NNSA decided to construct the CMRR–NF largely because the CMR facility cannot be modified to safely operate for many more years (see the basis for decision for plutonium research and development and operations above).

In addition to the comments that were essentially identical to ones submitted on the Draft SPEIS and to which NNSA responded to in the Final SPEIS, NNSA received the following new comments.

1. Some commenters stated they were unable to identify responses in the Final SPEIS to some of their comments.

*Response:* NNSA reviewed the comments it received to ensure that responses had been included in the Final SPEIS. Based on this review, NNSA concluded that it had provided appropriate responses for all comments and that responses to these commenters' submissions were included in the Final SPEIS.

2. The April 9, 2008, comments of the New Mexico Conference of Catholic Bishops, in a letter signed by Most Rev. Michael J. Sheehan, Archbishop of Santa Fe, and Most Rev. Ricardo Ramirez, CSB, Bishop of Las Cruces, were omitted from the SPEIS's text and compact disc (CD).

*Response:* NNSA does not have any record of receiving the letter identified above prior to issuing the Final SPEIS. However, NNSA contacted the commenter and requested a copy of the letter. That letter raised questions and issues related to: Potential violations of treaties; an international arms race; whether transformation of LANL will result in a more responsive infrastructure; whether the proposed transformation of the complex is based on a Nuclear Posture Review conducted before or after September 11, 2001; the type of Congressional support that has been received; and the costs and funding source for decontamination and decommissioning. NNSA reviewed these comments and concluded that the Final SPEIS addresses each of them.

3. A commenter asserted that the Scarboro community, within 5 miles of the Y–12 facility, is disproportionately impacted, historically and currently, by the pollutants released on the Oak Ridge Reservation. This commenter also urged NNSA to refrain from issuing a ROD for the SPEIS until it commissions and receives an independent study of canned subassembly/secondary reliability, indicating whether a UPF is actually necessary; and until NNSA prepares a supplemental EIS considering the nonproliferation impacts of the proposed action.

*Response:* NNSA conducted its Environmental Justice analysis consistent with the requirements of the applicable Executive Order and related guidance. Section 14.J of Volume III, Chapter III, addresses the Environmental Justice comments received during the comment period. The Scarboro community is identified as the closest developed area to Y–12 (see Volume II, Chapter 4, Section 4.9.2 of the SPEIS). The analysis in the SPEIS did not result in any disproportionately high and adverse impacts on any minority or low-income populations at Y–12 (see Volume II, Chapter 5, Sections 5.9.10, 5.9.11, and 5.9.12 of the SPEIS). The reasons for NNSA's decision to proceed with a UPF are set forth above in the discussion of uranium manufacturing and research and development. Comment Response 1.F, Volume III, Chapter III, addresses the nonproliferation impacts of Complex Transformation.

4. The Comment Response Document does not include several public petitions, including one from members of Santa Clara Pueblo supporting the comments made by the Tribal Council of Santa Clara Pueblo. Another petition circulated by youth in the Espanola Valley by the Community Service Organization del Norte (CSO del Norte) is also omitted. Many of the individual comment letters from people living in the Rio Embudo Watershed are missing as well. There is no listing of the names of these commenters in Tables 1.3–3, 1.3–4, 1.3–5 or 1.3–6. The listing of the ''Campaign Comment Documents'' fails to give any indication of the leaders of the campaigns or any geographic reference, unless one flips through that section of the document.

*Response:* NNSA received approximately 100,000 comment documents on the Draft SPEIS from federal agencies; state, local, and tribal governments; public and private organizations; and individuals. In addition, during the 20 public hearings that NNSA held, more than 600 speakers made oral comments. NNSA made every effort to include all comment documents in the SPEIS and to identify and to address every comment. Because it would be impractical to list the names of all commenters who submitted campaign e-mails, letters, and postcards, those names are provided electronically in the CD version of the SPEIS and on the project Web site (*http://www.ComplexTransformationSPEIS.com*). In addition, the CD contains additional information on the public comment period and includes meeting transcripts and signatories for campaign documents and petitions. With regard to the petition from members of the Santa Clara Pueblo, NNSA believes this petition was submitted as a comment on the 2008 LANL SWEIS and not as a comment on the SPEIS. NNSA responded to the petition in the ROD it issued in September that was based on the SWEIS. If any comment documents or petitions were omitted from the SPEIS, NNSA regrets that.

5. In Comment Response 14.K.11, Chapter III, Volume III of the SPEIS, NNSA, in response to a comment related to under-reported historic radiation emissions, stated that it was ''unaware of any published CDC [Centers for Disease Control and Prevention] study with findings as described by the commenter.'' The commenter had provided a reference to a Los Alamos Historical Document Retrieval and Assessment Project report for documentation of their claim that ''DOE has grossly under-reported historic radiation emissions by nearly 60-fold.''

*Response:* NNSA reviewed the Los Alamos Historical Document Retrieval and Assessment Project report, and NNSA stands by Comment Response 14.K.11, Chapter III, Volume III of the SPEIS, which states that, ''Chapter 4, Section 4.6.1, of the LANL SWEIS (LANL 2008) shows the radiation doses received over the past 10 years from LANL operations by the surrounding population and hypothetical maximally exposed individual (MEI). The annual dose to the hypothetical MEI has consistently been smaller than the annual 10-millirem radiation dose limit established for airborne emissions by the U.S. Environmental Protection Agency. The final LANL Public Health Assessment, by the Agency for Toxic Substances and Disease Registry, reports that ''there is no evidence of contamination from LANL that might be expected to result in ill health to the community,'' and that ''overall, cancer rates in the Los Alamos area are similar to cancer rates found in other communities'' (Agency for Toxic Substances and Disease Registry, *Public Health Assessment, Final, Los Alamos National Laboratory,* 2006).

6. A commenter noted that Comment Response 14.J.4, Chapter III, Volume III, of the SPEIS incorrectly refers the reader to Appendix D for a description of the accident analysis.

*Response:* The reference to Appendix D is incorrect. The correct reference should have been to Appendix C. NNSA regrets the confusion caused by this error.

7. A commenter stated that NNSA made a commitment to refrain from making a siting decision on the UPF until the Y–12 SWEIS is completed.

*Response:* NNSA did not make such a commitment. This ROD explains NNSA's decision to construct a UPF at Y–12 based on the analysis contained in the SPEIS and other factors. This decision is not a decision as to where at Y–12 the new facility would be located or its size. Those decisions will be made based on the more detailed analysis in the Y–12 SWEIS. Additionally, the Y–12 SWEIS will include one or more alternatives that do not include a UPF. The public will have the opportunity to review and comment on the Draft SWEIS when it is prepared.

8. With respect to the new section (Section 6.4) that NNSA added to the Final SPEIS to provide more information on the potential cumulative impacts of nuclear activities in New Mexico, one commenter stated that Pantex should be added to that cumulative assessment because it is just

as close to WIPP and to LANL as WIPP and LANL are to each other. Another commenter stated that the impacts of the WSMR should be included in that assessment.

*Response:* NNSA added Section 6.4 in response to public comments on the Draft SPEIS that requested an analysis of cumulative impacts for the three DOE nuclear Facilities in New Mexico, as well as other major planned or proposed nuclear facilities in the state. In part, these comments stated that the regions of influence for LANL and SNL/NM overlap and that all three DOE sites are along the Rio Grande corridor in New Mexico. NNSA believes that Section 6.4 is adequate and responsive to public comments received regarding the cumulative impact assessment of nuclear activities in New Mexico. As Pantex is not located in New Mexico, and its region of influence does not extend into New Mexico, it was not included in Section 6.4. Also, because the WSMR does not conduct nuclear activities, it was not included in Section 6.4.

9. A commenter stated that the socioeconomic impacts described in the SPEIS are ''incomplete and vague,'' and asked for an explanation regarding the economic multiplier used in the analysis.

*Response:* NNSA reviewed this comment and believes that the socioeconomic analyses contained in the SPEIS are appropriate and comply with NEPA's requirements. The economic multipliers used in the SPEIS vary by location and are consistent with the multipliers estimated by the U.S. Bureau of Labor Statistics and multipliers used in other NEPA documents.

10. The SPEIS failed to address impacts on global warming.

*Response:* The SPEIS assesses the direct, indirect, and cumulative environmental impacts of the No Action Alternative and reasonable alternatives for the proposed action. The assessment of impacts includes, where appropriate, the direct and indirect contributions to the emission of greenhouse gases resulting from operation and transformation of the nuclear weapons complex. As to the programmatic alternatives analyzed in the SPEIS, the direct impacts would result from the construction and operation of major facilities involved in operations using SNM (e.g., a CPC, CNPC, CMRR–NF, UPF), and from the transportation of components, materials and waste. The emissions of carbon dioxide ($CO_2$) from construction and operation of proposed major facilities are estimated in Chapter 5 (see Tables 5.1.4–1 and 5.1.4–3 in Section 5.1.4 of Chapter 5, Volume II of the SPEIS). The potential emissions from transportation are a direct function of numbers of trips and their distances. The significant differences among the various programmatic alternatives as to transportation also appear in Chapter 5 (see Section 5.10 of Chapter 5, Volume II of the SPEIS).

The indirect impacts of the programmatic alternatives would result primarily from the use of electricity that is generated from the mix of generating capacities (gas, coal, nuclear, wind, geothermal, etc.) operated by the utilities NNSA purchases power from; these utilities may alter that mix in the future regardless of the decisions NNSA makes regarding transformation of the complex. The use of electricity under the programmatic alternatives is shown in Chapter 5 (see Tables 5.1.3–1 and 5.1.3–2 in Section 5.1.3 of Chapter 5, Volume II of the SPEIS).

Overall, the release of greenhouse gases from the nuclear weapons complex constitutes a miniscule contribution to the release of these gases in the United States and the world. Overall U.S. greenhouse gas emissions in 2007 totaled about 7,282 million metric tons of $CO_2$ equivalents, including about 6,022 million metric tons of $CO_2$. These emissions resulted primarily from fossil fuel combustion and industrial processes. About 40 percent of $CO_2$ emissions come from the generation of electrical power (Energy Information Administration, ''Emissions of Greenhouse Gases in the United States 2007,'' DOE/EIA–0573 [2007]).

As the impacts of greenhouse gas releases on climate change are inherently cumulative, NNSA, and the DOE as a whole, strive to reduce their contributions to this cumulatively significant impact in making decisions regarding their ongoing and proposed actions. DOE's efforts to reduce emissions of greenhouse gases extend from research on carbon sequestration and new energy efficient technologies to making its own operations more efficient in order to reduce energy consumption and thereby decrease its contributions to greenhouse gases.

NNSA considers the potential cumulative impact of climate change in making decisions regarding its activities, including decisions regarding continuing the transformation of the nuclear weapons complex. Many of these decisions are applicable to the broad array of NNSA's activities, and therefore are independent of decisions regarding complex transformation. For example, NNSA (and other elements of the Department) are entering into energy savings performance contracts at its sites, under which a contractor examines all aspects of a site's operation for ways to improve energy use and efficiency. Also, NNSA seeks to reduce its contribution to climate change through decisions regarding individual actions, such as pursuing LEED certification for its new construction and refurbishment of its aging infrastructure. Examples of these decisions include projects that replace aging boilers and chillers with equipment that is more energy efficient. Such projects are underway at Y–12, SNL/NM, and LANL (''DOE Announces Contracts to Achieve $140 Million in Energy Efficiency Improvements to DOE Facilities,'' August 4, 2008, available at: *http://www.energy.gov/6449.htm*).

NNSA considered its contributions to the cumulative impacts that may lead to climate change in making the programmatic decisions announced in this ROD. These decisions will allow NNSA to reduce its greenhouse gas emissions by consolidating operations, modernizing its heating, cooling and production equipment, and replacing old facilities with ones that are more energy efficient. Many of these actions would not be feasible if NNSA had selected the No Action Alternative, which would have required it to maintain the Complex's outdated infrastructure. Federal regulations and DOE Orders require the Department of Energy to follow energy-efficient and sustainable principles in its siting, design, construction, and operation of new facilities, and in major renovations of existing facilities. These principles, which will apply to construction and operation of a UPF at Y–12 and the CMRR–NF at LANL, as well as to other facilities, include features that conserve energy and reduce greenhouse gas emissions.

Issued at Washington, DC, this 15th day of December 2008.

**Thomas P. D'Agostino,**

*Administrator, National Nuclear Administration.*

[FR Doc. E8–30193 Filed 12–18–08; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

### Record of Decision for the Complex Transformation Supplemental Programmatic Environmental Impact Statement—Tritium Research and Development, Flight Test Operations, and Major Environmental Test Facilities

**AGENCY:** National Nuclear Security Administration, U.S. Department of Energy.

**ACTION:** Record of Decision.

**SUMMARY:** The National Nuclear Security Administration (NNSA), a separately organized agency within the U.S. Department of Energy (DOE), is issuing this Record of Decision (ROD) for the continued transformation of the nuclear weapons complex (Complex). This ROD is based on information and analyses contained in the Complex Transformation Supplemental Programmatic Environmental Impact Statement (SPEIS) (DOE/EIS–0236–S4) issued on October 24, 2008 (73 FR 63460); comments received on the SPEIS; and other factors, including costs, technical and security considerations, and the missions of NNSA. The SPEIS analyzes the potential environmental impacts of alternatives for transforming the nuclear weapons complex into a smaller, more efficient enterprise that can respond to changing national security challenges and ensure the long-term safety, security, and reliability of the nuclear weapons stockpile.

The alternatives analyzed in the SPEIS are divided into two categories: programmatic and project-specific. Programmatic alternatives involve the restructuring of facilities that use or store significant (*i.e.*, Category I/II) quantities of special nuclear material (SNM).[1] These facilities produce plutonium components (commonly called pits [2]), produce highly enriched uranium (HEU) components including secondaries,[3] fabricate high explosives (HE) components and assemble and disassemble nuclear weapons. The decisions announced in this ROD relate to the project-specific alternatives. NNSA is issuing a separate ROD related to the programmatic alternatives.

The project-specific alternatives analyzed in the SPEIS involve the possible restructuring of the following missions involving research and development (R&D) and testing: (1) Tritium R&D; (2) flight test operations; (3) major environmental test facilities (ETFs); (4) high explosives R&D; (5) hydrodynamic testing; and (6) weapons support functions at Sandia National Laboratories/California (SNL/CA). In this ROD, NNSA announces decisions regarding the first three missions.

NNSA has decided to implement the preferred alternatives for these three missions described in the SPEIS and summarized in this ROD. The major elements of the decisions announced in this ROD are:

(1) Consolidate tritium R&D at the Savannah River Site (SRS) in South Carolina;

(2) Conduct flight testing in a campaign mode at Tonopah Test Range (TTR) in Nevada under a reduced footprint permit; and

(3) Consolidate major environmental test facilities at Sandia National Laboratories/New Mexico (SNL/NM).

These decisions will best enable NNSA to meet its statutory missions while minimizing technical risks, risks to mission objectives, costs, and environmental impacts. These decisions continue the transformation begun following the end of the Cold War and the cessation of nuclear weapons testing, particularly decisions announced in the 1996 ROD for the Programmatic Environmental Impact Statement for Stockpile Stewardship and Management (SSM PEIS) (DOE/EIS–0236) (61 FR 68014; Dec. 26, 1996).

NNSA will continue its missions involving high explosives R&D, hydrodynamic testing, and weapons support functions at SNL/CA as described in the No Action Alternative and pursuant to previous NNSA decisions. In other words, NNSA is not making any new decisions regarding these missions at this time.

**FOR FURTHER INFORMATION CONTACT:** For further information on the Complex Transformation SPEIS or this ROD, or to receive copies of these, contact: Ms. Mary E. Martin, NNSA NEPA Compliance Officer, Office of Environmental Projects and Operations, NA–56, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, toll free 1–800–832–0885, ext. 69438. A request for a copy of the document may also be sent by facsimile to 1–703–931–9222, or by e-mail to *complextransformation@nnsa.doe.gov*. The Complex Transformation SPEIS, this ROD, and additional information regarding complex transformation are available on the Internet at *http://www.ComplexTransformationSPEIS.com* and *http://www.nnsa.doe.gov.*

For information on the DOE NEPA process, contact: Ms. Carol M. Borgstrom, Director, Office of NEPA Policy and Compliance (GC–20), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, 202–586–4600, or leave a message at 1–800–472–2756. Additional information regarding DOE NEPA activities and access to many DOE NEPA documents are available on the Internet through the DOE NEPA Web site at: *http://www.gc.energy.gov/NEPA.*

**SUPPLEMENTARY INFORMATION:**

## Background

NNSA prepared this ROD pursuant to the regulations of the Council on Environmental Quality (CEQ) for implementing the *National Environmental Policy Act* (NEPA) (40 CFR Parts 1500–1508) and DOE's NEPA Implementing Procedures (10 CFR Part 1021). This ROD is based on information and analyses contained in the *Complex Transformation Supplemental Programmatic Environmental Impact Statement* (DOE/EIS–0236–S4) issued on October 24, 2008 (73 FR 63460); comments received on the SPEIS; other NEPA analyses as noted; and other factors, including cost, technical and security considerations, and the missions of NNSA. NNSA received approximately 100,000 comment documents on the Draft SPEIS from Federal agencies; state, local, and tribal governments; public and private organizations; and individuals. In addition, during the 20 public hearings that NNSA held, more than 600 speakers made oral comments.

National security policies require DOE, through NNSA, to maintain the United States' nuclear weapons stockpile, as well as the nation's core competencies in nuclear weapons. Since completion in 1996 of the SSM PEIS and associated ROD, DOE has pursued these objectives through the Stockpile Stewardship Program. This program emphasizes development and application of greatly improved scientific and technical capabilities to assess the safety, security, and reliability of existing nuclear warheads without nuclear testing. Throughout the 1990s, DOE also took steps to consolidate the Complex to its current configuration of three national laboratories (plus a flight test range operated by Sandia National Laboratories), four industrial plants, and a nuclear test site. This Complex enables NNSA to conduct research on weapons physics, materials science and engineering to design, develop, manufacture, maintain, and repair nuclear weapons; certify their safety,

[1] As defined in section 11 of the *Atomic Energy Act of 1954,* special nuclear material is: (1) plutonium, uranium enriched in the isotope 233 or in the isotope 235 and any other material which the U.S. Nuclear Regulatory Commission determines to be special nuclear material; or (2) any material artificially enriched by any of the foregoing. Special nuclear material is separated into Security Categories I, II, III, and IV based on the type, attractiveness level, and quantity of the material. Categories I and II require the highest level of security.

[2] A pit is the central core of a nuclear weapon, principally made of plutonium or enriched uranium.

[3] A secondary is the component of a nuclear weapon that contains elements needed to initiate the fusion reaction in a thermonuclear explosion.

security, and reliability; conduct surveillance on weapons in the stockpile; store Category I/II SNM; and dismantle and disposition retired weapons. Sites within the Complex and their current missions are described in the following paragraphs.

*Lawrence Livermore National Laboratory (LLNL), Livermore, California*—LLNL conducts research, design, and development of nuclear weapons; designs and tests advanced technology concepts; provides safety, security, and reliability assessments and certification of stockpile weapons; conducts plutonium and tritium R&D, hydrotesting, high explosives (HE) R&D and environmental testing; and stores Category I/II quantities of SNM. LLNL also conducts destructive and nondestructive surveillance evaluations on pits to evaluate their reliability. NNSA is currently removing Category I/II SNM from the site and by 2012 LLNL will not maintain Category I/II SNM. NNSA is constructing the National Ignition Facility (NIF) at LLNL, which will allow a wide variety of high-energy-density investigations. NIF is scheduled to begin operations in 2009.

*Los Alamos National Laboratory (LANL), Los Alamos, New Mexico*—LANL conducts research, design, and development of nuclear weapons; designs and tests advanced technology concepts; provides safety, security, and reliability assessments and certification of stockpile weapons; maintains production capabilities for limited quantities of plutonium components (*i.e.,* pits) for delivery to the stockpile; manufactures nuclear weapon detonators for the stockpile; conducts plutonium and tritium R&D, hydrotesting, HE R&D, and environmental testing; and stores Category I/II quantities of SNM. LANL also conducts destructive and nondestructive surveillance evaluations on pits to assess their reliability.

*Nevada Test Site (NTS), 65 miles northwest of Las Vegas, Nevada*—NTS maintains the capability to conduct underground nuclear testing; conducts high hazard experiments involving nuclear material and high explosives; provides the capability to process and dispose of a damaged nuclear weapon or improvised nuclear device; conducts non-nuclear experiments; conducts hydrodynamic testing and HE testing; conducts research and training on nuclear safeguards, criticality safety, and emergency response; and stores Category I/II quantities of SNM.

*Pantex Plant (Pantex), Amarillo, Texas*—Pantex dismantles retired weapons; fabricates HE components, and performs HE R&D; assembles HE, nuclear, and non-nuclear components into nuclear weapons; repairs and modifies weapons; performs nonintrusive pit modification; [4] and evaluates and performs surveillance of weapons. Pantex stores Category I/II quantities of SNM for the weapons program and stores other SNM in the form of surplus plutonium pits pending transfer to SRS for disposition.

*Sandia National Laboratories (SNL), Albuquerque, New Mexico; Livermore, California; and other locations*—SNL conducts systems engineering of nuclear weapons; conducts research, design, and development of non-nuclear components; manufactures non-nuclear components including neutron generators for the stockpile; provides safety, security, and reliability assessments of stockpile weapons; and conducts HE R&D, tritium R&D, and environmental testing. The principal laboratory is located in Albuquerque, New Mexico (SNL/NM); a division of the laboratory (SNL/CA) is located in Livermore, California. SNL also operates TTR near Tonopah, Nevada, for flight testing of gravity weapons (including R&D and testing of nuclear weapons components and delivery systems). In 2008, SNL/NM completed removal of its Category I/II SNM. SNL/NM no longer stores or uses Category I/II SNM on a permanent basis, although it may use Category I/II SNM for limited activities in the future. No SNM is stored at TTR, although some test operations have involved SNM.

*Savannah River Site (SRS), Aiken, South Carolina*—SRS extracts tritium and performs loading, unloading, and surveillance of tritium reservoirs, and conducts tritium R&D. SRS does not store Category I/II quantities of SNM for NNSA's weapons activities, but does store Category I/II quantities for other DOE activities. SRS is currently receiving Category I/II surplus, non-pit plutonium from LLNL for storage pending its disposition.

The following two sites are part of the Complex but will not be affected by decisions announced in this ROD.

*Kansas City Plant (KCP), Kansas City, Missouri*—KCP manufactures and procures non-nuclear components for nuclear weapons and evaluates and tests these components. KCP has no SNM. The General Services Administration, as the lead agency and NNSA, as a cooperating agency, prepared an Environmental Assessment (DOE/EA–1592, Apr. 2008) regarding the potential environmental impacts of modernizing the facilities and infrastructure for the non-nuclear production activities conducted by the KCP as well as moving these activities to other locations. The agencies issued a Finding of No Significant Impact (73 FR 23244; Apr. 29, 2008) regarding an alternative in the Kansas City area. The SPEIS does not assess alternatives for the activities conducted at the KCP.

*Y–12 National Security Complex (Y–12), Oak Ridge, Tennessee*—Y–12 manufactures uranium components for nuclear weapons, cases, and other nuclear weapons components; evaluates and tests these components; stores Category I/II quantities of HEU; conducts dismantlement, storage, and disposition of HEU; and supplies HEU for use in naval reactors.

**Alternatives Considered and Decisions**

In order to develop the project-specific alternatives to restructure R&D and testing facilities, NNSA identified reasonable actions that would reduce or consolidate activities, eliminate excess facilities, or otherwise make a mission more efficient and cost effective. NNSA assessed the requirements of each mission and methods to meet those requirements while making the weapons complex more secure and efficient. NNSA also developed alternatives that would restructure the facilities where R&D and testing are conducted. In addition to the environmental analyses of the impacts of these alternatives, NNSA completed detailed business case studies of the alternatives, which are available to the public at *http://www.ComplexTransformationSPEIS.com*. NNSA will continue activities in accordance with the No Action Alternative for three of the six project-specific missions: High explosives R&D, hydrodynamic testing, and weapons support functions at SNL/CA. For example, there is a continued need to conduct experiments involving weapons quantities of high explosives combined with plutonium. These experiments will continue in existing facilities at the NTS. For the three other project-specific missions—Tritium R&D, Flight Test Operations, and Major Environmental Test Facilities—NNSA has decided to make changes in them. NNSA's decisions and its bases for these decisions are described in the following paragraphs.

NNSA prepared a classified appendix to the SPEIS that evaluates the potential impacts of intentional destructive acts. Substantive details of terrorist attack scenarios, security countermeasures, and potential impacts are not released to the public because disclosure of this information could be used to plan attacks. Although the results of the

[4] Nonintrusive pit modification is modification to the external surfaces and features of a pit.

analyses were not disclosed in the unclassified SPEIS, the following general conclusion can be disclosed: the potential consequences of intentional destructive acts are highly dependent upon distance to the site boundary and size of the surrounding population—the closer and higher the surrounding population, the greater the potential consequences. In addition, it is generally easier and more cost-effective to protect new facilities, as modern security features can be incorporated into their design. The project-specific activities that are the subject of this ROD are not likely targets for intentional destructive acts, and therefore the decisions NNSA is making regarding these activities would not have significant potential impacts in this regard.

*A. Tritium R&D*

Alternatives Considered

In addition to analyzing the impacts associated with the No Action Alternative that would continue Tritium R&D activities at LLNL, LANL, SRS, and SNL/NM,[5] three other alternatives were evaluated: (1) Consolidate at SRS by moving gas transfer system R&D from LLNL[6] and LANL to SRS; (2) consolidate at LANL by moving gas transfer system R&D from LLNL to LANL; and (3) reduce activities in-place, which would reduce tritium operations at LLNL, LANL and SRS.

Alternatives Considered But Eliminated from Detailed Study

NNSA considered alternatives for tritium R&D other than those described above, but concluded that these alternatives were not reasonable and eliminated them from detailed analysis. As explained in the SPEIS, the following alternatives were considered but eliminated from detailed study: (1) Increasing or decreasing the tritium missions at SNL/NM; (2) consolidating tritium R&D at LLNL; and (3) removing the tritium target loading for NIF from LLNL.

Preferred Alternative

The Final SPEIS identified the preferred alternative for tritium as consolidating R&D at SRS. SRS would remain the site for tritium supply management and provide R&D support to production operations and gas transfer system development. Tritium R&D to support gas transfer system development currently conducted at LLNL and LANL would be consolidated at SRS into the following existing facilities: (1) H-Area New Manufacturing Building; (2) H-Area Old Manufacturing Building; and (3) Building 773–A. No new construction would be necessary to consolidate these missions, although minor upgrades to existing laboratories may be required. NNSA would move bulk quantities of tritium from LANL to SRS by 2009, and remove tritium materials greater than 30 grams from the Weapons Engineering Tritium Facility (WETF) at LANL by 2014. NNSA would then limit the amount of tritium in the WETF to 30 or fewer grams at any one time. This alternative would not affect neutron generator target loading at SNL/NM or R&D for NIF targets, or filling these targets, at LLNL.

Environmental Impacts of Alternatives

The environmental impacts of the alternatives are presented in Section 5.14 of the SPEIS. Under the No Action Alternative there would be no changes to impacts currently experienced. The environmental impacts of consolidating tritium R&D at SRS would be minor: Tritium emissions at SRS would increase by 2.4 percent over current emissions and impacts would remain below regulatory limits; tritium emissions at LANL would decrease by 42 percent compared to current emissions; about 25 jobs would be restructured at LANL and about 25 new jobs would be created at SRS; doses to workers and the public at SRS would remain small and within regulatory limits; and wastes would be managed in existing facilities. Transferring the LLNL's tritium R&D (not NIF tritium work) to SRS or LANL could be accommodated in existing SRS or LANL facilities without any significant changes. Phasing out tritium R&D operations at LLNL would have no significant effects.

Environmentally Preferable Alternative

NEPA's Section 101 (42 U.S.C. 4331) establishes a policy that Federal agencies have a continuing responsibility to improve and coordinate their plans, functions, programs and resources so that, among other goals, the nation may fulfill its responsibilities as a trustee of the environment for succeeding generations. The Council on Environmental Quality, in its ''Forty Most Asked Questions Concerning CEQ's NEPA Regulations'' (46 FR 18026; Mar. 23, 1981), defines the ''environmentally preferable alternative'' as the alternative ''that will promote the national environmental policy expressed in NEPA's Section 101.''

The analyses in the SPEIS of the environmental impacts associated with the tritium R&D alternatives indicated that the preferred alternative—to consolidate tritium R&D at SRS—is environmentally preferable. This alternative would result in minor increases in tritium emissions at SRS and corresponding reductions in emissions at LANL. At SRS, however, the tritium activities would be farther from the site boundary than at LANL, resulting in a smaller radiation dose to the maximally exposed individual (MEI). The reduction in dose to the population around LANL would be about equal to the increase in population dose at SRS. For accidents under the preferred alternative, there would be a lower potential dose to the maximally exposed individual at SRS than at LANL (again, because of the greater distance to the MEI at SRS), but, because of conservative assumptions about distribution of tritium releases among a larger total population, there would be a potentially larger population dose (see Section 5.14.1, Volume II of the SPEIS).

Decision on Tritium Research and Development Facilities

NNSA has decided to implement the preferred alternative to transfer tritium R&D in support of gas transfer system development from LLNL and LANL to SRS. SRS will continue tritium supply management and R&D support for production and gas transfer system filling and handling operations. Neutron generator target loading at SNL/NM and production of NIF targets at LLNL, which involve small quantities of tritium, will continue at those sites. NNSA will remove tritium materials greater than 30 grams from the WETF at LANL by 2014. NNSA would then limit the amount of tritium in this facility to 30 or fewer grams at any one time.

Basis for Decision on Tritium

NNSA decided to consolidate tritium R&D in support of gas transfer system development at SRS and remove tritium materials greater than 30 grams from the WETF at LANL by 2014 because this consolidation is environmentally preferable and furthers NNSA's objective of a smaller, more efficient enterprise that can respond to changing national security requirements. Transferring tritium R&D from LLNL and LANL to SRS allows consolidation of all handling operations involving significant quantities of tritium at one

[5] Tritium Operations at SNL/NM are primarily associated with the Neutron Generator Production Facility, which would be unaffected under all alternatives.

[6] This consolidation does not include R&D for NIF targets and filling these targets. Those operations would remain at LLNL under all alternatives.

site. SRS currently has tritium processing, storage, reservoir loading/unloading, and tritium production R&D missions. SRS also has available facility space to accommodate consolidation of R&D for gas transfer system development, which will allow NNSA to pursue elimination of duplicate capabilities at other sites. Benefits will also result from more integrated operations and attention by SRS personnel to this primary weapons program mission, which will enable NNSA to improve its use of personnel and facilities and to better meet requirements for tritium R&D in the future. This consolidation is possible because of reductions in the stockpile. Much of the tritium facility infrastructure at SRS was built for the much larger stockpile, and it can now be modified and used for capabilities that are currently located at other sites. Eliminating redundant tritium capabilities also enhances a more interdependent enterprise in which personnel from the nuclear weapons complex sites must work more effectively together while sharing facility capabilities at a single site.

NNSA has concluded that the benefits of reduced environmental impacts and of a smaller, more interdependent enterprise outweigh the cost and technical risks of consolidating tritium R&D in support of gas transfer system development at SRS. Although the business case study for tritium R&D (*Tritium R&D Business Case Report*, Oct. 17, 2008) estimated that the cost for consolidating these activities at SRS will be greater than the cost of other alternatives, NNSA believes it can minimize the costs and risks of consolidation through effective transition planning.

There would be increased programmatic risk in making this change if LANL's WETF operations were discontinued prior to establishing the necessary capabilities at SRS. However, the transfer of tritium R&D from LANL to SRS is currently estimated to take up to 5 years and, during this time, NNSA will maintain the WETF in a functional status for experimental purposes to address any unanticipated stockpile issues and to support Life Extension Programs for weapons.[7] NNSA's intention is then to close WETF after its functional status is no longer needed to support transfer of tritium R&D to SRS.

*B. Flight Test Operations for Gravity Weapons*

Alternatives Considered

In addition to analyzing the No Action Alternative, NNSA evaluated four alternatives for conducting flight test operations: (1) High-tech mobile upgrade; (2) operate at TTR in a campaign mode; (3) transfer flight test operations to White Sands Missile Range (WSMR) in New Mexico; and (4) transfer flight test operations to the NTS. The Campaign Mode Alternative has three options: campaign from the NTS, campaign from TTR under the existing land use permit with the U.S. Air Force, and campaign from TTR under a new reduced footprint permit (see Section 3.10.3 of the Final SPEIS for more information).

Under the No Action Alternative, High-Tech Mobile Upgrade Alternative, and Campaign Mode Alternative (all three options), NNSA would continue to conduct flight testing at TTR. There are minor differences in most aspects of these alternatives; however, the major difference would be staffing levels at TTR and the amount of land under NNSA's control.

NNSA also considered two alternatives that would discontinue flight testing at TTR and move the operations to either WSMR or NTS. Both of these alternatives would require construction of a concrete target 500 feet in diameter and 12 inches thick. Under both of these alternatives, NNSA and contractor personnel at TTR would either be transferred or laid off.

NNSA has conducted flight tests at test ranges other than TTR when specific test requirements could not be met at TTR. Under any of the alternatives considered in the SPEIS, NNSA might conduct occasional flight tests at different test ranges consistent with the environmental reviews for those sites.

Alternatives Considered But Eliminated From Detailed Study

NNSA considered flight test ranges operated by the Department of Defense, including Eglin Air Force Base in Florida, the China Lake testing and training range in California, and the Utah Test and Training Range. Each of these sites was determined to be unsuitable, primarily because the soils, underlying geologic formations, or both would make the recovery of deeply buried penetrators infeasible.

Preferred Alternative

The Final SPEIS identified the preferred alternative for flight test operations for gravity weapons as the Campaign Mode Operation of Tonopah Test Range (Option 3—Campaign under Reduced Footprint Permit). Under this alternative, NNSA would reduce the footprint of its activities at TTR, upgrade equipment with mobile capability, and operate in campaign mode. NNSA expects it would not use Category I/II SNM in future flight tests.

Environmental Impacts of Alternatives

The environmental impacts of the alternatives are presented in Section 5.15 of the SPEIS. Under the No Action Alternative there would be no changes to impacts currently experienced and no change to the permitted area at TTR (280 square miles). There would be no significant change in the workforce at TTR and no impacts to regional employment, income, or labor force.

The environmental impacts of the High-Tech Mobile Upgrade Alternative would not differ significantly from the No Action Alternative. This alternative would allow for a reduction in the operational costs of TTR through the introduction of newer, more efficient and technologically advanced equipment. There would be no construction required for this alternative. Annual operating requirements would be the same as for the No Action Alternative and there would be negligible effects to region of influence employment, income, and labor force.

All of the options under the Campaign Mode Alternative would retain flight testing operations at TTR, but would have socioeconomic impacts of varying levels. The reductions in employment would have secondary impacts on the service sector and commercial establishments in the region of influence. Because the flight testing operations would be the same under this alternative as both No Action and High-Tech Mobile Upgrade Alternatives, other environmental impacts would remain about the same. Option 1, Campaign from NTS, would result in the loss of approximately 92 full-time jobs at TTR, reducing the permanent workforce from 135 to 43. Option 2, Campaign under the Existing Land Use Permit, would result in the loss of approximately 57 jobs at TTR. Option 3, Campaign under a Reduced Footprint Permit, would result in the loss of about 70 jobs at TTR. However, for Options 2 and 3, the job loss would be partially offset by the addition of about 20 security guards as the Air Force assumes

[7] The Life Extension Program is an NNSA program that ensures the Nation's aging nuclear weapons are capable of safely and reliably meeting national defense requirements without producing new warheads or conducting nuclear tests. The purpose of this program is to refurbish existing nuclear weapons to extend their life and provide structural enhancements.

responsibility for continued contract site security, reducing the net job loss to approximately 37 and 50 jobs, respectively. In addition to socioeconomic impacts, Option 3 could reduce the area NNSA controls at TTR from 280 square miles to potentially less than 1 square mile. The reduction in footprint would be coordinated with the Air Force, and would not affect ongoing DOE and NNSA environmental restoration activities and responsibilities at TTR resulting from past testing by the Atomic Energy Commission, a predecessor of DOE. This reduction in footprint would not affect land use because the Air Force would continue to use TTR as a test and training range.

Transferring NNSA's flight testing operations from TTR to either WSMR or NTS would result in adverse socioeconomic impacts to the TTR region of influence, particularly the city of Tonopah. About 135 jobs would be lost at TTR and indirect effects on employment would include an additional loss of approximately 108 jobs. The annual impact to the income of the region of influence from both of these employment losses would be approximately $15.9 million ($10.2 million direct and $5.7 million indirect). The adverse socioeconomic impacts would extend to the housing market, schools, and community services.

Environmentally Preferable Alternative

The analyses in the SPEIS of the environmental impacts of the flight testing alternatives revealed that the No Action Alternative is environmentally preferable. This alternative would result in no increase in impacts to resources over the existing condition and would not have the adverse socioeconomic impacts of either the Campaign Mode options or of transferring flight test operations to WSMR or NTS.

Decision on Flight Testing

NNSA has decided to implement a campaign mode of operation at TTR as described in Option 3, Campaign under a Reduced Footprint Permit. NNSA would reduce the footprint of TTR, upgrade equipment with mobile capability, and operate in campaign mode. NNSA expects it would not use Category I/II SNM in future flight tests. Prior to making a decision to use these categories of SNM in future tests, NNSA would evaluate existing NEPA documents to determine if additional analysis would be required.

Basis for Decision on Flight Testing

NNSA decided to implement the preferred alternative, Option 3 of Campaign Mode Operation, because it poses the lowest risk to the mission, which was NNSA's most important consideration in making this decision. As explained in the next paragraph, although the alternative of transferring the program to WSMR would potentially result in lower costs, the significant risks to the execution of this mission do not justify pursuing these possible savings.

The risks to the mission are a result of the high demand for WSMR. WSMR is a national range with many different customers with diverse testing needs, and significant schedule coordination is required each year to meet these needs. An NNSA flight test program at WSMR would be assigned to priority category 4, behind programs such as Global War on Terrorism, major and minor research and development, test and evaluation programs, foreign military sales activities, and those programs that have been designated as documented Force/Activity Designator-1 programs. As a lower priority mission, NNSA's flight test program would not receive scheduling priority, which would pose risks to NNSA's mission it cannot accept. For example, because of the limited availability of nuclear certified aircraft, NNSA must generally accommodate its testing to times when Air Force aircraft are available. The low priority that would be assigned to NNSA flight testing at WSMR could limit NNSA's ability to conduct testing when aircraft become available. A secondary risk at WSMR is the uncertainty regarding the geology of the northern portion of the range and the associated uncertainty concerning NNSA's ability to use vertical recovery tools and techniques.

With respect to costs, NNSA conducted a detailed business case study of the flight testing alternatives (*Independent Business Case Analysis of Complex Transformation Flight Test Facilities Phase II,* Sept. 2008). This study provides a life-cycle cost comparison of the alternatives and includes costs associated with construction, transition, maintenance, operations, security, decontamination and decommissioning, and other activities. Based on this study, NNSA determined that conducting flight testing at TTR in a campaign mode with a reduced footprint would be the least expensive of the alternatives considered except for discontinuing operations at TTR and moving to WSMR.

Although the cost advantage of moving the program to WSMR could be as much as several million dollars annually, this is a small percentage of the total surveillance program budget. It also appears that the savings to the taxpayer might be lost due to the Air Force having to pick up new costs (now paid by NNSA) in order to conduct its programs at TTR. Additionally, potential scheduling delays and conflicts could further reduce or negate these savings.

Implementation of the campaign mode of operation and reduction of NNSA's footprint at TTR will have approximately the same environmental impacts as the No Action Alternative for all resources other than socioeconomics. The loss of about 70 jobs at TTR will have an adverse impact on the economy of the city of Tonopah; however, the impact will be less severe than from discontinuing flight testing at TTR and moving it to WSMR. In addition, as the Air Force would assume overall responsibility for site security, NNSA estimates that the approximately 20 current contractor security guard jobs would be retained.

NNSA recognizes that further planning and NEPA analysis may be required to implement some aspects of this option. The scope of these analyses could include security, facility operations and maintenance, environmental restoration, impact mitigation activities, or other topics, as appropriate. This could result in additional facility closures and demolitions or transfer of specified facilities from the NNSA to another user, such as the Air Force.

*C. Major Environmental Test Facilities*

Alternatives Considered

In addition to the No Action Alternative, NNSA evaluated two other alternatives for major Environmental Test Facilities: (1) Downsize-in-Place and (2) Consolidation of ETF Capabilities at One Site (either NTS or SNL/NM).

Under the No Action Alternative, NNSA would continue to operate redundant and aging ETF facilities at LLNL, LANL, SNL/NM, SNL/CA, and NTS. Only normal maintenance to meet safety and security standards would take place.

Under the Downsize-in-Place Alternative, facilities that are redundant, in need of major repair to enable continued operations, or no longer used, would be closed. This alternative would enable the closure of two facilities at LANL, two at LLNL, four at SNL/NM, and one at SNL/CA.

Under the Consolidation of Major ETF Capabilities at One Site, there are two options. One option would consolidate major ETF capabilities at NTS. This option would close four facilities at LANL, three at LLNL, twenty-one at SNL/NM, and one at SNL/CA. It would also require construction of five new facilities at NTS (an Annular Core Research Reactor-like facility, an Engineering Test Bay, an Aerial Cable Test Facility, a Building 834 Complex, and a sled track) to replace several of the capabilities lost through these closures. The two environmental test facilities at NTS, the Device Assembly Facility (DAF) and the U1a Complex, would remain in operation. The Engineered Test Bay (Building 334) at LLNL and three of the facilities at SNL/NM (considered to be capabilities critical to the continuance of the ETF Program) would remain open until the replacement facilities at NTS were operational.

The second consolidation option would locate major ETF capabilities at SNL/NM. This alternative would close four facilities at LANL, three at LLNL, four at SNL/NM, and one at SNL/CA. Under this option, NNSA would continue operations at DAF and the U1a Complex and at some of the facilities at SNL/NM. For this option, the major ETF activities presently conducted in Building 334 at LLNL and at the Building 834 Complex at LLNL's Site 300 would be transferred to either NTS or Pantex, or new facilities like these buildings would be constructed at SNL/NM.

Alternatives Considered But Eliminated from Detailed Study

No other alternatives were considered for major ETFs.

Preferred Alternative

The Final SPEIS identified the preferred alternative for major environmental testing as consolidating major environmental testing at SNL/NM and, infrequently, conducting operations requiring Category I/II SNM in security campaign mode there. NNSA would close LANL's and LLNL's major environmental testing facilities by 2010 (except those in LLNL Building 334 and the Building 834 Complex). NNSA would move environmental testing of nuclear explosive packages and other functions currently performed in LLNL Buildings 334 and 834 to Pantex by 2012.

Environmental Impacts of Alternatives

The environmental impacts of the alternatives are presented in Section 5.17 of the SPEIS. Under the No Action Alternative there would be no significant changes to impacts currently experienced. There would be no change in the workforce conducting major ETF activities at LANL, LLNL, NTS, SNL/NM, or SNL/CA. Therefore, there would be no impacts to employment, income, or the labor force in the regions of influence.

The Downsize-in-Place Alternative would close two facilities at LANL, two at LLNL, four at SNL/NM, and one at SNL/CA, reducing the existing floor space (about 558,000 square feet) by approximately 10 percent. Closing buildings could result in a reduction in the use of electricity and other energy sources, and would eliminate any emissions from operations. Although closing these facilities would generate wastes, sufficient management capacity exists for these wastes, and no major impacts are expected. There would be fewer than 20 jobs lost at any site.

The alternative of consolidating major ETF capabilities at NTS would result in closing four facilities at LANL, three at LLNL, 21 at SNL/NM, and one at SNL/CA, reducing the existing floor space by nearly 95 percent (a reduction of approximately 537,000 square feet). Although closing these facilities would generate wastes, sufficient management capacity exists for these wastes, and no major impacts are expected. Approximately 30 jobs at LANL, six at LLNL (including SNL/CA), and 224 at SNL/NM would be lost. This option would also require construction of new facilities at NTS to replace some capabilities lost through closures at other sites. Although this would disturb approximately 25 acres of land, less than 1 percent of available land at NTS would be affected. In addition, closing major test facilities at other sites would reduce energy demands and emissions associated with operation of those facilities.

The alternative of consolidating major ETF capabilities at SNL/NM would result in closing four facilities at LANL, three at LLNL, four at SNL/NM, and one at SNL/CA, reducing the existing floor space by nearly 25 percent (a reduction of approximately 133,000 square feet). Although closing these facilities would generate wastes, sufficient management capacity exists for these wastes, and no major impacts are expected. Approximately 30 jobs at LANL, 6 at LLNL (including SNL/CA) and 16 at SNL/NM would be lost. This option would also require the construction of new facilities at SNL/NM to replace some capabilities lost through closures at other sites. Although this would disturb approximately 2.5 acres of land, less than 1 percent of available land at SNL/NM would be affected.

The major ETF functions currently performed in Building 334 at LLNL and the Building 834 Complex at LLNL's Site 300 would be moved to Pantex and located in an existing building or the proposed Weapons Surveillance Facility. This would require removal of equipment from Building 334 and from the Building 834 Complex and the installation at Pantex of a measurement tower, a sealed source storage pit, and a five-ton bridge crane. This installation would require modification to only one building at Pantex; no new construction would be required. These changes would result in the addition of two jobs at Pantex. Operations would not be expected to generate additional waste other than normal office refuse, and waste associated with occasional use of solvents and cleaning fluids, and would not use additional water other than the sanitary and personal usage of the two additional employees.

Environmentally Preferable Alternative

The analyses in the SPEIS of the environmental impacts associated with the alternatives revealed that the No Action Alternative is environmentally preferable. This alternative would result in no increase in impacts to resources and would not produce any adverse socioeconomic impacts at LANL, LLNL, NTS, SNL/NM, or SNL/CA.

Decisions on Major Environmental Test Facilities

NNSA has decided to implement the preferred alternative to consolidate major ETF capabilities at SNL/NM and conduct infrequent operations requiring Category I/II SNM in a security campaign mode. NNSA will close four facilities at LANL (K Site Environmental Test Facility, Weapons Component Test Facility, Pulse Intense X-Ray (PIXY) with Sled Track, and Thermo-Conditioning Facility), three at LLNL (Engineered Building 834 Complex, Dynamic Testing Facility (836 Complex), and Building 334), four at SNL/NM (Sandia Pulsed Reactor Facility,[8] Low Dose Rate Gamma Irradiation Facility, Auxiliary Hot Cell Facility, and Centrifuge Complex), and one at SNL/CA (Environmental Test Complex). In addition, activities presently conducted in Building 334 at LLNL and at Building 834 Complex at LLNL's Site 300 will be transferred to Pantex and placed either in existing buildings or in the proposed Weapons Surveillance Facility. Any new

[8] The reactor itself has already been moved to NTS.

construction would be subject to appropriate NEPA review.

Basis for Decision on Major Environmental Test Facilities

NNSA's decision to consolidate major ETF capabilities at SNL/NM is the least costly alternative and poses no greater technical risk than other alternatives; cost and technical risk were the most important considerations in making this decision. Because the majority of the ETF capabilities currently exist at SNL/NM, consolidating these capabilities there will require the least construction and will have the lowest cost of the consolidation alternatives. Considering life-cycle costs through the year 2060, this alternative is also the least costly, although the business case study showed only minor cost differences among the alternatives. All alternatives analyzed were found to pose some technical risk; however, no significant differences were found among the alternatives. For the alternatives involving consolidation at SNL/NM or NTS, the major risk was the potential delay in constructing a new facility to house the Building 334 and Building 834 missions. For these missions, consolidation into an existing building at Pantex has the lowest cost, poses the smallest risk, and produces the least environmental impacts.

Considering potential environmental impacts, cost, technical risk and schedule, the alternative of consolidating major ETF capabilities at SNL/NM, and moving the activities conducted at Building 334 and Building 834 to Pantex, is the best alternative.

Mitigation Measures

As described in the SPEIS, NNSA conducts its missions in compliance with environmental laws, regulations, and policies within a framework of contractual requirements; many of these requirements mandate actions to control and mitigate potential adverse environmental effects. Examples include the site environment, safety, and health manuals, site security and threat protection plans, emergency plans, Integrated Safety Management Systems, pollution prevention and waste minimization programs, cultural resource and protected species programs, and energy and water conservation programs.

**Comments Received on Final SPEIS Related to the Project-Specific Alternatives**

During the 30-day period following the EPA's notice of availability for the Final SPEIS (73 FR 63460, Oct. 24, 2008), NNSA received written comments from the following groups: Alliance for Nuclear Accountability, Project on Government Oversight, National Radical Women, Physicians for Social Responsibility, Oak Ridge Environmental Peace Alliance, Tri-Valley CAREs, the Union of Concerned Scientists, Nuclear Watch New Mexico, the Arms and Security Initiative of the New America Foundation, Concerned Citizens for Nuclear Safety, Embudo Valley Environmental Group, Ecology Ministry, Loretto Community, Aqua es Vida Action Team, Citizens for Alternatives to Radioactive Dumping, and Tewa Women United. Written comments were also received from approximately 30 individuals. The majority of these comments, which focused primarily on policy and programmatic issues, are considered by NNSA in the ROD for the programmatic decisions. NNSA did receive comments related to two issues regarding the project-specific alternatives, though neither has bearing on any of the three missions that this ROD concerns. These project-specific comments and NNSA's responses follow.

1. Referring to the Preferred Alternative for Major Hydrodynamic Testing as described in the Final SPEIS (Section 3.17.2, Volume I), one commenter stated that containing hydrodynamic testing at LLNL in the Contained Firing Facility by the end of fiscal year (FY) 2008 implies that open-air detonation experiments would cease at LLNL's Site 300 by the end of FY 2008. The commenter points out that the Preferred Alternative also states that hydrodynamic testing at Site 300 would be consolidated to a smaller footprint by 2015. The commenter then states that since many of the hydrodynamic testing facilities at Site 300 are open-air firing tables, it is not clear whether open-air detonations would continue at LLNL Site 300 facilities until 2015, or potentially a later date. If NNSA plans to cease open-air detonation experiments at Site 300, either by the end of FY 2008 or in 2015, it should express this determination in unequivocal language. Another commenter stated that all open air tests must be contained and questioned the meaning of the following sentence in the Final SPEIS: ''Open-air hydrotests at LANL's DARHT [Dual-Axis Radiographic Hydrodynamic Test facility], excluding SNM, would only occur if needed to meet national security requirements.'' (See Section S.3.17.2, Summary.) The commenter specifically asked what the phrase ''if needed'' means and asked who would make this decision.

*Response:* As stated in this ROD, NNSA is not making any new decisions regarding hydrodynamic testing activities at this time. These activities will continue as described in the No Action Alternative and pursuant to previous decisions. If NNSA decides to make significant changes to hydrodynamic testing, it would issue a ROD to announce and explain the new decision.

2. In reference to the Preferred Alternative for HE R&D as described in the Final SPEIS (Section S.3.17.2 of the Summary), one commenter stated that a schedule that defines when LANL would arrive at contained HE R&D experimentation must be given. Just stating that LANL will ''move towards'' contained HE R&D experimentation is meaningless and will continue to impose environmental impacts on the public.

*Response:* As stated in this ROD, NNSA is not making any new decisions regarding HE R&D activities at this time. These activities will continue as described in the No Action Alternative and pursuant to previous decisions. If NNSA decides to make significant changes to HE R&D activities, it would issue a ROD to announce and explain the new decision.

Issued at Washington, DC, this 15th day of December 2008.

**Thomas P. D'Agostino,**

*Administrator, National Nuclear Security Administration.*

[FR Doc. E8–30194 Filed 12–18–08; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Project No. 1256–029–Nebraska]**

## Loup River Public Power District; Notice of Scoping Meetings and Site Visits

December 12, 2008.

a. *Type of Filings:* Notice of Intent to File License Applications for New Licenses; Pre-Application Documents; Commencement of Licensing Proceedings.

b. *Project No.:* 1256–029.

c. *Dated Filed:* October 16, 2008.

d. *Submitted By:* Loup River Public Power District (Loup Power District).

e. *Name of Project:* Loup River Hydroelectric Project No. 1256.

f. *Location:* The Loup River Hydroelectric Project is located on the Loup River in Nance and Platte Counties, Nebraska.

g. *Filed Pursuant to:* 18 CFR Part 5 of the Commission's Regulations.

h. *Potential Applicant Contact:* Neal Suess, President/CEO, Loup Power District, P.O. Box 988, 2404 15th Street, Columbus, Nebraska 68602 (866) 869–2087.

i. *FERC Contact:* Kim Nguyen (202) 502–6015 or via e-mail at *kim.nguyen@ferc.gov*.

j. Loup Power District filed Pre-Application Document (PAD) for the Loup River Project, including proposed process plan and schedule, with the Commission pursuant to 18 CFR 5.6 of the Commission's regulations.

k. Copies of the PAD and Scoping Document 1 (SD1) 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.

Register online at *http://ferc.gov/esubscribenow.htm* to be notified via e-mail of new filings and issuances related to these or other pending projects. For assistance, contact FERC Online Support.

l. With this notice, we are soliciting comments on SD1. All comments on SD1 should be sent to the address above in paragraph h. In addition, all comments on the PAD and SD1, study requests, requests for cooperating agency status, and all communications to Commission staff related to the merits of the potential applications (original and eight copies) must be filed with the Commission at the following address: Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. All filings with the Commission relevant to the Loup River Hydroelectric Project must include on the first page, the project name (Loup River Project), and number (P–1256–029), and bear the heading, as appropriate, ''Comments on Scoping Document 1.'' Any individual or entity interested in commenting on SD1 must do so by February 10, 2009.

Comments on SD1 and other permissible forms of communications with the Commission may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the ''e-filing'' link.

m. At this time, Commission staff intends to prepare a single Environmental Assessment for the project, in accordance with the National Environmental Policy Act.

**Scoping Meetings**

We will hold two scoping meetings for each project at the times and places noted below. The daytime meetings will focus on resource agency, Indian tribes, and non-governmental organization concerns, while the evening meetings are primarily for receiving input from the public. We invite all interested individuals, organizations, Indian tribes, and agencies to attend one or all of the meetings, and to assist staff in identifying particular study needs, as well as the scope of environmental issues to be addressed in the environmental document. The times and locations of these meetings are as follows:

*Daytime Scoping Meeting*

*Date:* Tuesday, January 13, 2009.
*Time:* 9 a.m.
*Location:* Holiday Inn Express, 524 E. 23rd Street, Columbus, Nebraska 68601, (402) 564–2566.

*Evening Scoping Meeting*

*Date:* Monday, January 12, 2009.
*Time:* 7 p.m.
*Location:* same as daytime meeting.

SD1, which outlines the subject areas to be addressed in the environmental document, has been mailed to the individuals and entities on the Commission's mailing list. Copies of SD1 will be available at the scoping meetings, or may be viewed on the Web at *http://www.ferc.gov*, using the ''eLibrary'' link. Follow the directions for accessing information in paragraph k. Depending on the extent of comments received, a Scoping Document 2 (SD2) may or may not be issued.

**Site Visits**

The Loup Power District and Commission staff will conduct a site visit of the key project facilities on Monday, January 12, 2009, starting at 9 a.m. Those wishing to participate should meet at 8:45 a.m. at: Loup Power District Main Office, 2404 15th Street, Columbus, Nebraska 68602.

To appropriately accommodate persons interested in attending the site visit, participants should contact Ron Ziola at (402) 564–3171 or e-mail *rziola@loup.com* by January 5, 2009. The Loup Power District will provide transportation from their Main Office to the project site and lunch for the site visit. Participants should dress appropriately for outdoor, winter elements. In the event of inclement weather, participants can check the Loup Power District's Relicensing Hotline at (866) 869–2087 for updates on the site visit.

**Scoping Meeting Objectives**

At the scoping meetings, staff will: (1) Present the proposed list of issues to be addressed in the EA; (2) review and discuss existing conditions and resource agency management objectives; (3) review and discuss existing information and identify preliminary information and study needs;

(4) review and discuss the process plan and schedule for pre-filing activity that incorporates the time frames provided for in Part 5 of the Commission's regulations and, to the extent possible, maximizes coordination of federal, state, and tribal permitting and certification processes; and (5) discuss requests by any federal or state agency or Indian tribe acting as a cooperating agency for development of an environmental document.

Meeting participants should come prepared to discuss their issues and/or concerns. Please review the Pre-Application Document in preparation for the scoping meetings. Directions on how to obtain a copy of the PAD and SD1 are included in item k of this notice.

**Scoping Meeting Procedures**

The scoping meetings will be recorded by a stenographer and will become part of the formal Commission records for the projects.

n. A notice of intent to file license application, filing PAD, solicitation of comments on the PAD and SD1, solicitation of study requests, and commencement of proceedings will be issued by December 19, 2008, setting the date for filing comments on the PAD and study requests in accordance with Commission regulations and the proposed process plan.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–30144 Filed 12–18–08; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Docket Nos. PA08–6–000; EL05–102–000; EL05–104–000; ER03–713–000]**

## Southern Company Services Inc., Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Southern Power Company; Notice of Audit Report Issuance and Invitation To Comment

December 12, 2008.

On October 5, 2006, the Commission issued an Order on Settlement (Settlement Order) accepting in part and rejecting in part an Offer of Settlement (Settlement Offer) submitted by the settling parties [1] in Docket No. EL05–102–000, *et al.*[2] The Settlement Order required numerous modifications to the Settlement Offer intended to provide immediate benefits to consumers and competitors that operate in the Southern region.

The Settlement Order also directed the Office of Enforcement to conduct an audit of the Southern Operating Companies (Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Southern Power Company (Southern Power)) to: (1) ensure that the Southern Operating Companies are fully complying with all the conditions set forth in the Settlement Order, and (2) determine whether the conditions imposed there were sufficient to address any remaining opportunities for affiliate abuse under the Intercompany Interchange Contract (IIC) related to Southern Power.[3]

In the Settlement Order, the Commission advised that it will notice the audit report for comment and, after considering the comments on it, determine what, if any, further action is appropriate.[4] The Commission added that if affiliate abuse concerns remain, it would either set such concerns for hearing or require further changes immediately.[5] The Office of Enforcement has recently completed its audit report. A copy of the report is attached to this Notice.

All interested persons desiring to comment on what, if any, further action is appropriate on the matters addressed by the audit report, including the IIC and remaining opportunities for affiliate abuse, may file written comments on or before January 12, 2009. After reviewing these comments, the Commission will determine whether further action is appropriate.

The Commission encourages electronic submission of comments in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the comments to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

*Comment Date:* 5 pm Eastern Time on January 12, 2009.

**Kimberly D. Bose,**

*Secretary.*

## Federal Energy Regulatory Commission

## Audit Report of Southern Company's

- Compliance with the Conditions Imposed by the Commission in Docket No. EL05–102–000, *et al.*, and
- Remaining Opportunities for Affiliate Abuse related to Southern Power under the Intercompany Interchange Contract

Docket No. PA08–06–000

December 12, 2008.

*Office of Enforcement*

Division of Audits

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### I. Executive Summary

#### *A. Overview*

On October 5, 2006, the Commission issued an Order on Settlement (Settlement Order) accepting in part and rejecting in part an Offer of Settlement (Settlement Offer) submitted by the settling parties [6] in Docket No. EL05–102–000, *et al.*[7] The Settlement Order required numerous modifications intended to provide immediate benefits to consumers and competitors that operate in the Southern region. The Settlement Order also directed the Division of Audits (DA) within the Office of Enforcement (OE) to conduct an audit of the Southern Operating Companies (Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Southern Power Company (Southern Power)) to: (1) Ensure that the Southern Operating Companies are fully complying with all the conditions set forth in the order, and (2) determine whether the conditions imposed therein were sufficient to address any remaining opportunities for affiliate abuse under the Intercompany Interchange Contract (IIC) related to Southern Power.

The Southern Operating Companies made a compliance filing on November 6, 2006, notifying the Commission that they had implemented the modifications required by the Settlement Order. The Southern Operating Companies also provided a projected implementation schedule reflecting the compliance efforts to date and a seven-month timeline to complete the remaining compliance milestones. The Commission accepted the compliance filing on April 19, 2007 (Acceptance Order), subject to further modifications to the IIC, Separation of Functions and Communications Protocol (Separation Protocol), and Generator Support Service Tariff (GSS Tariff).[8] The Commission required the Southern Operating Companies to fully implement all the compliance efforts included in its implementation schedule within seven months from the issuance of the Acceptance Order. The Commission also directed OE to monitor the Southern Operating Companies' implementation progress and, once the implementation is complete, to commence its audit and finish the audit within 12 months. The Southern Operating Companies completed the implementation on November 16, 2007, and filed a Notice of Completion with

[1] Southern Company Services, Inc. (acting for itself and as agent for Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Savannah Electric and Power Company, and Southern Power Company, collectively Southern Company), Calpine Corporation, Coral Power, LLC, and the Board of Water, Light and Sinking Fund Commissioners of the City of Dalton (collectively the settling parties).

[2] *Southern Company Services, Inc.,* 117 FERC ¶ 61,021 (2006).

[3] Settlement Order at P 60.

[4] *Id.*

[5] *Id.*

[6] Southern Company Services, Inc. (acting for itself and as agent for Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Savannah Electric and Power Company, and Southern Power Company, collectively Southern Company), Calpine Corporation, Coral Power, LLC, and the Board of Water, Light and Sinking Fund Commissioners of the City of Dalton (collectively the settling parties).

[7] Southern Company Services, Inc., 117 FERC ¶ 61,021 (2006).

[8] Southern Company Services, Inc., 119 FERC ¶ 61,065 (2007).

the Commission. The Commission accepted the Southern Operating Companies' Notice of Completion on January 11, 2008.[9] OE commenced the audit of the Southern Operating Companies on November 19, 2007.

OE has completed its audit of the Southern Operating Companies. The audit examined whether the Southern Operating Companies are fully complying with the modifications the Commission set forth in the Settlement and Acceptance Orders and whether the conditions imposed therein are sufficient to address any remaining opportunities for affiliate abuse under the IIC related to Southern Power. The audit covered the period from November 19, 2007 through August 29, 2008.

Audit staff concluded that the Southern Operating Companies properly implemented the modifications and generally complied with the conditions imposed by the Commission in the Settlement and Acceptance Orders. However, audit staff determined that Southern Company should implement additional corrective actions to prevent the potential for Southern Power employees to access non-public market information. Moreover, Southern Company should follow the Commission's and its company's policies for posting non-public market information on its Open Access Same-Time Information System (OASIS). OE's audit findings and recommendations are summarized below in sections D and E of this audit report (report), and discussed comprehensively in section IV of this report.

Audit staff's conclusions are based on evidence obtained through 85 employee interviews, four face-to-face meetings, weekly phone conferences, four site visits, facility inspections, extensive data inquiries and examinations, and review of approximately 7,000 e-mails and 2,800 voice recordings.

*B. Southern Company*

Southern Company is an electric utility holding company and the parent company of the Southern Operating Companies, Southern Company Services, Inc., and other direct and indirect subsidiaries. The primary business of Southern Company is the supply and sale of electricity in the Southeast region of the United States. Southern Power, a wholesale energy provider, constructs, acquires, and manages generation assets in the wholesale market, where it sells electricity at market-based rates. Southern Power is the large wholesale energy provider in the Southeast, owning and operating more than 6,500 megawatts of generating assets. The other Southern Operating Companies are vertically integrated utilities that provide electric service in the states of Alabama, Georgia, Florida, and Mississippi.

Southern Company Services, Inc. is a centralized service company which provides various services, at cost, to the Southern Operating Companies and its subsidiaries. For example, Southern Company Services, Inc. acts as agent to the Southern Operating Companies for administering and carrying out the operational activities under the IIC and for the sale of wholesale power at market-based rates. Southern Company Services, Inc. also acts as agent to the Southern Operating Companies for providing transmission service under Southern Company's OATT. Further, Southern Company Services, Inc. enters into gas purchase and sales agreements, and transportation and storage contracts, as agent on behalf of the Southern Operating Companies.

The Southern Operating Companies function as an integrated public utility system through the joint commitment and economic dispatch of their generating resources to meet their collective load obligations. The integrated operation of their respective electric generating facilities and system operations (generally referred to as the pool) is governed by the IIC, which is a rate schedule on file with the Commission pursuant to the Federal Power Act.[10] The IIC provides for the coordinated and integrated operation of the generating facilities and resources owned, contractually controlled, and operated by the Southern Operating Companies, as well as the pooling of surplus energy for short-term wholesale energy sale opportunities. In essence, the IIC: (1) Specifies the types of transactions involved in system operations; (2) provides for the sharing of the benefits and burdens associated with the operation of facilities that are used for the mutual benefit of the Southern Operating Companies; and (3) provides guidance for pool operations. Southern Company Services, Inc. operates the pool in accordance with the IIC using a centralized economic dispatch model to serve the obligations of the Southern Operating Companies with the lowest cost resources while at the same time reliably operating the interconnected system. Any energy generated in excess of these obligations becomes available to the pool for making short-term wholesale energy sales to third parties on behalf of the Southern Operating Companies. Southern Company Services, Inc. is responsible for billing the Southern Operating Companies for transactions and services under the IIC on a monthly basis.

The Southern Operating Companies also make wholesale sales at market-based rates, pursuant to market-based rate tariffs, which include a code of conduct and a Separation Protocol. The code of conduct provides important protections concerning the business relationship amongst the Southern Operating Companies and marketing affiliates with market-based rate authority. The Separation Protocol places protections between Southern Power and the other Southern Operating Companies in the codes of conduct. Specifically, the Separation Protocol requires the functional separation of the wholesale activities that Southern Power carries out for the sole benefit of its shareholders from the activities of the other Southern Operating Companies. Further, the Separation Protocol allows Southern Power to use employees of Southern Company Services, Inc. or any other affiliate as long as those employees are dedicated exclusively to Southern Power. Southern Power is also permitted to use shared support employees as long as it does so consistent with the independent functioning requirements of the Standards of Conduct.[11] In addition, the Separation Protocol contains other restrictions designed to protect against Southern Power's physical and electronic access to non-public market information, receiving preferential treatment with regard to the purchase or sale of transmission service or electric energy, and abuses related to the purchase or the sale of non-power goods and services.

*C. Summary of Commission Proceedings in Docket No. EL05–102 et al.*

Southern Power is a wholly-owned subsidiary of Southern Company and affiliate of the other Southern Operating Companies. Southern Power is a competitive generation provider that does not have a franchised obligation to serve at retail. In this capacity, it raises several regulatory concerns, which were described by the Commission in the Settlement Order. As the Commission explained therein, when a competitive affiliate is a member of a power pool with its regulated operating company

[9] *Southern Company Services, Inc.,* Docket Nos. EL05–102–005 and EL05–102–006 (January 11, 2008) (unpublished letter order).

[10] Second Revised Rate Schedule FERC Number 138.

[11] 18 CFR 358.4(a)(5)(2008).

affiliates, an incentive exists for the regulated affiliates to subsidize the sales of the competitive affiliate to benefit their mutual shareholders.[12] Second, when Southern Power sells power to other Southern Operating Companies, there is a concern that the competitive affiliate not be granted an undue preference.[13] When the competitive affiliate sells to a regulated affiliate, the Commission's concern is that the price not be set too high.[14] Conversely, when the regulated affiliate sells to a competitive affiliate, the Commission's principal concern is that the price not be set too low.[15] When sales are made to third parties, the Commission's principal concern is that the regulated Southern Operating Companies continue to compete for such sales rather than favoring sales by Southern Power.[16] Finally, the Commission expressed concerns that the integration of the companies created by the pool could lead to potential violations of the Standards of Conduct and hence the obligation to provide transmission service on a nondiscriminatory basis.[17] Together, these concerns form the basis for the conditions and modifications the Commission imposed on Southern Company that is the subject of this audit.

The proceeding in Docket No. EL05–102–000 began on May 5, 2005, when the Commission instituted an investigation to determine whether the role of Southern Power in Southern Company's pool continued to be appropriate and consistent with the Commission's regulations and precedents regarding affiliate abuse.[18] Specifically, the Commission set for hearing the following issues: (1) The justness and reasonableness of the IIC, including the justness and reasonableness of Southern Power's inclusion in the pool and whether such inclusion involves undue preference and undue discrimination that adversely affected wholesale competition and wholesale customers in the Southeast; (2) whether any of the Southern Operating Companies had violated or were violating the Commission's Standards of Conduct which were in effect at the time; and (3) whether the Southern Operating Companies' Code of Conduct was just and reasonable and whether the Code of Conduct should continue to define Southern Power as a ''system company.''

On April 11, 2006, Southern Company Services, Inc., on behalf of the Southern Operating Companies, filed the Settlement Offer to resolve the regulatory proceedings in Docket No. EL05–102 and other related proceedings. The purpose of the Settlement Offer was to resolve all allegations that the IIC and certain other aspects of the Southern Operating Companies' structure and operations provided Southern Power with an undue preference over non-affiliated power suppliers. The Settlement Offer also encompassed other measures that the Southern Operating Companies were planning to implement in response to allegations that their operations improperly favored affiliates. On October 5, 2006, the Commission issued its Settlement Order, which accepted in part and rejected in part the Settlement Offer.[19] The Commission explained that the Settlement Offer did not adequately protect customers against affiliate abuse. As a result, the Commission ordered the Southern Operating Companies to make significant changes to the Settlement relating to the IIC, Separation Protocol, and GSS Tariff, to adequately protect customers from affiliate abuse in the sale of wholesale power and the provision of transmission service. In the Settlement Order, the Commission directed the OE to conduct an audit of Southern Power and its regulated Operating Company affiliates. Further, the Commission advised that it will notice the audit report for comment and after considering the comments on it, determine what further action is appropriate.[20] Moreover, the Commission stated that if affiliate abuse concerns remained, it will either set such concerns for hearing or require further changes immediately. Lastly, the Commission advised that it would keep the section 206 investigation open until receiving the audit, any public comments on it, and determine what further action is appropriate in this docket.

On November 6, 2006, Southern Company Services, Inc., acting as agent for the Southern Operating Companies, submitted a modified compliance filing, as directed by the Settlement Order. The compliance filing included the required amendments to the IIC, Separation Protocol, and GSS Tariff, as well as a projected implementation schedule outlining the actions taken to date and the expected timeframe for implementing the Separation Protocol over a seven-month period. On April 19, 2007, the Commission issued an Acceptance Order, which accepted the modified compliance filing and projected implementation schedule, but directed a further compliance filing be made.[21] On May 18, 2007, Southern Company Services, Inc. filed a revised compliance filing in Docket No. EL05–102–003, as directed by the Commission in its Acceptance Order. The Commission accepted, by delegated authority, this revised compliance filing with minor modifications on July 16, 2007.[22] On August 13, 2007, Southern Company Services, Inc. filed these minor modifications in Docket No. EL05–102–004, which the Commission accepted by delegated authority on September 12, 2007.[23]

On November 16, 2007, Southern Company Services, Inc. filed, on behalf of the Southern Operating Companies, a Notice of Completion and Conformed Compliance Filing in connection with the Settlement and Acceptance Orders. The Southern Operating Companies stated that the implementation of the requirements set forth in the Settlement and Acceptance Orders was complete. Moreover, the Southern Operating Companies submitted an effective conformed version of the Separations Protocol. The filing also conformed the definition of ''market information'' used in the Separation Protocol and IIC to the definition of that term established by the Commission in Order No. 697.[24] The Southern Operating Companies requested that the Commission accept the Order No. 697 conformed rates for filing.[25] The Southern Operating Companies later determined that the November 16, 2007 filing should not have included the section 205 request that the definition of ''market information'' established by the Commission in Order No. 697 apply to that same term as used in the Southern Operating Companies' Separation Protocol. Accordingly, on December 4, 2007, the Southern Operating Companies amended its Notice of Completion filing to remove the section

[12] Settlement Order, 117 FERC ¶ 61,021 at P 31.

[13] *Id.* at P 38.

[14] *Id.*

[15] *Id.* at P 43.

[16] *Id.* at P 47.

[17] *Id.* at P 51.

[18] *Southern Company Services, Inc.*, 111 FERC ¶ 61,146 (Hearing Order), *clarified*, 112 FERC ¶ 61,015 (2005).

[19] Settlement Order at P 3.

[20] Settlement Order at P 60.

[21] Acceptance Order, at P. 2.

[22] *Southern Company Services, Inc.*, Docket No. EL05–102–003 (July 16, 2007) (unpublished letter order).

[23] *Southern Company Services, Inc.*, Docket No. EL05–102–004 (September 12, 2007) (unpublished letter order).

[24] *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697–A, 73 Fed. Reg. 25,832 (May 7, 2008), FERC Stats. & Regs. ¶ 31,268 (2008).

[25] Southern Company Services' November 16, 2007 transmittal letter, page 1.

205 aspect of its submission. On January 11, 2008, the Commission, by delegated authority, accepted the Southern Operating Companies' Notice of Completion and the Separation Protocol with an effective date of November 19, 2007.[26]

On November 19, 2007, OE commenced the audit of the Southern Operating Companies in Docket No. PA08–6–000.

*D. Summary of Compliance Findings*

Although audit staff determined that the Southern Operating Companies generally complied with the conditions in the Settlement and Acceptance Orders, audit staff identified three areas where the Southern Operating Companies should strengthen and further its compliance measures related to electronic separation, employee separation, and posting of Separation Protocol violations on OASIS.[27] Below is a summary of audit staff's compliance findings. A more detailed discussion of audit staff's compliance findings is included in section IV.

• *Electronic Separation*—Although Southern Company implemented electronic controls to prevent Southern Power employees from accessing non-public market information, audit staff detected some gaps in the controls that potentially provided Southern Power employees with access to non-public market information. Specifically, a Southern Power employee was able to breach Southern Company's network access restrictions through a non-Southern Power computer workstation and the wireless network. Additionally, Southern Company did not have adequate procedures in place to review for non-public market information available through: (1) Personal network drives of employees who transferred jobs and (2) files transferred to shared network drives by non-Southern Power employees.

• *Employee Separation*—Audit staff observed an employee performing transmission activities that support the long-term wholesale energy transactions of Southern Power, while at the same time performing transmission and energy trading activities that support the short-term wholesale energy transactions made by the pool on behalf of the Southern Operating Companies. Audit staff believes that Southern Company should dedicate separate employees to perform the transmission activities supporting Southern Power's long-term wholesale energy transactions and the transmission activities supporting the short-term wholesale energy transactions made for the pool on behalf of the Southern Operating Companies to prevent the potential for any undue preference.

• *Posting of Separation Protocol Violations on OASIS*—Southern Company did not immediately post, date, and time stamp all the postings it made to OASIS in accordance with the Commission's Standards of Conduct requirements in effect during the audit period.

*E. Summary of Recommendations and Corrective Actions Taken*

Audit staff provides the following recommendations to ensure adequate corrective actions are taken by Southern Company to address the remaining opportunities for potential affiliate abuse under the IIC related to Southern Power.

• Create procedures for reviewing files posted to Southern Power shared drives by non-Southern Power employees for non-public market information. Additionally, create procedures for reviewing the personal network drives of all employees who transfer into Southern Power for non-public market information. For each review, remove all files that contain non-public market information from the personal network drive of the transferred employee.

On November 14, 2008, Southern Company implemented new policies governing the monitoring and review of Southern Power shared drives and the personnel network drives of employees transferring into Southern Power.

• Perform periodic reviews to ensure that Southern Power employees do not have access rights to applications, databases, and shared network drives containing non-public market information. Additionally, these periodic reviews should include testing of the segmented network to determine whether Southern Power employees can bypass the segmented network and potentially access non-public market information.

On November 14, 2008, Southern Company implemented new procedures requiring a periodic review of Southern Power shared drives and periodic testing of the segmented network.

• Add the ''SPC'' designator to Southern Power employee names in Cool Compliance, as is already done in the Global Address List for e-mails, to spotlight a Southern Power employee having access rights granted in Cool Compliance.[28]

On November 10, 2008, Southern Company informed audit staff that it will identify and label all Southern Power employees in Cool Compliance. However, Southern Company did not provide an implementation date.

• Dedicate employees performing transmission activities that support Southern Power's long-term wholesale energy transactions solely to Southern Power.

On November 7, 2008, Southern Company informed audit staff that it transferred the responsibilities associated with the procurement of transmission service for Southern Power's long-term wholesale energy transactions to Southern Power.

• Post all violations of the Separation Protocol immediately, in accordance with the Standards of Conduct at 18 CFR 358.5(b)(3). In addition to the date the violation occurred, include on each document the date and time Southern Company posted the violation in accordance with the OASIS regulations at 18 CFR 37.6(g)(2).

On November 14, 2008, Southern Company revised its Separation Protocol Violations Investigative Procedure to reflect that upon determining an actual violation has occurred, the incident must immediately be posted on OASIS. Further, Southern Company implemented a procedural change to include a date and time stamp for each document posted on OASIS relating to the violation.

• Strengthen procedures and controls for maintaining e-mail distribution lists and providing reports to Southern Power that may contain non-public market information. Incorporate these procedures and other pertinent procedural enhancements in the Separation Protocol compliance training program to achieve a reduction in the number of future violations.

On November 14, 2008, Southern Company implemented new procedures requiring employees to maintain and periodically review their e-mail distribution lists to verify employee memberships. Further, Southern Company revised its Separation Protocol training regarding electronic communications with Southern Power employees and the development and maintenance of e-mail distribution lists.

[26] *Southern Company Services, Inc.*, Docket Nos. EL05–102–005 and EL05–102–006 (January 11, 2008) (unpublished letter orders).

[27] The time frame for the audit covers a period prior to the effective date of Order No. 717. Therefore, the audit measures compliance with then-existing regulations. The Commission recently changed certain posting requirements for Standards of Conduct regulations (see *Standards of Conduct for Transmission Providers, Order No. 717*, 125 FERC ¶ 61,064 (2008).

[28] Cool Compliance is a computer application originally created to maintain Sarbanes-Oxley controls, which Southern Company also adopted as a tool to provide a consistent automated process for evaluating and managing access requests.

**II. Southern Company's Compliance With Commission Orders**

The Southern Operating Companies' efforts to comply with the Settlement and Acceptance Orders included the following activities: (1) Tariff modifications filed with the Commission; (2) functional separation through organizational restructuring, relocation of employees and infrastructure changes; (3) electronic access controls (information technology); (4) training of employees; and (5) a compliance filing to conform to the definition of ''market information'' used in the Separation Protocol and IIC to the definition of that term established by the Commission in Order No. 697. Further, the Southern Operating Companies expended almost $20 million to implement the modifications required by the Commission's Settlement and Acceptance Orders. In addition, the Southern Operating Companies anticipate there will be on-going costs for compliance, including the purchasing of equipment, additional staffing, training, and other costs that are difficult to quantify at this time.

*Tariff Modifications*

Subsequent to the issuance of the Settlement Order, the Southern Operating Companies made several compliance filings, which the Commission has approved, that changed the tariff language of the IIC, Separation Protocol, and GSS Tariff to comply with the Commission's Settlement and Acceptance Orders.[29] The IIC changes pertained to sales between the Southern Operating Companies that were outside the pool operating window, but less than a year in length, opportunity sales made on behalf of the pool members, Southern Power taking transmission service under the OATT, Southern Power as an Energy Affiliate under the Standards of Conduct in effect at the time, and defining ''market information'' consistently with Order No. 697.

The Separation Protocol changes pertained to broadening the separated functions responsibilities to any function undertaken for the benefit of Southern Power's shareholders (except joint economic dispatch and reserve sharing), prohibiting the sharing of any information, protecting against preferential treatment in regard to the purchase or sale of transmission service or electric energy between the Southern Operating Companies, and the pricing of non-power goods and services. The GSS tariff changes pertained to filing the GSS tariff with the Commission to provide all similarly situated merchant generators access to back-up power by the Southern Operating Companies, and requiring the just and reasonable standard, as opposed to the public interest standard, to govern all revisions to the GSS tariff. The Commission accepted all of these modifications to the IIC, Separation Protocol, and GSS tariff.

*Functional Separation*

In addition to the tariff filings, the Southern Operating Companies made several organizational and structural changes to comply with the Settlement and Acceptance Orders. The Southern Operating Companies began to evaluate the measures necessary to comply with the Settlement Order in late 2006 and, after the Commission issued the Acceptance Order in April 2007, initiated the compliance effort. Based on the schedule accepted by the Commission, the Southern Operating Companies were afforded seven months to complete the functional separation of Southern Power, implement the required information sharing restrictions, and provide Separation Protocol training to its employees.

Southern Company evaluated its corporate structure and made various organizational changes. To functionally separate Southern Power's wholesale activities from the other Southern Operating Companies, Southern Company created Southern Wholesale Energy and Southern Power as divisions within Southern Company Services, Inc. Southern Wholesale Energy, a business unit within Southern Company Services, Inc. performs all of the bilateral, long-term wholesale activities of the Southern Operating Companies, with the exception of Southern Power. Southern Power, as subsidiary of Southern Company performs wholesale activities including asset management and trading, market analysis and structure, generation development, and asset acquisition on behalf of its shareholders. Southern Power also created its own finance, accounting, budgeting, and compliance groups separate from the other Southern Operating Companies. In addition, Southern Power established separate officer positions, including President, Chief Commercial Officer, Senior Production Officer, Chief Financial Officer, and Compliance Officer.

Southern Company reviewed its physical facilities and, as a result, relocated employees, made changes to its electronic infrastructure, and implemented physical access controls. Southern Company relocated 65 Southern Power employees and 90 other Southern Operating Companies employees within the Birmingham, Alabama, and Atlanta, Georgia, offices as a result of functionally separating Southern Power from the other Southern Operating Companies. In Birmingham, Southern Company physically separated employees solely dedicated to Southern Power to a separate floor and developed Southern Power's own trading floor. Southern Power's separate floor contains its asset management and trading, market analysis and structure, generation development, and asset acquisition functions. Southern Power installed electronic card key access controls on this separate floor to provide access only to employees solely dedicated to Southern Power. Southern Company also implemented electronic card key access controls to restrict Southern Power employees' access to non-public market information in other areas of the building where the other Southern Operating Companies perform operating and trading activities. Further, Southern Company instituted sign-in procedures for all non-authorized visitors in these areas to provide extra protection. Southern Company included these same protections in its Atlanta facilities and the generating plants owned and operated by Southern Power.

*Electronic Access Controls*

Southern Company conducted an extensive review of its computer and e-mail systems, business software applications and databases, and intranet sites to establish controls that prevent Southern Power employees from having electronic access to or receiving non-public market information from the other Southern Operating Companies. As a result of this review, Southern Company installed a segmented network to comply with the electronic separation requirements ordered by the Commission's Settlement and Acceptance Orders. The segmented network allows Southern Power to coexist on the same information technology infrastructure as the rest of Southern Company, yet at the same time precludes Southern Power from obtaining non-public market information electronically. Southern Company also created separate intranet Web sites for Southern Power and the other Southern Operating Companies to ease the burden of electronic separation

[29] *Southern Company Services, Inc.*, Docket No. EL05–102–003 (July 16, 2007) (unpublished letter order); *Southern Company Services, Inc.*, Docket No. EL05–102–004 (September 12, 2007) (unpublished letter order), *Southern Company Services, Inc.*, Docket Nos. EL05–102–005 and EL05–102–006 (January 11, 2008) (unpublished letter order).

and Southern Power's restriction to non-public market information. Further, all shared drives that contain non-public market information are electronically protected and restrict Southern Power employees' access. In addition to these protective measures, Southern Company added an ''SPC'' notation next to the e-mail addresses of Southern Power employees to clearly distinguish them from non-Southern Power employees and avoid the inadvertent exchange of non-public market information.

*Employee Training*

Southern Company informed audit staff that the Southern Operating Companies provided the Separation Protocol training required by the Commission's Settlement Order to over 15,000 employees. This training educated employees on functional separation requirements, physical separation requirements, ''prohibited information'' definitions, electronic access requirements, no conduit rules, and violation reporting instructions. The type of training provided (instructor-led or on-line) was based on the priority level of employees. Employees in the high priority level included employees of Southern Power, generation employees, transmission employees, shared support service employees and corporate officers of the other Southern Operating Companies responsible for these areas. These high priority level employees received instructor-led training while others participated in an on-line training program. Continued education and training on the Separation Protocol is provided on an annual basis. Additionally, training materials for the Separation Protocol are available on the intranets of both Southern Company and Southern Power.

*Order No. 697 Compliance Filing*

In the Acceptance Order, the Commission directed Southern Company Services, Inc. to revise its Separation Protocol and IIC to prohibit the sharing of any market information, whether or not such information is public.[30] Subsequent to the Acceptance Order, the Commission issued Order No. 697, which, among other things, codified a new definition of ''market information.'' Pursuant to the Commission's regulations, ''market information'' means non-public information related to the electric energy and power business including, but not limited to, information regarding sales, cost of production, generator outages, generator heat rates, unconsummated transactions, and historical generator volumes. Market information includes information from either affiliates or non-affiliates.[31] This new definition not only provides greater specificity regarding the type of information falling within its scope, but also limits its application to non-public information.

On December 4, 2007, Southern Company Services, Inc., on behalf of the Southern Operating Companies, made a section 205 filing in Docket No. ER08–298–000 to conform the definition of ''market information'' as used in the Separation Protocol and the IIC to the definition of that term established in Order No. 697. On January 11, 2008, the Commission accepted the filing.[32]

*Standards of Conduct Compliance*

In the Settlement Order, the Commission directed Southern Operating Companies to revise section 4.4 of the IIC to make clear that the IIC is not to serve as a means whereby transmission information is shared in a manner contrary to the Commission's Standards of Conduct.[33] The Settlement Order also required revision of section 4.4 of the IIC to make clear that Southern Power is treated as an Energy Affiliate under the Standards of Conduct and therefore cannot receive any nonpublic transmission information.[34]

While the Commission recently revised its Standards of Conduct regulations, the fundamental principle prohibiting a transmission provider's transmission function employees from disclosing nonpublic transmission information (which includes customer information) to marketing function employees is retained. The revisions do not affect either Southern Operating Company's compliance with the recommendations regarding shared employees or the information restrictions discussed herein. We also note that the Southern Operating Companies are subject to restrictions similar to those in the Standards of Conduct regulations based on its market-based rate authority.[35] In addition to restricting information sharing between a franchised public utility with captive customers and a market-regulated power sales affiliate, those rules contain separation of function requirements and a no conduit provision.

**Introduction**

*A. Objectives*

The primary objective of the audit was to determine whether the Southern Operating Companies fully complied with the conditions and modifications imposed by the Commission in its Settlement and Acceptance Orders. The audit also evaluated whether the conditions and modifications set forth in both orders are sufficient to address any remaining opportunities for affiliate abuse related to Southern Power under the IIC. The audit covered the period from November 19, 2007 through August 29, 2008.

*B. Scope and Methodology*

Audit staff conducted a series of reviews prior to the commencement of the audit to gain an understanding of Southern Company's corporate environment, and state and federal regulatory affairs. Audit staff also monitored the implementation of the modifications imposed upon the Southern Operating Companies by the Commission in Docket No. EL05–102–000 through a series of phone conferences and compliance filing reviews. The audit activities conducted included:

- *Corporate Review*—Audit staff conducted a corporate review prior to the commencement of the audit to obtain a preliminary understanding of Southern Company's corporate structure, system design and operations, and market and financial activities. Audit staff reviewed publicly available materials and references including Southern Company's: OASIS and corporate Web sites; Federal Energy Regulatory Commission (FERC) Electric Quarterly Reports (EQR); FERC Forms No. 1, 60, and 714; IIC Annual Informational Filing; Securities and Exchange Commission (SEC) Forms 8–K, 10–Q, and 10–K; annual stockholder reports; various industry Web sites; and trade press releases.
- *Internal Auditor and External Accountant Review*—Audit staff reviewed relevant audit reports and workpapers of the Southern Companies' internal audit department and external audit firm, Deloitte & Touche LLP. The audit staff also reviewed the prior SEC audit report relating to service company costs and revenue allocations.
- *Federal Regulatory Review*—Audit staff reviewed numerous company filings and Commission orders to obtain

[30] Acceptance Order at P 26.

[31] 18 CFR 35.36(a)(8).

[32] *See Southern Company Services, Inc.,* Docket No. ER08–298–000 (January 11, 2008) (unpublished letter order).

[33] Settlement Order, at P 55.

[34] The Commission recently eliminated the concept of ''energy affiliate'' from the Standards of Conduct regulations (see *Standards of Conduct for Transmission Providers, Order No. 717,* 125 FERC ¶ 61,064 (2008).

[35] 18 CFR 35.39 (2008).

an understanding of the issues involved in the audit, including: Docket Nos. EL05–102, EL05–104, and ER03–713; market-based rate tariffs and authorizations, including Docket Nos. ER95–1468, ER96–780, ER00–1655, ER03–3240, ER01–1633, and ER03–1383; and various dockets authorizing Southern Power to sell power to Alabama Power and Georgia Power. Additionally, audit staff reviewed company filings and orders relating to Southern Company's OATT and Order No. 697 compliance filings.

• *State Regulatory Review*—Audit staff performed a comprehensive review of each State Commission's (Georgia, Alabama, Mississippi, and Florida) Web site to obtain an understanding of their oversight responsibilities and regulatory involvement with Southern Company. Additionally, audit staff conducted phone conferences with staff at each State Commission to establish points of contact for the audit and to discuss its past regulatory review of Southern Company. In particular, audit staff inquired about each State Commission's compliance audits related to affiliated transactions and cross-subsidization, their understanding and review of the terms and conditions of the IIC and related billing process, and their involvement in solicitation of competitive bids for generation suppliers.

• *Monitoring of Compliance Implementation*—To ensure that Southern Company adhered to the Commission-approved compliance implementation schedule, audit staff monitored Southern Company's progress prior to the audit. Specifically, audit staff reviewed compliance filings made with the Commission by Southern Company Services, Inc. on behalf of the Southern Operating Companies. Further, audit staff held three phone conferences with Southern Company regarding the status and completion of its projected compliance implementation plan before the commencement of the audit on November 19, 2007.

Audit staff also reviewed specific areas related to the objectives of the audit and conducted testing in those areas to evaluate the Southern Operating Companies' compliance with the conditions imposed by the Settlement and Acceptance Orders, and whether those conditions were sufficient to address any remaining opportunities for affiliate abuse by Southern Power under the IIC. Audit staff held regular conference calls and formal meetings with Southern Company, and performed three site visits at Southern Company's facilities in Birmingham, Alabama, and one site visit in Atlanta, Georgia. Further, audit staff issued nearly two hundred data requests to obtain information for review and testing purposes, and to collect evidence to support its conclusions. The specific areas audit staff reviewed and tested include the Separation Protocol, wholesale sales, transmission, and GSS tariff.

• *Separation Protocol*—Audit staff conducted multiple tests to evaluate the Southern Operating Companies' compliance with the conditions imposed by the Commission and remaining opportunities for affiliate abuse relating to the separation of functions and employee workspace, restriction of non-public market information, separation protocol training, and sale of non-power goods and services. Specifically, audit staff:

○ Reviewed Southern Company's organizational structure and conducted interviews with several employees to ensure that Southern Company functionally separated all wholesale activities carried out for the sole benefit of Southern Power shareholders, including its trading activities by the other Southern Operating Companies.

○ Toured and inspected Southern Power and other facilities in Birmingham, Alabama, and Atlanta, Georgia, to ensure that the workspace of all employees conducting separated functions of Southern Power were separated from the workspace of the other Southern Operating Companies.

○ Inspected the physical and electronic information security restrictions in place and tested the information system processes and controls in place at the network, application, and workstation level to ensure non-public market information is protected from employees conducting the separated functions of Southern Power.

○ Reviewed various physical and electronic means by which Southern Power could access or receive non-public market information from the other Southern Operating Companies to ensure they did not violate the Separation Protocol. The various means inspected included: employee e-mails and voice recordings; access to shared drives and databases containing non-public market information; electronic card key access permissions at facilities containing non-public market information; records of joint meetings between Southern Power and other Southern Operating Companies; and visitor sign-in logs at facilities containing non-public market information. Further, audit staff conducted interviews with employees who conduct separated functions for Southern Power and interviews with employees performing pool operations and trading as a secondary level of testing.

○ Reviewed the training program Southern Company developed to educate employees affected by the Separation Protocol to assess its adequacy and completeness. Audit staff also interviewed compliance officers involved with providing training and employees receiving training to assess their knowledge and understanding of the Separation Protocol. As part of this testing, audit staff reviewed the processes in place for detecting and investigating potential violations of the Separation Protocol, and procedures for posting actual violations of the Separation Protocol on OASIS.

○ Reviewed the allocation methodologies and pricing for non-power goods and services provided and purchased amongst Southern Company Services, Inc., Southern Power, and the other Southern Operating Companies, to determine whether such allocation methodologies and pricing were consistent with the Separation Protocol and did not result in subsidization. Audit staff reviewed all service agreements in effect that provide for non-power goods and services to identify the types of non-power goods and services provided and purchased amongst Southern Company Services, Inc. and the Southern Operating Companies, and the pricing for such non-power goods and services. Audit staff also reviewed the methods used to allocate cost amongst the Southern Operating Companies.

○ *Wholesale Sales*—Audit staff conducted several tests to evaluate the Southern Operating Companies' compliance with the conditions imposed by the Commission and remaining opportunities for affiliate abuse relating to wholesale sales, including the IIC provisions for: reserve sharing and generation expansion plans; sales between the Southern Operating Companies; and wholesale sales to third parties. Specifically, audit staff:

○ Conducted group discussions and interviews with operational, trading, and shared employees to obtain an in-depth knowledge and understanding of the provisions of the IIC and the operation of Southern Company's integrated system. Further, audit staff reviewed business practices and procedures, observed operational and trading activities, and reviewed transactional and other business data to determine how to apply these provisions for testing compliance.

○ Reviewed Southern Company's annual IIC informational filing, conducted employee interviews, and analyzed data to determine how the Southern Operating Companies derived recognized capacity for the reserve sharing calculation. As part of the data analysis, audit staff reviewed expansion plans to verify Southern Power did not automatically include new capacity resources in the reserve sharing calculation as recognized capacity that was not part of the coordinated planning process. Further, audit staff analyzed reserve sharing calculations and billings to verify the payments to and receipts from the Southern Operating Companies for reserve sharing were in accordance with the provisions of the IIC.

○ Analyzed transactions, billings, and other documents to validate the payments to and receipts from the pool for interchange energy and opportunity interchange energy were in accordance with the provisions of the IIC. Audit staff reviewed pool interchange energy sale transactions between the Southern Operating Companies to validate the charges were based upon the variable costs of the generating resource supplying the interchange energy. Audit staff also reviewed pool opportunity interchange energy sales transactions to verify the Southern Operating Companies received revenues based upon approved peak period load ratios and paid costs based upon the variable dispatch costs.

○ Reviewed regulatory filings to determine whether the Commission approved any sales between the Southern Operating Companies outside the pool operating window for the periods of less than one year and greater than one year. Audit staff also analyzed transactional data and conducted employee interviews to independently assess whether any sales between the Southern Operating Companies occurred outside the pool operating window without prior Commission approval.

○ Analyzed transactional data and other supporting documents to verify Southern Power made all of its wholesale sales outside the pool operating window using its own generating capacity. Audit staff also interviewed Southern Operating Companies' employees to assess the adequacy of procedures and controls in place for ensuring all of Southern Power's wholesale sales occur outside the pool operating window and that Southern Power has available capacity from its own generating resources to support these wholesale sales.

○ Reviewed the Southern Operating Companies' coordinated planning process to verify Southern Power independently developed its generation expansion plans and did not participate in reviewing and recommending the generation expansion plans of the other Southern Operating Companies. Further, audit staff reviewed e-mails and interviewed the Southern Power Senior Production Officer on the Operating Committee to ensure Southern Power did not receive non-public market information from other Operating Committee members.

○ *Transmission*—Audit staff conducted several tests to evaluate the Southern Operating Companies' compliance with the conditions imposed by the Commission and remaining opportunities for affiliate abuse relating to the Southern Operating Companies' access to non-public transmission information and Southern Power's adherence to the terms and conditions of the OATT and treatment as an Energy Affiliate under the Standards of Conduct. Specifically, audit staff:

○ Conducted interviews with Southern Company transmission function managers and employees to understand the physical aspects and operations of Southern Company's electric transmission system.

○ Reviewed corporate organizational charts and employee job descriptions to assess the functional separation of Southern Power and other marketing functions from the transmission function.

○ Reviewed all transmission services provided to each of the Southern Operating Companies by Southern Company's transmission function and then analyzed transmission service agreements, reservations, schedules, and billing statements to validate that Southern Power adhered to the terms and conditions of the OATT.

○ Reviewed various physical and electronic means for Southern Power and other employees performing marketing activities to access or receive non-public transmission information to ensure that they did not violate the Commission's Standards of Conduct regulations in effect during the audit period. The various means inspected included: employee e-mails and voice recordings; marketing employees' access to shared drives and transmission databases; transmission facilities' electronic card key access permissions; records of joint meetings between transmission and marketing function employees; and records for visitor sign-in logs at the operating control center. Audit staff also conducted interviews with personnel who work in separated functions for Southern Power and interviews with employees performing pool operations and trading as a secondary level of testing.

○ Reviewed OASIS to determine whether the Southern Operating Companies made required postings in accordance with the Standards of Conduct as in effect at the time.

○ *GSS Tariff*—Audit staff conducted testing to evaluate the Southern Operating Companies' compliance with the conditions imposed by the Commission and remaining opportunities for affiliate abuse relating to similarly-situated merchant generators' access to back-up power. Audit staff reviewed all filings made by Southern Company Services, Inc. to validate that Southern Company complied with the Commission's order to file a GSS tariff that offered all similarly-situated merchant generators access to back-up power. Audit staff issued data requests and conducted interviews to assess the internal processes and procedures related to the administration of the GSS tariff. Audit staff also used these data requests and interviews to verify whether any scheduling entity requested service under the GSS tariff, and to determine whether any scheduling entity was improperly denied service under the GSS tariff.

**III. Findings and Recommendations**

*1. Electronic Separation*

Although Southern Company implemented electronic controls to prevent Southern Power employees from accessing non-public market information, audit staff detected gaps that could have potentially provided Southern Power employees with access to non-public market information. Specifically, as part of our audit testing, a Southern Power employee was able to breach Southern Company's network access protections through a non-Southern Power computer workstation and the wireless network.

Additionally, Southern Company did not have adequate procedures in place to review: (1) Personal network drives that may contain non-public market information when employees transferred jobs and (2) files transferred to shared network drives by non-Southern Power employees for non-public market information.

Pertinent Guidance

The Commission's Settlement Order required the Southern Operating Companies to ''adopt a clear separation of functions, including restrictions on

information sharing,'' for transactions benefitting Southern Power's shareholders. The Settlement Order also required Southern to make clear that Southern Power is to be treated as an Energy Affiliate under the Standards of Conduct and therefore cannot receive any nonpublic transmission information.[36] In response to implementing these modifications, Southern Company included language in its Separation Protocol to protect against the electronic sharing of non-public market information. Specifically, the Separation Protocol applicable to Southern Power states in paragraph no. 4:

> Prohibited information will be electronically protected from employees conducting the separated functions of Southern Power through restricted access to any shared drive that includes such information. Access to these shared drives by employees conducting the separated functions of Southern Power will require pre-approval under an authorization process administered by the Southern Company Generation Compliance Officer.

**Background**

Southern Company conducted a comprehensive review of its computer network environment, business software applications and databases, intranet Web sites, and other computer related systems to ensure it had adequate controls in place to restrict Southern Power employees from having electronic access to non-public market information. Southern Company implemented a segmented network as its overarching control to comply with the electronic separation and information sharing requirements set forth in the Commission's Settlement Order. The segmented network allows Southern Power to co-exist on the same information technology infrastructure as the rest of Southern Company, yet at the same time is designed to preclude Southern Power from electronically accessing non-public market information. The implementation of the segmented network and other computer infrastructure related changes required extensive employee hours and cost approximately $1.3 million.

The compliance measures taken by Southern Company required re-engineering of its existing computer infrastructure with the implementation of a segmented network. Audit staff's review of the segmented network determined that it is an effective first line of defense in electronically protecting Southern Power employees' access to non-public market information. However, audit staff's testing of Southern Company's electronic separation control environment for the segmented network detected some minor weaknesses that could have potentially provided Southern Power employee's access to non-public market information through personal employee computers workstations and the wireless network had they been left unresolved.

Further, Southern Company did not have adequate procedures in place to review for non-public market information: (1) personal network drives when employees transferred jobs and (2) files transferred to shared network drives by non-Southern Power employees.

*Segmented Network*

The segmented network was achieved by installing dedicated computer infrastructure, such as dedicated servers, switches and firewalls, and by implementing automated rules with Microsoft's Active Directory and Group Policy within the infrastructure to electronically separate Southern Power from the remainder of Southern Company and to control access to non-public market information. Southern Company's segmented network is an effective first line of defense in electronically protecting non-public market information from Southern Power employees.

The segmented network is ultimately controlled through Microsoft's Active Directory and relies on an internally designed set of scripts to ensure that Southern Power employees cannot access non-public market information. The scripts, known as the Validator program, ensure that three conditions are met before allowing Southern Power employees electronic access: the employee must be a member of the restricted user group, the workstation must be a member of the restricted workstation group, and the location must be a restricted site. If any of these three conditions is not met, the Validator program should shut down the workstation for Southern Power employees.

Audit staff conducted testing at non-Southern Power computer workstations to determine whether the segmented network controls adequately blocked Southern Power employees' access to restricted areas containing non-public market information. One test confirmed that the segmented network successfully blocked a Southern Power employee from gaining access to the protected segmented network using a non-Southern Power computer workstation located in an employee's office. However, the other test detected that the segmented network could be breached by a Southern Power employee through the use of a non-Southern Power computer workstation located in a non-Southern Power conference room. In comparing the two different outcomes, Southern Company explained that the Southern Power employee successfully logged onto the conference room computer workstation because it resided on the SOCOGEN network.

Upon discovery, Southern Company took immediate action to resolve the conference room workstation breach. Southern Company explained that most of the workstations on the SOCOGEN network are in secure areas to which Southern Power employees do not have access privileges. Therefore, Southern Company believed it was not necessary to implement the ''deny access'' log-on controls applied to Southern Power employees on the SOCOGEN network. Rather than applying the ''deny access'' log-on controls to these conference room workstations, Southern Company addressed this breach by applying the log-on restrictions across the entire SOCOGEN network, in case there were additional SOCOGEN workstations in non-secure areas of the building. Had this problem been left uncorrected, this breach could have potentially provided a Southern Power employee access to non-public market information.

*Wireless Network*

Southern Company implemented a separate wireless network for Southern Power in order to restrict access to non-public market information. Southern Power employees should be capable of accessing only the Southern Power wireless network, placing them behind Southern Power's dedicated firewalls and subjecting them to all of the rules applied to a Southern Power workstation connected to the network through wired access. Southern Company's other employees can connect to the ''Office wireless network.'' Southern Power employees should not be able to connect to the Office wireless network.

Audit staff's testing of the wireless network from a Southern Power laptop computer revealed that the employee using a Southern Power restricted workstation was able to connect to the Office wireless network. Essentially, by successfully connecting to Southern Company's Office wireless network, a Southern Power employee was able to bypass the segmented network. This connection potentially allowed the Southern Power employee access to non-public market information. According to Southern Company, some users had Active Directory permission

[36] Settlement Order at P. 3.

inadvertently enabled on their laptop computers for remote access. This permission superseded the Active Directory ''deny access'' configuration applied to all Southern Power users for the Office wireless network. To correct this issue, Southern Company modified the configuration to ignore this Active Directory property for remote access, removing the conflict in permissions. Audit staff's re-testing of the wireless network demonstrated that the system did not allow the Southern Power employee connection.

*Employee Computer Workstations*

Audit staff conducted testing of Southern Power employee computer workstations to determine whether they could access non-public market information through personal network drives, shared network drives, and applications and databases. Audit staff's testing did not detect any evidence that Southern Power employees accessed or received non-public market information through its personal computer workstations. However, audit staff observed that Southern Company had some procedural weaknesses related to personal network drives, shared drives, and computer applications and databases that could potentially provide Southern Power the opportunity to access non-public market information.

During interviews, audit staff learned that each employee has a personal network drive and if an employee transfers from one area of Southern Company to another, such as from the Transmission function into Southern Power, the employee's personal network drive is transferred with the employee. However, Southern Company did not have a policy in place to review the contents of the transferred employees' personal network drive for non-public market information. Audit staff also learned that the network server access restrictions are one-directional (*i.e.* Southern Power to the other Southern Operating Companies). As a result, a non-Southern Power employee with write access to a shared network drive could transfer files containing non-public market information to the network drive it shares with Southern Power. Southern Company also did not have a policy in place to review shared network drives for non-public market information. Currently, the Separation Protocol and Standards of Conduct training programs are the only control mechanisms in place to prevent Southern Power access to non-public market information through personal and shared network drives.

To prevent the type of breaches audit staff detected during its examination of the segmented network and wireless network, Southern Company should implement multiple strategies to electronically restrict Southern Power employees' access to non-public market information. For example, Southern Company should implement procedures to ensure Southern Power employees are electronically restricted from obtaining non-public market information through access rights to shared network drives. Further, Southern Company should develop procedures to review and remove non-public market information from personal network drives for employees who transfer to Southern Power from another area of the company.

**Recommendations**

*We recommend Southern Company:*

1. Create procedures for reviewing files posted to Southern Power shared drives by non-Southern Power employees for non-public market information. Additionally, create procedures for reviewing the personal network drives of all employees who transfer into Southern Power for non-public market information. For each review, remove all files that contain non-public market information from the personal network drive of the transferred employee.

2. Perform periodic reviews to ensure that Southern Power employees do not have access rights to shared network drives containing non-public market information. Additionally, these periodic reviews should include testing of the segmented network to determine whether Southern Power employees can bypass the segmented network and potentially access non-public market information.

3. Add the SPC designator to Southern Power employee names in Cool Compliance, as is already done in the Global Address List for e-mails, to spotlight a Southern Power employee having access rights granted in Cool Compliance.

**Corrective Action Taken**

On November 14, 2008, Southern Company implemented new procedures governing the monitoring and review of shared drives and personnel network drives. For shared drives the new procedures require any non-Southern Power employee who posts material to a Southern Power shared folder to send an e-mail notifying the Southern Power employee of the posting content. For personnel network drives the new procedures requires a Southern Power business manager and transferred employee to review and remove any documents containing non-public market information from the personnel network drive and to a complete and submit a transfer checklist to a compliance officer for review.

Southern Company also implemented new procedures that require a semi-annual review of approved access lists and content of Southern Power shared drives by a generation compliance officer. Further, the new procedures also require periodic testing of the segmented network to verify the integrity of the preventive controls and to confirm that Southern Power employees do not have access to network drives that contain non-public market information.

On November 10, 2008, Southern Company informed audit staff that it will begin identifying and labeling all Southern Power employees in Cool Compliance to help prevent inadvertent disclosure of non-public market information. However, Southern Company did not provide an the implementation date for this new procedure.

*Employee Separation*

Audit staff observed a shared employee performing transmission activities that support the long-term wholesale energy transactions of Southern Power, while at the same time performing transmission and energy trading activities that support the short-term wholesale energy transaction made by the pool on behalf of the Southern Operating Companies. Audit staff believes that Southern Company should dedicate separate employees to perform the transmission activities supporting Southern Power's long-term wholesale energy transactions and the transmission activities supporting the short-term wholesale energy transactions made for the pool on behalf of the Southern Operating Companies to prevent the potential for any undue preference.

**Pertinent Guidance**

The Settlement Order clarified that where a competitive affiliate enters into transactions for its own benefit, it must separate its functions from those of its regulated affiliates.[37] This separation of functions obligation includes, in part, a requirement to maintain separate staffs to perform the sales functions and a restriction on the sharing of any non-public market information. These protections ensure that the parent corporation cannot favor sales by the

[37] Southern Company Services, Inc., 117 FERC ¶ 61,021 (2006).

competitive affiliate over those of the regulated affiliates.

Moreover, the Commission's Acceptance Order further clarified that the Southern Operating Companies must adopt a clear separation of functions, including restrictions on information sharing, and a separation of personnel, for any function that is undertaken for the benefit of Southern Power's shareholders (*i.e.* any function except joint economic dispatch and reserve sharing under the IIC).[38]

To implement these modifications, Southern Company Services, Inc., included specific language in its Separation Protocol regarding the functional separation of Southern Power employees from the other Southern Operating Companies. Specifically, the Southern Company Services, Inc., Separation Protocol approved by the Commission applicable to Southern Power, Items No. 1 and 2, states:

> The wholesale activities of Southern Power carried on for the sole benefit of Southern Power are to be functionally separated from the other Southern Operating Companies. These activities (collectively referred to as separated functions) consist of any function undertaken for the benefit of Southern Power's shareholders.
>
> Personnel who conduct separated functions for Southern Power may be employees of Southern Power or they may be employees of a service company or other affiliated company. To the extent the service company or other affiliated company employees conduct these separated functions, such employees must be dedicated exclusively to Southern Power and all associated costs (direct and indirect) must be borne by Southern Power or its shareholders.

**Background**

The Southern Operating Companies did not solely dedicate a shared employee performing transmission activities that support the long-term wholesale energy transactions of Southern Power and a different employee to support the short-term wholesale energy transactions made by the pool on behalf of the Southern Operating Companies. Southern Power relies on a shared employee to procure transmission service (*e.g.*, negotiate transmission service agreements and reserve transmission service) that supports its long-term wholesale energy transactions made outside the pool operating window. This same shared employee is responsible for performing energy trading and the transmission activities for the pool on behalf of the Southern Operating Companies for short-term wholesale energy transactions made under the IIC.

During the audit period, audit staff did not identify any occurrences where Southern Power received an undue preference. However, absent having an employee solely dedicated to Southern Power for performing transmission activities, there is a potential risk for Southern Power to receive an undue preference due to this shared employee's co-existing duties as a term energy trader for the pool and associated transmission responsibilities performed on behalf of the pool and Southern Power. Audit staff believes that the Commission's Settlement and Acceptance Orders and the Southern Company Services, Inc., Separation Protocol require further separation of the transmission activities performed by this shared employee by solely dedicating this person or another employee to Southern Power.

Audit staff's review of transmission service agreements between Southern Power and Southern Company's transmission function acknowledged the shared employee signed transmission service agreements on behalf of Southern Power. In addition to transmission service agreements, audit staff obtained transactional data from OASIS showing that the same shared employee made transmission service reservations to support Southern Power's wholesale energy transactions and the wholesale energy transactions made by the pool on behalf of the Southern Operating Companies. Further, audit staff reviewed the job description of this shared employee and interviewed the shared employee to confirm his job responsibilities included: (1) Optimizing daily and long-term point-to-point (PTP) transmission positions on behalf of the Southern Operating Companies including purchasing, reselling, and/or redirecting transmission through OASIS; (2) querying OASIS to determine available transfer capability on all Southern Company interfaces; (3) requesting long-term PTP transmission for the Southern Operating Companies (through OASIS); (4) executing transmission service agreements; and (5) conducting term energy trading on behalf of the pool.

Southern Company explained that when Southern Power needs long-term (*i.e.*, one month or greater) transmission service as the result of its entry into a wholesale energy purchase or sale contract, Southern Power notifies this shared employee of that transmission need. The shared employee then pursues available long-term transmission that meets Southern Power's needs through queries on Southern Company's or a non-affiliated Transmission Provider's OASIS and through inquiries to potential counterparties. When such transmission is found, a transmission service agreement is executed on behalf of Southern Power and provided to it. This same shared employee, within the nearer-term operational window as provided by the IIC, procures transmission service for the Southern Operating Companies to support any short-term wholesale energy transactions made on behalf of the pool. This process applies to transmission procured from Southern Company's transmission function as well as from non-affiliated Transmission Providers.

Southern Company stated that it uses this shared employee to perform the transmission activities for Southern Power and the pool on behalf of the Southern Operating Companies because of the integrated operating nature of the pool. Further, Southern Company stated that the pool seeks to optimize all of the Southern Operating Companies' resources related to unit commitment and joint economic dispatch, including generation, purchased power, transmission and fuel arrangements (*e.g.*, natural gas supply, transportation and storage). Audit staff agrees that the pool must operate on an integrated basis and that all reserved transmission capacity should be obtained by the pool in accordance with the terms and conditions of the OATT. However, as required by the Commission's Settlement and Acceptance Orders and the Southern Company Services, Inc. Separation Protocol, the procurement of transmission service supporting Southern Power's long term wholesale energy transactions should not be a pool responsibility performed by a shared employee, but rather a responsibility performed by an employee solely dedicated to Southern Power.

Audit staff is concerned that there is a potential risk for Southern Power to receive an undue preference if this shared employee continues to have co-existing duties as an energy trader for the pool, along with the transmission responsibilities associated to the wholesale energy transactions conducted on behalf of the pool and Southern Power.

**Recommendation**

We recommend Southern Company:

4. Dedicate employees performing transmission activities that support Southern Power's long-term wholesale energy transactions solely to Southern Power.

**Corrective Action Taken**

On November 7, 2008, Southern Company informed audit staff that it

[38] Acceptance Order at P. 16–17.

transferred the responsibilities associated with the procurement of transmission service for Southern Power's long-term wholesale energy transactions to Southern Power.

*Posting of Separation Protocol Violations on OASIS*

Southern Company did not immediately post, date, and time stamp the postings it made to OASIS in accordance with the Commission's Standards of Conduct requirements in effect during the audit period.

**Pertinent Guidance**

Pursuant to the Separation Protocol paragraph 6, the Southern Operating Companies are required to post any violation of the Separation Protocol on OASIS in a manner consistent with the process under the Standards of Conduct.[39] The Standards of Conduct require the Transmission Provider to post immediately information that an employee of the Transmission Provider discloses in a manner contrary to the requirements of § 358.5(b)(1) on its OASIS or Internet Web site.[40] The requirement of 18 CFR 358.5(b)(1) (2008) states:

> An employee of the Transmission Provider may not disclose to its Marketing or Energy Affiliates any information concerning the transmission system of the Transmission Provider or the transmission system of another * * * through non-public communications conducted off the OASIS or Internet Web site, through access to information not posted on the OASIS or Internet Web site that is not contemporaneously available to the public, or though information on the OASIS or Internet Web site that is not at the same time publicly available.

The Commission's Standards of Conduct regulations also require all OASIS database transactions, except other transmission-related communications provided for under 18 CFR 37.6(g)(2)(2008), must be stored, dated, and time stamped.[41] Further, the Commission explained, in 18 CFR 37.6(g)(1)(2008), that other transmission-related communications may include ''want ads'' or ''other communications'' such as using the OASIS as a transmission-related conference space or making transmission-related messaging services between OASIS users.

**Background**

On November 19, 2007, the Separation Protocol applicable to Southern Power became effective and in part required the Southern Operating Companies to post any violation of the Separation Protocol on OASIS in a manner consistent with the Commission's Standards of Conduct requirements. In accordance with this requirement, Southern Company has made fourteen postings covering violations of the Separation Protocol on its OASIS between November 19, 2007 and August 31, 2008. However, Southern Company did not immediately post, date and time stamp the postings it made to OASIS. The fourteen violations included the following:

- Eleven e-mails containing non-public market information that were electronically sent to Southern Power employees from employees of the other Southern Operating Companies. The non-public market information included in these e-mails pertained to non-Southern Power plant outages, unit status, plant damage, plant equipment issues, and plant performance. Some of the non-public market information shared also pertained to system load data and financial information such as mark-to-market accounting and budgets. The Compliance Officer's investigation of these violations determined that Southern Power employees viewed non-public market information in seven of the eleven e-mails received. One of the violations involved the distribution of the same non-public market information sent to Southern Power employees in a previous e-mail. The other three e-mails contained non-public market information which was received, but not viewed by, Southern Power employees. Most of the violations occurred from having outdated e-mail distribution lists that contained Southern Power employees and from reports received by Southern Power employees, where the senders did not realize the contents included non-public market information.
- One involved a Southern Power employee who obtained access to the power pool trading floor, which is a physically restricted access area. The review performed by a compliance official determined that the Southern Power employee did not view or review any non-public market information.
- One violation involved a meeting where employees from Southern Power and the other Southern Operating Companies were present. During this meeting, non-public market information pertaining to a plant outage with a third party that sold the output of the plant to Georgia Power Company was shared with Southern Power. A compliance official informed the Southern Operating employee that they should not do this going forward when meeting with Southern Power employees.
- One involved computer access to an application containing load forecast data of Georgia Power Company. The initial Separation Protocol review did not detect any problems with this application; however, a modification to the application was made subsequent to this review which granted Southern Power employees access to non-public market information. A compliance official interviewed each employee with access to the load forecast data and determined that none of these employees accessed or viewed this information. Southern Company resolved this problem by removing the Southern Power employee's access to non-public information of Georgia Power Company.

Audit staff requested copies of documents related to all potential and actual Separation Protocol violations that were investigated since November 19, 2007. Audit staff's review of these reports determined Southern Company posted many of the Separation Protocol violations days or weeks after the Southern Power employee received access to the non-public market information. For example, Southern Company posted one incident over one full month following the receipt of the non-public market information by a Southern Power employee. Moreover, audit staff determined that Southern Company identified the date of occurrence, but did not date or time stamp any of the Separation Protocol violations it posted on OASIS. As a result, non-affiliated transmission customers could not determine whether Southern Company posted the Separation Protocol violations immediately, as required by the Standards of Conduct.

The Standards of Conduct require Southern Company to immediately post information that an employee of the Transmission Provider discloses in a manner contrary to the requirements of § 358.5(b)(1) on the OASIS.[42] Further, all OASIS database transactions, except other transmission-related communications provided for under 18 CFR 37.6(g)(2)(2008), must be stored, dated, and time stamped.[43] Accordingly, Southern Company should immediately post all non-public market information that a Southern Power employee receives and include a date and time stamp in accordance with the Standards of Conduct.[44]

[39] Southern Company Services, FERC Electric Tariff, Second Revised Volume No. 4, Original Sheet No. 6.

[40] 18 CFR 358.5(b)(3)(2008).

[41] 18 CFR 37.7(a)(2008).

[42] 18 CFR 358.5(b)(3)(2008).

[43] 18 CFR 37.7(a)(2008).

[44] 18 CFR 37.6(g)(2)(2008).

**Recommendations**

*We recommend Southern Company:*

5. Post all violations of the Separation Protocol immediately in accordance with 18 CFR 358.5(b)(3). In addition to the date the violation occurred, Southern Company should include on each document the date and time Southern Company posted the violation to OASIS in accordance with 18 CFR 37.6(g)(2).

6. Strengthen procedures and controls for maintaining e-mail distribution lists and providing reports to Southern Power that may contain non-public market information. Incorporate these procedures and other pertinent procedural enhancements in the Separation Protocol compliance training program to achieve a reduction in the number of future violations.

**Corrective Action Taken**

On November 14, 2008, Southern Company revised its Separation Protocol Violations Investigative Procedure to reflect that upon determining an actual violation has occurred, the incident must immediately be posted on OASIS. Further, Southern Company implemented a procedural change to include a date and time stamp for each document posted on OASIS relating to the violation.

Southern Company also implemented new procedures requiring employees to maintain and periodically review their e-mail distribution lists to verify employee memberships. Further, Southern Company revised its Separation Protocol training to provide additional and more detailed guidance with regard to electronic communications with Southern Power employees and, the development and maintenance of e-mail distribution lists. The revised training will be conducted online, with an anticipated completion deadline of December 31, 2008.

**V. Southern Companies' Comments on the Draft Audit Report**

*FERC Docket No. PA08–6–000*

Southern Company Services, Inc., acting as agent for Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Southern Power Company (collectively, ''Southern Companies''), submits the following comments on the Draft Audit Report provided by the Division of Audits on November 4, 2008.

In this submission, Southern Companies have purposefully sought to focus their comments on more substantive matters, and thus have not undertaken to address each and every aspect with which they disagree. In like manner, Southern Companies saw no need to set forth the substantive reasons for their disagreement with any recommendations that they have nonetheless agreed to implement. Accordingly, the absence of comment directed to a given statement, assertion, representation, or conclusion in the Draft Audit Report should not be interpreted as their agreement or tacit admission as to accuracy or completeness thereof.

1. Electronic Separation

*Recommendation No. 1:* Create procedures for reviewing files posted to Southern Power shared drives by non-Southern Power employees for non-public market information. Additionally, create procedures for reviewing the personal network drives of all employees who transfer into Southern Power for non-public market information. For each review, remove all files that contain non-public market information from the personal network drive of the transferred employee.

Southern Companies' Comments on Recommendation No. 1:

Effective November 14, 2008, Southern Companies have implemented the ''Separation Protocol Policy to Govern Monitoring of the Southern Power Shared Folders,'' which is a new policy regarding information posted to Southern Power Company (''Southern Power'') shared folders by non-Southern Power employees. This new procedure includes periodic reviews of approved access lists and content. The procedure also includes a requirement that any non-Southern Power employee who posts material to a Southern Power shared folder will notify the owner of such folder by e-mail of the posting. Southern Companies have submitted this policy to Audit Staff for review.

Effective November 14, 2008, Southern Companies have implemented the ''Separation Protocol Policy to Govern Employee Transfers to Southern Power Company,'' which is a new policy that addresses the personal network drives of employees who transfer into Southern Power. This policy will insure that these employees do not retain any documents (hard copy or electronic) containing Prohibited Information. Southern Companies have submitted this policy to Audit Staff for review.

*Recommendation No. 2:* Perform periodic reviews to ensure that Southern Power employees do not have access rights to shared network drives containing non-public market information. Additionally, these periodic reviews should include testing of the segmented network to determine whether Southern Power employees can bypass the segmented network and potentially access non-public market information.

Southern Companies' Comments on Recommendation No. 2:

Effective November 14, 2008, Southern Companies have implemented the ''Separation Protocol Policy to Govern Monitoring of the Segmented Network,'' which is a new policy that requires periodic testing of the segmented network to verify the integrity of the preventive controls and to confirm that Southern Power employees do not have access to network drives that contain Prohibited Information. Southern Companies have submitted this policy to Audit Staff for review.

*Recommendation No. 3:* Add the SPC designator to Southern Power employee names in Cool Compliance, as is already done in the Global Address List for e-mails, to spotlight a Southern Power employee having access rights granted in Cool Compliance.

Southern Companies' Comments on Recommendation No. 3:

The designator ''(SPC)'' will be added to Southern Power employee names in Cool Compliance. Southern Companies have submitted evidence of this implementation to Audit Staff.

2. Employee Separation

*Recommendation No. 4:* Dedicate employees performing transmission activities that support Southern Power's long-term wholesale energy transactions solely to Southern Power.

Southern Companies' Comments on Recommendation No. 4:

Southern Companies disagree with the findings in this section of the Draft Audit Report and the related recommendation. However, in order to resolve this issue, the procurement of long-term transmission service associated with the long-term wholesale energy transactions of Southern Power has been moved to Southern. Accordingly, all long-term transmission service requests associated with Southern Power's long-term energy transactions will be made on OASIS by Southern Power employees.

3. Posting of Separation Protocol Violations on OASIS

*Recommendation No. 5:* Post all violations of the Separation Protocol immediately in accordance with 18 CFR

358.5(b)(3). In addition to the date the violation occurred, Southern Company should include on each document the date and time Southern Company posted the violation to OASIS in accordance with 18 CFR 37.6(g)(2).

Southern Companies' Comments on Recommendation No. 5:

Southern Companies have revised their ''Separation Protocol Violations Investigative Procedure'' to state that when ''it is determined that an actual violation has occurred, the incident must be posted on OASIS *immediately.*'' Southern Companies have submitted the revised protocol to Audit Staff for review.

Southern Companies have implemented the changes necessary so that the date and time a violation is posted on OASIS will be included for each posting.

*Recommendation No. 6:* Strengthen procedures and controls for maintaining e-mail distribution lists and providing reports to Southern Power that may contain non-public market information. Incorporate these procedures and other pertinent procedural enhancements in the Separation Protocol compliance training program to achieve a reduction in the number of future violations.

Southern Companies' Comments on Recommendation No. 6:

Effective November 14, 2008, Southern Companies have implemented the revised ''Fleet Operations and Trading Floor Information, Physical Access and Visitor's Policy,'' which revision requires employees to maintain their e-mail distribution lists and to periodically review such lists to verify employee memberships. Southern Companies have also revised the Separation Protocol training to provide additional and more detailed guidance with regard to electronic communications with Southern Power employees and, the development and maintenance of e-mail distribution lists. This revised training will be conducted online, with an anticipated completion deadline of December 31, 2008. In addition, Southern Companies will continue to conduct individual training and counseling for employees that are involved in Separation Protocol investigations. Southern Companies have submitted the revised policy and applicable portions of the revised training materials to Audit Staff for review.

[FR Doc. E8–30143 Filed 12–18–08; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Docket No. ID–3914–009]**

## Davis, Curtis H.; Notice of Filing

December 15, 2008.

Take notice that on December 4, 2008, Curtis H. Davis submitted for filing, an application for authority to hold interlocking positions, pursuant to section 305(b) of the Federal Power Act, 16 U.S.C. 825d(b) (2008) and Part 45 of Title 18 of the Code of Federal Regulations, 18 CFR Part 45 (2008).

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

*Comment Date:* 5 p.m. Eastern Time on December 29, 2008.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–30230 Filed 12–18–08; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Docket Nos. EL07–86–006; EL07–88–006; EL07–92–006]**

## Midwest Independent Transmission System Operator, Inc.; Notice of Filing

December 12, 2008.

Take notice that on December 10, 2008, Midwest Independent Transmission System Operator, Inc. (Midwest ISO) submitted proposed revisions to the current Open Access Transmission Tariff regarding Revenue Sufficiency Guarantees, as well as to the Open Access Transmission, Energy and Operating Reserve Markets Tariff and associated explanations of the refunds to be carried out by Midwest ISO pursuant to the Commission's November 10, 2008 Order. *Midwest Independent Transmission System Operator, Inc.*, 125 FERC ¶ 61, 161. (2008).

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on December 31, 2008.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–30145 Filed 12–18–08; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. EL03–193–006]**

### Modesto Irrigation District; Notice of Filing

December 15, 2008.

Take notice that on December 12, 2008, Modesto Irrigation District filed an amendment to the Agreement and Stipulation jointly filed with the Commission Trial Staff on February 26, 2004 in compliance with the Commission's November 14, 2008, Order Denying Rehearing. *Modesto Irrigation District et al.*, 125 FERC ¶ 61,173 (2008).

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on January 2, 2009.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–30225 Filed 12–18–08; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. EL03–159–005]**

### Modesto Irrigation District; Notice of Filing

December 15, 2008.

Take notice that on December 12, 2008, Modesto Irrigation District filed an amendment to the Agreement and Stipulation jointly filed with the Commission Trial Staff on November 3, 2003 in compliance with the Commission's November 14, 2008, Order Denying Rehearing. *Modesto Irrigation District,* 125 FERC ¶ 61,174 (2008).

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on January 2, 2009.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–30231 Filed 12–18–08; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. EL03–196–006]**

### Northern California Power Agency; Notice of Filing

December 15, 2008.

Take notice that on December 12, 2008, Northern California Power Agency submitted an amendment to the Agreement and Stipulation filed on January 15, 2004 and supplemented on March 4, 2004 in compliance with the Commission's November 14, 2008, Order Denying Rehearing. *Coral Power L.L.C. et al.,* 125 FERC ¶ 61,176 (2008).

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed

docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

*Comment Date:* 5 p.m. Eastern Time on January 2, 2009.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–30226 Filed 12–18–08; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket Nos. EL03–166–005; EL03–199–005]**

### Powerex Corp.; Notice of Filing

December 15, 2008.

Take notice that on December 12, 2008, Powerex Corp. filed an amendment to the Agreement and Stipulation jointly filed with the Commission Trial Staff on October 31, 2003 in compliance with the Commission's November 14, 2008, Order Denying Rehearing. *Aquila Merchant Services, Inc.,* 125 FERC ¶ 61,175, further order denying reh'g, 125 FERC ¶ 61,218 (2008).

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

*Comment Date:* 5 p.m. Eastern Time on January 2, 2009.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–30224 Filed 12–18–08; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER09–382–000]**

### Hay Canyon Wind, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

December 15, 2008.

This is a supplemental notice in the above-referenced proceeding of Hay Canyon Wind, 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 5, 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 Street, 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. E8–30228 Filed 12–18–08; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER09–393–000]**

### West Oaks Energy, LLC; Supplemental Notice that Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

December 15, 2008.

This is a supplemental notice in the above-referenced proceeding of West Oaks Energy, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability, is January 5, 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 dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–30229 Filed 12–18–08; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket Nos. ER06–615–000; ER07–1257–000]**

### California Independent System Operator Corporation; Notice of FERC Staff Attendance

December 15, 2008.

The Federal Energy Regulatory Commission (Commission) hereby gives notice that on the following dates members of its staff will attend a meeting of the Board of Governors of the California Independent System Operator (CAISO). Unless otherwise noted, this meeting will be held at the CAISO, 151 Blue Ravine Road, Folsom, CA or by teleconference. The agenda and other documents for the meetings are available on the CAISO's Web site, *http://www.caiso.com.*

December 16–17, 2008, Board of Governors Meeting.

Sponsored by the CAISO, this meeting is open to all market participants, and staff's attendance is part of the Commission's ongoing outreach efforts. This meeting may discuss matters at issue in the above captioned dockets.

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. E8–30227 Filed 12–18–08; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. IS08–405–000]**

### Dixie Pipeline Company; Notice Cancelling Technical Conference

December 15, 2008.

On December 12, 2008, Dixie Pipeline Company (Dixie) filed a Notice of Withdrawal of Dixie Tariffs FERC No. 92 and FERC No. 93, effective as of that date. Withdrawal of the tariffs serves to terminate this proceeding and eliminates the need for the technical conference scheduled for Tuesday, December 16, 2008.

Take notice that the Commission cancels the technical conference in this proceeding scheduled for Tuesday, December 16, 2008, at 9 a.m. (EST) at the offices of the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

For further information, please contact Jenifer Lucas at (202) 502–8362 or *Jenifer.Lucas@ferc.gov.*

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–30223 Filed 12–18–08; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. RM98–1–000]**

### Records Governing Off-the-Record Communications; Public Notice

December 11, 2008.

This constitutes notice, in accordance with 18 CFR 385.2201(b), of the receipt of prohibited and exempt off-the-record communications.

Order No. 607 (64 FR 51222, September 22, 1999) requires Commission decisional employees, who make or receive a prohibited or exempt off-the-record communication relevant to the merits of a contested proceeding, to deliver to the Secretary of the Commission, a copy of the communication, if written, or a summary of the substance of any oral communication.

Prohibited communications are included in a public, non-decisional file associated with, but not a part of, the decisional record of the proceeding. Unless the Commission determines that the prohibited communication and any responses thereto should become a part of the decisional record, the prohibited off-the-record communication will not be considered by the Commission in reaching its decision. Parties to a proceeding may seek the opportunity to respond to any facts or contentions made in a prohibited off-the-record communication, and may request that the Commission place the prohibited communication and responses thereto in the decisional record. The Commission will grant such a request only when it determines that fairness so requires. Any person identified below as having made a prohibited off-the-record communication shall serve the document on all parties listed on the official service list for the applicable proceeding in accordance with Rule 2010, 18 CFR 385.2010.

Exempt off-the-record communications are included in the decisional record of the proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under 18 CFR 385.2201(e)(1)(v).

The following is a list of off-the-record communications recently received by the Secretary of the Commission. The communications listed are grouped by docket numbers in ascending order. These filings are 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, please contact FERC, Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

| Docket number | File date | Presenter or requester |
|---|---|---|
| Prohibited: | | |
| CP06–365–000 | 12–5–08 | Rory Cox. |
| CP06–366–000. | | |
| CP06–376–000. | | |
| CP06–377–000. | | |
| Exempt: | | |
| CP07–62–000 | 12–3–08 | Hon. C.A. Dutch Ruppersberger. |
| CP07–63–000. | | |
| CP08–31–000 | 11–24–08 | Hon. Andrew E. Dinniman. |
| CP08–31–000 | 11–24–08 | Barbara M. Kelley. |

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–30099 Filed 12–18–08; 8:45 am]

**BILLING CODE 6717–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–8755–2]**

### Delaware; Adequacy Status of the 2008 Reasonable Further Progress Plan for the Delaware Portion of the Philadelphia-Wilmington-Atlantic City 8-Hour Ozone Nonattainment Area Motor Vehicle Emission Budgets

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

**ACTION:** Notice of adequacy.

**SUMMARY:** In this notice, EPA is notifying the public that we have found that the Motor Vehicle Emissions Budgets (MVEBs) in the Reasonable Further Progress Plan (RFP) submitted as a State Implementation Plan (SIP) revision on June 13, 2007 by the Delaware Department of Natural Resources and Environmental Control (DNREC), are adequate for transportation conformity purposes. As a result of EPA's finding, the State of Delaware must use the MVEBs from the June 13, 2007 RFP Plan for future conformity determinations for the 8-hour ozone standard.

**DATES:** These MVEBs are effective January 5, 2009.

**FOR FURTHER INFORMATION CONTACT:** Martin Kotsch, U.S. EPA, Region III, 1650 Arch Street, Philadelphia, PA 19103 at (215) 814–3335 or by e-mail at: *kotsch.martin@EPA.gov.* The finding is available at EPA's conformity Web site: *http://www.epa.gov/otaq/stateresources/transconf/currsips.htm.*

**SUPPLEMENTARY INFORMATION:** Throughout this document ''we,'' ''us,'' or ''our'' refer to EPA. The word ''budgets'' refers to the motor vehicle emission budgets for volatile organic compounds (VOCs) and nitrogen oxides ($NO_X$ ). The word ''SIP'' in this document refers to the RFP Plans for the Delaware portion of the Philadelphia-Wilmington-Atlantic City Ozone Nonattainment Area submitted to EPA as SIP revisions on June 13, 2007.

Today's notice is simply an announcement of a finding that EPA has already made. In this notice, EPA is notifying the public that we have found that the MVEBs in the RFP for 2008, submitted on June 13, 2007 by DNREC, are adequate for transportation conformity purposes. As a result of EPA's finding, the State of Delaware must use the MVEBs from the June 13, 2007 RFP Plan for future conformity determinations for the 8-hour ozone standard. This finding has also been announced on EPA's conformity web site: *http://www.epa.gov/otaq/stateresources/transconf/pastsips.htm.* The adequate MVEBs are provided in the following table:

TABLE 1—DELAWARE MOTOR VEHICLE EMISSIONS BUDGETS

| Nonattainment area | 2008 Reasonable Further Progress | |
|---|---|---|
| | VOC (tpd) | $NO_X$ (tpd) |
| New Castle County | 21.35 | 10.61 |
| Kent County | 9.68 | 4.14 |
| Sussex County | 12.86 | 7.09 |

Transportation conformity is required by section 176(c) of the Clean Air Act, as amended in 1990. EPA's conformity rule requires that transportation plans, programs and projects conform to state air quality implementation plans, and establishes the criteria and procedures for determining whether or not they do. Conformity to a SIP means that transportation activities will not produce new air quality violations, worsen existing violations, or delay timely attainment of the national ambient air quality standards. The criteria by which we determine whether a SIP's motor vehicle emission budgets are adequate for conformity purposes are outlined in 40 CFR 93.118(e)(4). Please note that an adequacy review is separate from EPA's completeness review, and it also should not be used to prejudge EPA's ultimate approval of the SIP. Even if we find a budget adequate, the SIP could later be disapproved. We have described our process for determining the adequacy of submitted SIP budgets in 40 CFR 93.118(f), and have followed this rule in making our adequacy determination.

Dated: December 5, 2008.

**William T. Wisniewski,**

*Acting Regional Administrator, Region III.*

[FR Doc. E8–30207 Filed 12–18–08; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–8755–3]**

### Pennsylvania; Adequacy Status of the 2008 Reasonable Further Progress Plan for the Pennsylvania Portion of the Philadelphia-Wilmington-Atlantic City 8-Hour Ozone Nonattainment Area Motor Vehicle Emission Budgets

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

**ACTION:** Notice of adequacy.

**SUMMARY:** In this notice, EPA is notifying the public that we have found that the Motor Vehicle Emissions Budgets (MVEBs) in the Reasonable Further Progress Plan (RFP) submitted as a State Implementation Plan (SIP) revision on August 29, 2007 by the Pennsylvania Department of Environmental Protection (PADEP), are adequate for transportation conformity purposes. As a result of EPA's finding, the Commonwealth of Pennsylvania must use the MVEBs from the August 29, 2007 RFP Plan for future conformity determinations for the 8-hour ozone standard.

**DATES:** These MVEBs are effective January 5, 2009.

**FOR FURTHER INFORMATION CONTACT:** Martin Kotsch, U.S. EPA, Region III, 1650 Arch Street, Philadelphia, PA

19103 at (215) 814–3335 or by e-mail at: *kotsch.martin@EPA.gov.* The finding is available at EPA's conformity Web site: *http://www.epa.gov/otaq/stateresources/transconf/currsips.htm.*

**SUPPLEMENTARY INFORMATION:** Throughout this document ''we,'' ''us'', or ''our'' refer to EPA. The word ''budgets'' refers to the motor vehicle emission budgets for volatile organic compounds (VOCs) and nitrogen oxides ($NO_X$ ). The word ''SIP'' in this document refers to the RFP Plans for the Pennsylvania portion of the Philadelphia-Wilmington-Atlantic City Ozone Nonattainment Area submitted to EPA as SIP revisions on August 29, 2007.

Today's notice is simply an announcement of a finding that EPA has already made. EPA Region III sent a letter to PADEP on November 20, 2008 stating that the MVEBs in the RFP Plan are adequate for transportation conformity purposes. As a result of EPA's finding, the State of Pennsylvania must use the MVEBs from the August 29, 2007 RFP Plan for future conformity determinations for the 8-hour ozone standard. This finding has also been announced on EPA's conformity Web site: *http://www.epa.gov/otaq/stateresources/transconf/pastsips.htm.* The adequate MVEBs are provided in the following table:

TABLE 1—PENNSYLVANIA MOTOR VEHICLE EMISSIONS BUDGETS

| Nonattainment area | 2008 Reasonable Further Progress | |
|---|---|---|
| | VOC (tpd) | $NO_X$ (tpd) |
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Transportation conformity is required by section 176(c) of the Clean Air Act, as amended in 1990. EPA's conformity rule requires that transportation plans, programs and projects conform to state air quality implementation plans and establishes the criteria and procedure for determining whether or not they do. Conformity to a SIP means that transportation activities will not produce new air quality violations, worsen existing violations, or delay timely attainment of the national ambient air quality standards. The criteria by which we determine whether a SIP's motor vehicle emission budgets are adequate for conformity purposes are outlined in 40 CFR 93.118(e)(4). Please note that an adequacy review is separate from EPA's completeness review, and it also should not be used to prejudge EPA's ultimate approval of the SIP. Even if we find a budget adequate, the SIP could later be disapproved. We have described our process for determining the adequacy of submitted SIP budgets in 40 CFR 93.118(f), and have followed this rule in making our adequacy determination.

Dated: December 5, 2008.

**William T. Wisniewski,**

*Acting Regional Administrator, Region III.*

[FR Doc. E8–30206 Filed 12–18–08; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPPT–2008–0790; FRL–8754–4]**

## Asbestos-Containing Materials in Schools; State Request for Waiver From Requirements

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

**ACTION:** Notice of proposed approval and request for comments.

**SUMMARY:** This action provides notice and an opportunity for public hearing, and solicits written comments on EPA's proposed waiver of the requirements of the Federal asbestos-in-schools program for the State of New Hampshire. A waiver request will be granted if EPA determines that the State of New Hampshire is implementing or intends to implement a state program of asbestos inspection and management that is at least as stringent as the federal program. This action provides notice and an opportunity for a public hearing, and solicits written comments on the waiver request submitted by the State of New Hampshire.

**DATES:** Written comments under Docket ID Number EPA–HQ–OPPT–2008–0790 must be received by February 17, 2009. Each comment must include the name and address of the submitter. Any request for a public hearing must be in writing, and be received on or before February 17, 2009, and detail specific objections to the grant of the waiver. If, during the comment period, EPA receives such a request for a public hearing, EPA will schedule a public hearing in New Hampshire following the comment period. EPA will announce the date of the public hearing in the **Federal Register**.

**ADDRESSES:** Submit your comments, identified by Docket ID Number EPA–HQ–OPPT–2008–0790, by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.

2. *E-mail: bryson.jamesm@epa.gov.*

3. *Fax:* (617) 918–0563.

4. *Mail:* Docket ID Number EPA–HQ–OPPT–2008–0790, Asbestos Coordinator, Region 1—New England, Environmental Protection Agency, One Congress Street, Suite 1100 Mailcode SEP, Boston, MA 02114–2023.

5. *Hand Delivery or Courier:* James M. Bryson, Asbestos Coordinator, Region 1—New England, Environmental Protection Agency, One Congress Street, Suite 1100 Mailcode SEP, Boston, MA 02114–2023. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 5, excluding Federal holidays.

*Instructions:* Direct your comments to Docket ID Number EPA–HQ–OPPT–2008–0790. 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 through *http://www.regulations.gov* or e-mail, information that you consider to be CBI or otherwise protected.

The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

*Docket:* All documents in the electronic docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., 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 electronically in *http://www.regulations.gov* or in hard copy with the Asbestos Coordinator, Region 1—New England, Environmental Protection Agency, One Congress Street, Suite 1100 Mailcode SEP, Boston, MA 02114–2023. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 5 excluding Federal holidays.

**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) 564–8182; e-mail address: *TSCA-Hotline@epa.gov.*

For technical information contact: James M. Bryson, Asbestos Coordinator, Region 1—New England, Environmental Protection Agency, One Congress Street, Suite 1100 Mailcode SEP, Boston, MA 02114–2023; telephone number: (617) 918–1524; e-mail address: *bryson.jamesm@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. Background

### *A. What Action Is the Agency (EPA) Taking?*

EPA is considering granting a waiver of the asbestos-in-schools program to the State of New Hampshire. This notice is issued, and the waiver, if granted, would be issued under Section 203(m) of the Toxic Substances Control Act (TSCA) and 40 CFR 763.98. Section 203 is within Title II of TSCA, the Asbestos Hazard Emergency Response Act (AHERA).

The Agency recognizes that a waiver granted to any State would not encompass schools operated under the defense dependents' education system (the third type of local education agency (LEA) defined at TSCA section 202(7) and 40 CFR 763.83, which serve dependents in overseas areas, and other elementary and secondary schools outside a State's jurisdiction, which generally includes schools in Indian country. Such schools would remain subject to EPA's asbestos-in-schools program.

### *B. What Is the Agency's Authority for Taking This Action?*

In 1987, under TSCA section 203, at 15 U.S.C. 2643, the Agency promulgated regulations that require the identification and management of asbestos-containing material by LEAs in the nation's elementary and secondary school buildings: the ''AHERA Schools Rule'' (40 CFR part 763, subpart E). Under section 203(m) of TSCA and 40 CFR 763.98, upon request by a State Governor and after notice and comment and opportunity for a public hearing in the State, EPA may waive, in whole or in part, the requirements of the asbestos-in-schools program (TSCA section 203 and the AHERA Schools Rule) if EPA determines that the State has established and is implementing or intends to implement a program of asbestos inspection and management that contains requirements that are at least as stringent as those in the Agency's asbestos-in-schools program. A State seeking a waiver must submit its request to the EPA Region in which that State is located.

### *C. When Did New Hampshire Submit Its Request for a Waiver and How Is EPA Proposing To Respond?*

On July 15, 2008, Governor John H. Lynch submitted to the EPA Region 1 Regional Administrator, a letter with supporting documentation requesting a full waiver of the requirements of EPA's asbestos-in-schools program pursuant to the AHERA statute and 40 CFR 763.98. The EPA Region 1 Administrator indicated to New Hampshire, by letter dated July 31, 2008, that the request was received. On September 30, 2008, the Manager of EPA's Toxics and Pesticides Unit submitted comments to the New Hampshire Department of Environmental Service's Air Resources Division regarding the AHERA waiver request. The State provided EPA with a response, dated October 10, 2008, in which each of EPA's comments was addressed.

EPA is hereby issuing this notice in the **Federal Register** announcing receipt of the complete New Hampshire waiver request and an opportunity for public comment and a hearing (if necessary) and, also, making the request and supporting documentation available in the public record for this notice. The Agency is also describing the information submitted by New Hampshire and EPA's preliminary determination as to how the waiver request meets the criteria for granting a waiver.

### *D. What Was EPA's Determination With Regard to the Completeness of New Hampshire's Waiver Request?*

The New Hampshire waiver request was deemed complete 30 days after receipt by EPA with regard to the required contents of a waiver request, as specified at 40 CFR 763.98. In particular, the State's waiver request contains the following information from, and representations by, New Hampshire:

1. A copy of the New Hampshire regulatory provisions relating to its program. These consist of the following, as well as other supporting documentation: (a) A copy of the proposed New Hampshire regulatory provisions related to its program of asbestos inspection and management in Schools RSA 141–E:4, I and II, Chapter Env-A 1800 Asbestos Management And Control Regulations, (b) A comparison of the New Hampshire School Program RSA 141–E:4, I and II, Chapter Env-A 1800 Asbestos Management And Control Regulations, to the EPA program at 40 CFR part 763, Subpart E, (c) an assurance of Legal Authority from New Hampshire Attorney General, and (d) a reference to the New Hampshire Compliance Assurance Response Policy (CARP) at *http://des.nh.gov/organization/commissioner/legal/carp/index.htm* which describes New Hampshire's approach to enforcement, relevant legal authorities, and penalty calculations. New Hampshire intends to use as guidance EPA's January 31, 1989 AHERA Enforcement Response Policy (ERP) to calculate penalties based on determinations of the circumstance level and extent of severity applicable to specific violations.

2. The agency that is responsible for administrating and enforcing the requirements for which a waiver is requested is the New Hampshire Department of Environmental Services (DES), Division of Air Resources, Compliance Bureau. The officials within the Compliance Bureau who are responsible for New Hampshire's asbestos-in-schools program are: Pamela G. Monroe, Compliance Bureau Administrator; Barbara L. Hoffman, Compliance and Enforcement Programs Manager; Stephen G. Cullinane, Asbestos Program Manager; Marjorie Yin, AHERA Specialist; and Elizabeth Nixon, Enforcement Section Supervisor.

3. Detailed reasons, supporting papers, and rationale for concluding that New Hampshire's asbestos inspection and management programs, for which the waiver request is made, are at least as stringent as the

requirements of the AHERA Schools Rule (40 CFR part 763, subpart E).

4. New Hampshire neither highlighted nor discussed any special situations, problems, and needs pertaining to the State's waiver request. Accordingly, no explanation of how the State would handle the issues was provided.

5. A statement of the resources that New Hampshire intends to devote to the administration and enforcement of the provisions relating to the waiver request.

6. Copies of any specific or enabling New Hampshire laws and regulations relating to the request, including provisions for assessing criminal and/or civil penalties.

7. Assurance from the Governor, that DES has the legal authority necessary to carry out the requirements relating to the waiver request, as indicated in the July 15, 2008, letter from Governor Lynch of New Hampshire to the EPA Region *TSCA-Hotline@epa.gov* 1 Regional Administrator.

*E. What Are the Criteria for EPA's Grant of the Waiver?*

EPA may waive some or all of the requirements of the Agency's asbestos-in-schools program if the Agency determines that New Hampshire has met the criteria set forth at 40 CFR 763.98. The specific criteria and EPA's preliminary determination for each relative to the grant of the waiver to New Hampshire are set forth below:

1. The State's lead agency has the legal authority necessary to carry out the provisions of asbestos inspection and management in schools relating to the waiver request.

Preliminary Determination—EPA has determined preliminarily that the statutory and regulatory provisions cited at Section I.D.1 of this notice gives DES' Division of Air Resources the legal authority necessary to carry out the provisions of asbestos inspection and management in schools relating to the waiver request.

2. The State's program of asbestos inspection and management in schools and its implementation of the program are or will be at least as stringent as the requirements of the AHERA Schools Rule.

Preliminary Determination—EPA has determined preliminarily that New Hampshire's program is at least as stringent as EPA's program. On October 10, 2008, New Hampshire addressed the EPA recommended revisions as provided in EPA's September 30, 2008 correspondence. On October 16, 2008 New Hampshire's Joint Legislative Committee on Administrative Rules approved the New Hampshire RSA 141–E:4, I and II, Chapter Env-A 1800 Asbestos Management and Control Regulations.

3. The State has an enforcement mechanism to allow it to implement the program described in the waiver request.

Preliminary Determination—EPA has determined preliminarily that the compliance and enforcement provisions of New Hampshire's asbestos-in-schools program are adequate to run the program. DES is authorized by RSA 141–E to implement a program of asbestos licensing, inspection and management. DES has the authority to enter any public building, facility, school, or rental dwelling to ''cause inspections to be carried out'' if the agency has reason to suspect the presence of regulated asbestos-containing material RSA 141–E:8. DES has authority to enter any asbestos abatement worksite, obtain samples for air testing and monitoring, procure and examine licenses issued under RSA 141–E:10 and certificates issued under RSA 141–E:11, and to request, inspect, and record information or test results relating to school asbestos abatement planning activities. RSA 141–E:13.

DES has the authority to enforce the state's asbestos laws and rules through orders and notices of abatement. RSA 141–E:14. DES has the authority to impose administrative fines up to $2,000 per violation. RSA 141–E:16. Through the NH Attorney General, DES can seek civil penalties up to $25,000 per day as well as injunctive relief for violations of RSA 141–E and any rule adopted thereunder. RSA 141–E:17. Any person who knowingly and willfully violates any provisions of RSA 141–E or any rule adopted thereunder, or who violates any term or condition of a license, certification or order issued under RSA 141–E, or who makes or certifies a material false statement relative to any document or information required under RSA 141–E is guilty of a class B felony and can be fined $25,000 per day per violation. RSA 141–E:15. To help ensure compliance with its asbestos regulations, DES will revise their Neutral Administrative Inspection Scheme (NAIS) for targeting compliance inspections. By focusing on activities where problems are most likely to occur, the NAIS is designed to maximize the effectiveness of DES' inspection/enforcement efforts toward preventing and controlling asbestos-related risks to human health and the environment.

4. The State has or will have qualified personnel to carry out the provisions relating to the waiver request.

Preliminary Determination—EPA has determined preliminarily that New Hampshire has qualified personnel to carry out the provisions of the waiver. The existing program staff includes 2 employees trained to enforce the requirements of 40 CFR part 763, subpart E. The program will be carried out by staff in the DES' Division of Air Resources, Compliance Bureau. New Hampshire commits approximately 2 persons each year to AHERA compliance monitoring and enforcement activities under the EPA TSCA Asbestos Enforcement Grant. Staff is fully trained and certified as Contractor/Supervisor, Inspector, and Management Planner.

5. The State will devote adequate resources to the administration and enforcement of the asbestos inspection and management provisions relating to the waiver request.

Preliminary Determination—EPA has determined preliminarily that the resources developed by DES' Division of Air Resources are adequate to effectively administer and enforce the provisions of the asbestos program in New Hampshire. In particular, New Hampshire is currently expected to receive funding through an EPA grant in the amount of $100,000 annually which, when combined with State matching funds of approximately $33,000, results in a total funding level of $133,000 for this FY 2009.

6. The State has responded to EPA and addressed all of the Agency's concerns in numbers 2 through 4 above.

Preliminary Determination—EPA will grant a full waiver as long as New Hampshire continues its asbestos-in-schools implementation and enforcement strategy utilizing adequate resources. EPA may evaluate periodically the adequacy of New Hampshire's program under 40 CFR 763.98, and under circumstances set forth in the regulation.

*F. What Recordkeeping and Reporting Burden Approvals Apply to the New Hampshire Waiver Request?*

The recordkeeping and reporting burden associated with waiver requests was approved by the Office of Management and Budget (OMB) under OMB control number XXXX–XXX. This document simply announces the Agency's receipt of the New Hampshire waiver request and therefore it imposes no additional burden beyond that covered under existing OMB control number XXXX–XXXX.

**II. Materials in the Official Record**

The official record, under Docket ID Number EPA–HQ–OPPT–2008–0790,

contains the New Hampshire waiver request and other supporting, relevant documents underlying the State's request and EPA's proposed approval in response to the request.

Dated: November 30, 2008.

**Robert W. Varney,**

*Regional Administrator, EPA New England.*

[FR Doc. E8–30201 Filed 12–18–08; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–8754–8; Docket ID No. EPA–HQ–ORD–2007–0517]**

## Draft Integrated Science Assessment for Particulate Matter

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice of Public Comment Period.

**SUMMARY:** The U.S. Environmental Protection Agency (EPA) is announcing the availability of its ''First External Review Draft Integrated Science Assessment for Particulate Matter'' (EPA/600/R–08/139 and EPA/600/R–08/139A). The document was prepared by the National Center for Environmental Assessment (NCEA) within EPA(s Office of Research and Development as part of the review of the national ambient air quality standards (NAAQS) for particulate matter.

EPA is releasing this draft document to seek review by the Clean Air Scientific Advisory Committee (CASAC) and the public (meeting date and location to be specified in a separate **Federal Register** notice). The draft document does not represent, and should not be construed to represent, any final EPA policy, viewpoint, or determination. EPA will consider any public comments submitted in response to this notice when revising the document.

**DATES:** The public comment period begins on or about December 19, 2008. Comments must be received on or before March 13, 2009.

**ADDRESSES:** The ''First External Review Draft Integrated Science Assessment for Particulate Matter'' will be available primarily via the Internet on the National Center for Environmental Assessment's home page under the Recent Additions and Publications menus at *http://www.epa.gov/ncea.* A limited number of CD–ROM or paper copies will be available. Contact Ms. Debbie Wales by phone (919–541–4731), fax (919–541–5078), or e-mail (*wales.deborah@epa.gov*) to request either of these, and please provide your name, your mailing address, and the document title, ''First External Review Draft Integrated Science Assessment for Particulate Matter'' (EPA/600/R–08/139 and EPA/600/R–08/139A) to facilitate processing of your request.

**FOR FURTHER INFORMATION CONTACT:** For technical information, contact Dr. Lindsay Wichers Stanek, NCEA; telephone: 919–541–7792; facsimile: 919–541–2985; or e-mail: *stanek.lindsay@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Information About the Document

Section 108(a) of the Clean Air Act directs the Administrator to identify certain pollutants which, among other things, ''cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare'' and to issue air quality criteria for them. These 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 * * *'' Under section 109 of the Act, EPA is then to establish national ambient air quality standards (NAAQS) for each pollutant for which EPA has issued criteria. Section 109 (d) of the Act subsequently requires periodic review and, if appropriate, revision of existing air quality criteria to reflect advances in scientific knowledge on the effects of the pollutant on public health or welfare. EPA is also to revise the NAAQS, if appropriate, based on the revised air quality criteria.

Particulate matter (PM) is one of six principal (or ''criteria'') pollutants for which EPA has established NAAQS. Periodically, EPA reviews the scientific basis for these standards by preparing an Integrated Science Assessment (ISA) (formerly called an Air Quality Criteria Document). The ISA and supplementary annexes, in conjunction with additional technical and policy assessments, provide the scientific basis for EPA decisions on the adequacy of the current NAAQS and the appropriateness of possible alternative standards. The Clean Air Scientific Advisory Committee (CASAC), an independent science advisory committee whose existence and whose review and advisory functions are mandated by Section 109 (d) (2) of the Clean Air Act, is charged (among other things) with independent scientific review of EPA's air quality criteria.

On June 28, 2007 (72 FR 35462), EPA formally initiated its current review of the air quality criteria for PM, requesting the submission of recent scientific information on specified topics. A draft of EPA's ''Integrated Review Plan for the National Ambient Air Quality Standard for Particulate Matter'' (EPA/452/P–08/006) was made available in October 2007 for public comment and was discussed by the CASAC via a publicly accessible teleconference consultation on November 30, 2007 (72 FR 63177). EPA finalized the plan and made it available in March 2008 (EPA/452/R–08/004; *http://www.epa.gov/ttn/naaqs/standards/pm/s_pm_2007_pd.html*). In June 2008 (73 FR 30391), EPA held a workshop to discuss, with invited scientific experts, initial draft materials prepared in the development of the PM ISA and its supplementary annexes.

The first external review draft ISA for PM will be discussed at a public meeting for review by CASAC, and public comments received will be provided to the CASAC review panel. A future **Federal Register** notice will inform the public of the exact date and time of that CASAC meeting.

### II. How to Submit Technical Comments to the Docket at *http://www.regulations.gov*

Submit your comments, identified by Docket ID No. EPA–HQ–ORD–2007–0517, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: ORD.Docket@epa.gov.*
- *Fax:* 202–566–1753.
- *Mail:* Office of Environmental Information (OEI) Docket (Mail Code: 2822T), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. The phone number is 202–566–1752.
- *Hand Delivery:* The OEI Docket is located in the EPA Headquarters Docket Center, Room 3334 EPA West Building, 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. Such deliveries are only accepted during the docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

If you provide comments by mail or hand delivery, please submit three copies of the comments. For attachments, provide an index, number pages consecutively with the comments, and submit an unbound original and three copies.

*Instructions:* Direct your comments to Docket ID No. EPA–HQ–ORD–2007–0517. Please ensure that your comments are submitted within the specified comment period. Comments received after the closing date will be marked ''late,'' and may only be considered if time permits. It is EPA's policy to include all comments it receives in the public docket without change and to make the comments available online at *http://www.regulations.gov,* including any personal information provided, unless a comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information through *http://www.regulations.gov* or e-mail that you consider to be CBI or otherwise protected. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

*Docket:* 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 materials, such as copyrighted material, are 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 OEI Docket in the EPA Headquarters Docket Center.

Dated: December 11, 2008.

**Rebecca Clark,**

*Acting Director, National Center for Environmental Assessment.*

[FR Doc. E8–30197 Filed 12–18–08; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[ER–FRL–8588–6]**

## Environmental Impacts Statements; Notice of Availability

*Responsible Agency:* Office of Federal Activities, General Information (202) 564–1399 or *http://www.epa.gov/compliance/neap/.* Weekly receipt of Environmental Impact Statements Filed 12/08/2008 Through 12/12/2008. Pursuant to 40 CFR 1506.9.

*EIS No. 20080513, Draft EIS, AFS, AK,* Central Kupreanof Timber Harvest Project, Proposes To Harvest up to 70.2 Million Board Feet of Timber, Kupreanof Island, Petersburg Ranger District, Tongass National Forest, AK, Comment Period Ends: 02/02/2009, Contact: Tiffany Benna 907–772–3871.

*EIS No. 20080514, Final EIS, AFS, ID,* Corralled Bear Project, Management of Vegetation, Hazardous Fuels, and Access, Plus Watershed Improvements, Palouse Ranger District, Clearwater National Forest, Latah County, ID, Wait Period Ends: 01/20/2009, Contact: Kara Chadwick 208–875–1131.

*EIS No. 20080515, Final EIS, BLM, WY,* West Antelope Coal Lease Application (Federal Coal Lease Application WYW163340), Implementation, Converse and Campbell Counties, WY, Wait Period Ends: 01/20/2009, Contact: Sarah Bucklin 307–261–7541.

*EIS No. 20080516, Draft EIS, NPS, AK,* LEGISLATIVE—Glacier Bay National Park Project, Authorize Harvest of Glaucous-Winged Gull Eggs by the Huna Tlingit, Implementation, AK, Comment Period Ends: 03/06/2009, Contact: Mary Beth Moss 907–317–1270.

*EIS No. 20080517, Final EIS, FHW, NY,* Kosciuszko Bridge Project, Propose Rehabilitation or Replacement a 1.1 mile Segment Brooklyn-Queens Expressway (-278) from Morgan Avenue in Brooklyn and the Long Island Expressway (1495) in Queens, Kings and Queens Counties, NY, Wait Period Ends: 01/23/2009, Contact: Jeffrey Kolb 518–431–4125.

*EIS No. 20080518, Draft EIS, BLM, NV,* Bald Mountain Mine Norther Operations Area Project, Proposes To Expand Current Mining Operations at Several Existing Pits, Rock Disposal Areas, Heap Leach Pads, Processing Facilities, and Interpit Area, Combining the Bald Mountain Mine Plan of Operations Boundary and the Mooney Basin Operation Area Boundary, White Pine County, NV, Comment Period Ends: 02/02/2009, Contact: Lynn Bjorklund 775–289–1893.

*EIS No. 20080519, Draft EIS, NPS, PA,* White-tailed Deer Management Plan, Develop a Deer Management Strategy That Supports Protection, Preservation and Restoration of Native Vegetation, Implementation, Valley Forge National Historical Park, King of Prussia, PA, Comment Period Ends: 02/17/2009, Contact: Kristina M. Heister 610–783–1008.

*EIS No. 20080520, Draft EIS, CGD, 00,* USCG Pacific Operations: Districts 11 Area, California and Districts 13 Area, Oregon and Washington, Improve the Protection and Conservation of Marine Protected Species and Marine Protected Areas, CA, OR and WA, Comment Period Ends: 02/17/2009, Contact: Lt. Jeff Bray 202–372–3752.

*EIS No. 20080521, Draft EIS, NPS, ND,* Theodore Roosevelt National Park, Elk Management Plan, Implementation, Billing and McKenzie Counties, ND, Comment Period Ends: 03/19/2009, Contact: Valerie Naylor 701–623–4466.

*EIS No. 20080522, Final EIS, NRC, GA,* GENERIC—License Renewal of Nuclear Plants, Supplement 34 to NUREG–1437, Regarding Vogtle Electric Generating Plant Units 1 and 2 (VEGP) near Waynesboro, GA, Comment Period Ends: 01/20/2009, Contact: Samuel Hernandez 301–415–4049.

*EIS No. 20080523, Draft EIS, BLM, 00,* UNEV Pipeline Project, Construction of a 399-Mile Long Main Petroleum Products Pipeline, Salt Lake, Tooele, Juab, Millard, Iron, and Washington Counties, UT, and Clark County, NV, Comment Period Ends: 02/02/2009, Contact: Joe Incardine 801–524–3833.

*EIS No. 20080524, Draft EIS, STB, AK,* Northern Rail Extension Project, Construct and Operate a Rail Line Between Norther Pole, AK, and Delta Junction, AK, Comment Period Ends: 02/02/2009, Contact: Dave Navecky 202–245–0294.

*EIS No. 20080525, Final EIS, FHW, NJ,* I–295/I–76/Route 42 Direct Connection Project, To Improve Traffic Safety and Reduce Traffic Congestion, Funding and U.S. Army COE Section 10 and 404 Permits, Borough of Bellmawr, Borough of

Mount Ephraim and Gloucester City, Camden County, NJ, Wait Period Ends: 01/20/2009, Contact: Matthew Zeller 609–637–4200.

*EIS No. 20080526, Final EIS, IBR, CO,* Southern Delivery System Project, Water Supply Development, Execution of up to 40-year Contracts for Use of Fryingpan-Arkansas Project Facilities, Special Use Permit, El Paso County, CO, Wait Period Ends: 01/20/2009, Contact: Kara Lamb 970–663–3212.

**Amended Notices**

*EIS No. 20080418, Draft EIS, DOE, 00,* PROGRAMMATIC—Global Nuclear Energy Partnership (GNEP) Program, To Support a Safe, Secure, and Sustainable Expansion of Nuclear Energy, Both Domestically and Internationally, (DOE/EIS–0396), Comment Period Ends: 03/16/2009, Contact: Francis G. Schwartz 866–645–7803.

Revision of FR Notice Published 10/17/2008: Extending Comment Period 12/16/2008 to 03/16/2009.

*EIS No. 20080448, Draft EIS, NPS, AZ,* Fire Management Plan, Management of Wildland and Prescribed Fire, Protection of Human Life and Property Restoration and Maintenance of Fire Dependent Ecosystems, and Reduction of Hazardous Fuels, Grand Canyon National Park, Coconino County, AZ, Comment Period Ends: 01/21/2009, Contact: Chris Marks 986–606–1050.

Revision to FR Notice Published: Extending Comment Period from12/22/2008 to 01/21/2009.

*EIS No. 20080469, Draft EIS, FTA, HI,* Honolulu High-Capacity Transit Corridor Project, Provide High-Capacity Transit Service on O'ahu From Kapolei to the University of Hawaii at Manoa and Waikiki, City and County of Honolulu, O'ahu, Hawaii, Comment Period Ends: 02/06/2009, Contact: Ted Matley 415–744–3133.

Revision to FR Notice Published 11/21/2008: Extending Comment Period from 01/07/2009 to 02/06/2009.

Dated: December 16, 2008.

**Robert W. Hargrove,**

*Director, NEPA Compliance Division, Office of Federal Activities.*

[FR Doc. E8–30208 Filed 12–18–08; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[ER–FRL–8588–7]**

### Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared pursuant to the Environmental Review Process (ERP), under section 309 of the Clean Air Act and Section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at 202–564–7146. An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in FR dated April 6, 2008 (73 FR 19833).

**FINAL EISs**

*EIS No. 20080296, ERP No. F–FHW–G40180–TX*, Grand Parkway (State Highway 99) Selected the Preferred Alternative Alignment, Segment F–2 from SH 249 to IH 45, Right-of-Way Permit and U.S. Army COE Section 404 Permit, Harris County, TX.

Summary: EPA does not object to the proposed project.

*EIS No. 20080318, ERP No. F–BLM–J65475–WY*, Pinedale Resource Management Plan, Implementation, of Public Lands Administered, Pinedale Field Office, Sublette and Lincoln Counties, WY.

Summary: No formal comment letter was sent to the preparing agency.

*EIS No. 20080449, ERP No. F–AFS–K65329–CA*, Sugarberry Project, Proposes to Protect Rural Communities from Fire Hazards by Constructing Fuel Breaks Known as Defensible Fuel Profile Zones (DFPZs), Feather River Ranger District, Plumas National Forest, Plumas, Sierra, Yuba Counties, CA.

Summary: EPA commends the decommissioning of 11.5 miles of roads, watershed improvement projects, and aspen and black oak restoration. However, EPA continues to have environmental concerns about the cumulative effects of regional Defensible Fuel Profile Zones and fuel management actions given past extraction and road construction activities and proposed soil-disturbing activities on adjacent private lands. EPA recommended concurrent road decommissioning and restoration actions, and other measures to ensure timely watershed improvements.

*EIS No. 20080450, ERP No. F–NOA–E91023–00*, Amendment 16 to the Fishery Management Plan for the Snapper Grouper Fishery, Address Overfishing, Bycatch, Management Reference Points, and Allocations for Snapper Grouper Species, Implementation, South Atlantic Region.

Summary: EPA does not object to the proposed action.

*EIS No. 20080453, ERP No. F–FTA–C54010–00*, Access to the Region's Core Project, Additional Information on the Build Alternative, To Increase Trans-Hudson Commuter Rail Capacity, Improve System Safety and Reliability between Secaucus Junction Station in NJ and midtown Manhattan, Funding, Hudson County, NJ and New York County NY.

Summary: EPA does not object to the proposed project.

*EIS No. 20080399, ERP No. FS–FTA–K54022–CA*, Central Subway/Third Street Light Rail Phase 2, Funding, San Francisco Municipal Transportation Agency, in the City and County San Francisco, CA.

Summary: EPA does not object to the proposed project.

*EIS No. 20080511, ERP No. FS–USN–K11094–00*, Developing Home Port Facilities for Three NIMITZ-Class Aircraft Carriers in Support of the U.S. Pacific Fleet, New Circumstances and Information to Supplements (the 1999 FEIS) Coronado, CA.

Summary: No formal comment letter was sent to the preparing agency.

Dated: December 16, 2008.

**Robert W. Hargrove,**

*Director, NEPA Compliance Division, Office of Federal Activities.*

[FR Doc. E8–30210 Filed 12–18–08; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–8754–2]**

### National Advisory Council for Environmental Policy and Technology

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

**ACTION:** Request for Nominations to the National Advisory Council for Environmental Policy and Technology (NACEPT).

**SUMMARY:** The U.S. Environmental Protection Agency (EPA) invites nominations from a diverse range of qualified candidates to be considered for appointment to the National Advisory Council for Environmental Policy and Technology (NACEPT). It is anticipated that vacancies will be filled

by late spring 2009. Additional sources may be utilized in the solicitation of nominees.

*Background:* NACEPT is a federal advisory committee chartered under the Federal Advisory Committee Act (FACA), Public Law 92463. EPA established NACEPT in 1988 to provide independent advice to the EPA Administrator on a broad range of environmental policy, technology and management issues. Members serve as representatives from academia, industry, non-governmental organizations, and state, local, and tribal governments. Members are appointed by the EPA Administrator for two year terms with the possibility of reappointment. The Council usually meets 3 times annually and the average workload for the members is approximately 10 to 15 hours per month. Members serve on the Council in a voluntary capacity. However, EPA provides reimbursement for travel expenses associated with official government business. EPA is seeking nominations from all sectors, including academia, industry, non-governmental organizations, and state, local and tribal governments. Nominees will be considered according to the mandates of FACA, which requires committees to maintain diversity across a broad range of constituencies, sectors, and groups.

The following criteria will be used to evaluate nominees:

—Extensive professional knowledge of environmental policy, management, and technology issues.
—Demonstrated ability to examine and analyze environmental issues with objectivity and integrity.
—Senior-level experience that fills a current need on the Council.
—Excellent interpersonal, oral and written communication, and consensus-building skills.
—Ability to volunteer approximately 10 to 15 hours per month to the Council's activities, including participation on teleconference meetings and preparation of text for Council reports and advice letters.

Nominations must include a resume and a short biography describing the professional and educational qualifications of the nominee, as well as the nominee's current business address, e-mail address, and daytime telephone number. Interested candidates may self-nominate.

**ADDRESSES:** Submit nominations to: Sonia Altieri, Designated Federal Officer, Office of Cooperative Environmental Management, U.S. EPA (1601M), 1200 Pennsylvania Avenue NW., Washington, DC 20460. You may also e-mail nominations to *altieri.sonia@epa.gov.*

**FOR FURTHER INFORMATION CONTACT:** Sonia Altieri, Designated Federal Officer, U.S. EPA; telephone (202) 564–0243; fax: (202) 564–8129; e-mail *altieri.sonia@epa.gov.*

Dated: December 5, 2008.

**Sonia Altieri,**

*Designated Federal Officer.*

[FR Doc. E8–30087 Filed 12–18–08; 8:45 am]

**BILLING CODE 6560–50–M**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–8754–3]**

## Brown & Bryant Superfund Site; Notice of Proposed CERCLA Administrative Settlement Agreement and Order on Consent

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

**ACTION:** Notice; request for public comment.

**SUMMARY:** In accordance with section 122(i) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (''CERCLA''), 42 U.S.C. 9622(i), the EPA is hereby providing notice of a proposed administrative settlement agreement and order on consent (''Settlement Agreement'') with Union Pacific Railroad Company and BNSF Railway Company (''the Respondents'') concerning the Brown & Bryant Superfund Site in Arvin, California (''Site''). Section 122(h) of CERCLA, 42 U.S.C. 9622(h), provides EPA with the authority to enter into administrative settlements for claims for costs incurred by EPA under CERCLA.

The Settlement Agreement resolves certain claims under Sections 106 and 107 of CERCLA, 42 U.S.C. 9606, 9607. Under the Settlement Agreement, each Respondent will pay EPA $492,500, for a total of $985,000 (''Settled Response Costs''). Respondents are jointly and severally liable for the total amount due under the Settlement Agreement.

The Settled Response Costs will be deposited in the Brown & Bryant Superfund Site Special Account within the EPA Hazardous Substance Superfund. EPA will use all Settled Response Costs in the Brown & Bryant Superfund Site Special Account to relocate Arvin City Well 1, as the first phase of the remedy selected in the Record of Decision issued on September 30, 2007. If any portion of the Settled Response Costs remains in the Brown & Bryant Superfund Site Special Account after full implementation of this work, EPA will, after consultation with the Respondents, apply such funds for other response costs at or in connection with the Site. In the event that there are no additional costs at the Site to which the funds can be applied, EPA may transfer the funds to the EPA Hazardous Substance Superfund.

The Settlement Agreement may be examined at the following EPA Web site: *http://www.epa.gov/region09/brown&bryant.* The Settlement Agreement also may be examined at the U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, Office of Regional Counsel, San Francisco, California 94105, and also at the public information repository located at the Kern County Library, Arvin Branch, 201 Campus Drive, Arvin, California 93203. A paper or electronic copy of the Settlement Agreement may also be obtained from Joshua Wirtschafter, who can be contacted by mail at U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street (mail code ORC–3), San Francisco, California 94105–3901, by telephone at (415) 972–3912, by fax at (415) 947–3570, or by e-mail at *Wirtschafter.Joshua@epa.gov.*

**DATES:** EPA must receive comments by January 20, 2009 relating to the Settlement Agreement. EPA will consider all comments it receives during this period, and may not consent to the settlement if any comments disclose facts or considerations indicating that the settlement is inappropriate, improper, or inadequate.

**ADDRESSES:** Written comments may be submitted to Joshua Wirtschafter by mail, fax, or e-mail to the U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street (mail code ORC–3), San Francisco, California 94105–3901, by telephone at (415) 972–3912, by fax at (415) 947–3570, or by e-mail at *Wirtschafter.Joshua@epa.gov.*

**FOR FURTHER INFORMATION CONTACT:** Additional information about the Site and about the proposed Settlement Agreement may be obtained by contacting Joshua Wirtschafter at (415) 972–3912.

Dated: December 8, 2008.

**Nancy Lindsey,**

*Acting Director, Superfund Division, Region IX.*

[FR Doc. E8–30200 Filed 12–18–08; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2005–0162; FRL–8389–4]**

## Carbofuran; Notice of Receipt of Request to Voluntarily Cancel Carbofuran Pesticide Registrations

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

**ACTION:** Notice.

**SUMMARY:** In accordance with section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, EPA is issuing a notice of receipt of a request dated September 29, 2008 by the registrant to voluntarily cancel some registrations and amend other registrations to terminate uses of certain end-use products containing the pesticide carbofuran. The request would terminate flowable carbofuran use in or on alfalfa, cotton, ornamentals, popcorn, small grains (wheat, oats and barley) soybeans, sugarcane, sweet corn, and tobacco. The request would also terminate all carbofuran products registered under FIFRA section 24 Special Local Need Labels for use in or on corn (field), CRP acres, cucumbers, grapes, melons, ornamentals (container and field production), peppers (including Chiles and bell), sorghum, squash, sugar beets, sugarcane (soil applied), tobacco, and small grains (wheat, oats, and barley). The request would also terminate, subject to a two-year phase-out period, the use of flowable carbofuran as a post-plant application to artichokes. The request proposes to cancel the use of granular carbofuran on bananas, coffee, cucumbers, melons, and squash. The request would not terminate the last carbofuran products registered for use in the US.

**DATES:** Comments must be received on or before January 20, 2009.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2005–0162 by one of the following methods:

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

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

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

*Instructions*: Direct your comments to docket ID number EPA–HQ–OPP–2005–0162. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

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

**FOR FURTHER INFORMATION CONTACT:** Jude Andreasen, Special Review and Reregistration Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–9342; fax number: (703) 308–7070; e-mail address: *andreasen.jude@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this Action Apply to Me?*

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

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

1. *Submitting CBI*. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments*. When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

**II. Background on the Receipt of Requests to Cancel Registrations**

This notice announces receipt by EPA of a written request dated September 29, 2008 from FMC Corporation, the sole registrant of carbofuran, to cancel carbofuran product registrations on certain uses. Carbofuran is an N-methyl carbamate insecticide. The affected products and uses are provided in Table 1. This request will result in the termination of the use of flowable and granular carbofuran products on certain crops in the United States. The request would also terminate all carbofuran products registered under FIFRA section 24 Special Local Need Labels for use in or on corn (field), CRP acres, cucumbers, grapes, melons, ornamentals (container and field production), peppers (including Chiles and bell), sorghum, squash, sugar beets, sugarcane (soil applied), tobacco, and small grains (wheat, oats, and barley). The request would also terminate, subject to a two-year phase-out period, the use of flowable carbofuran as a post-plant application to artichokes. The request proposes to cancel the use of granular carbofuran on bananas, coffee, cucumbers, melons, and squash. The request would not terminate the last carbofuran products registered for use in the US. The request does not affect the use of granular carbofuran (products 279–3023 and 279–2712) on pumpkin. This request does not affect the existing volume limitations (2,500 pounds active ingredient per year) for granular product manufacture. EPA intends to grant this request for cancellation at the close of the comment period for this announcement unless the Agency receives a request within the comment period to transfer the registration to a new registrant or unless the registrant withdraws their request within this period. Upon acceptance of this request, any sale, distribution, or use of products listed in this notice will be permitted only if such sale, distribution, or use is consistent with the terms as described in the final order. Any carbofuran uses not affected by this voluntary cancellation request, and any uses for which the requested cancellation do not become final, will remain subject to cancellation through the process that the Agency initiated in a draft Notice of Intent to Cancel (NOIC) carbofuran, January 8, 2008, which can be accessed in the public docket at *www.regulations.gov*, docket number EPA–HQ–OPP–2005–0162. The basis for the draft NOIC was that pesticide products containing carbofuran, when used in accordance with widespread and commonly recognized practice, generally cause unreasonable adverse effects on humans and the environment. EPA further determined that none of the available alternatives to cancellation of all registered uses could reduce the potential risks to acceptable levels.

**III. What Action is the Agency Taking?**

This notice announces receipt by EPA of a request from FMC Corporation to cancel certain uses of flowable and granular carbofuran. The affected products and the registrants making the request are identified in Table 1 and Table 2 of this unit.

Under section 6(f)(1)(A) of FIFRA, registrants may request, at any time, that their pesticide registrations be canceled or amended to terminate one or more pesticide uses. Section 6(f)(1)(B) of FIFRA requires that before acting on a request for voluntary cancellation, EPA must provide a 30–day public comment period on the request for voluntary cancellation or use termination. In addition, section 6(f)(1)(C) of FIFRA requires that EPA provide a 180–day comment period on a request for voluntary cancellation or termination of any minor agricultural use before granting the request, unless:

1. The registrants request a waiver of the comment period, or

2. The Administrator determines that continued use of the pesticide would pose an unreasonable adverse effect on the environment.

FMC Corporation, a carbofuran registrant, has requested that EPA waive the 180–day comment period. EPA will provide a 30–day comment period on the proposed requests.

Unless a request is withdrawn by the registrant within 30 days of publication of this notice, or if the Agency determines that there are substantive comments that warrant further review of this request, an order will be issued canceling the affected registrations.

TABLE 1A.—CARBOFURAN PRODUCT REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION OF CERTAIN USES

| Registration Number | Product Name | Company |
|---|---|---|
| 279-2876 | Furadan 4F | FMC Corporation |
| 279-3310 | Furadan LFR | FMC Corporation |
| 279-2712 | Furadan 10G | FMC Corporation |
| 279-3023 | Furadan 15G | FMC Corporation |

TABLE 1B.—CARBOFURAN PRODUCT REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION OF ALL USES OF CARBOFURAN

| Registration Number | Product Name | Company |
|---|---|---|
| 279-2922 | Furadan 5G | FMC Corporation |

TABLE 1C.—CARBOFURAN SPECIAL LOCAL NEED (SLN) PRODUCT REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION OF ALL USES OF CARBOFURAN

| Registration Number | Company |
|---|---|
| AL880003 | FMC Corporation |
| AL940002 | FMC Corporation |
| AR810051 | FMC Corporation |
| AR810052 | FMC Corporation |
| AZ910001 | FMC Corporation |
| CA830058 | FMC Corporation |
| CA860037 | FMC Corporation |
| CA940005 | FMC Corporation |
| CA980011 | FMC Corporation |
| CA980012 | FMC Corporation |
| CO920001 | FMC Corporation |
| CO920002 | FMC Corporation |
| DE830004 | FMC Corporation |
| DE930001 | FMC Corporation |
| IA930001 | FMC Corporation |
| ID060003 | FMC Corporation |
| ID060004 | FMC Corporation |
| ID910007 | FMC Corporation |
| ID920002 | FMC Corporation |
| IL040002 | FMC Corporation |
| IL980003 | FMC Corporation |
| IN830001 | FMC Corporation |
| IN930001 | FMC Corporation |
| KS880001 | FMC Corporation |
| KS880002 | FMC Corporation |
| LA000009 | FMC Corporation |
| LA050001 | FMC Corporation |
| LA990007 | FMC Corporation |
| MD810008 | FMC Corporation |
| MI820025 | FMC Corporation |
| MI930001 | FMC Corporation |
| MO790006 | FMC Corporation |
| MO810024 | FMC Corporation |
| MO860003 | FMC Corporation |

TABLE 1C.—CARBOFURAN SPECIAL LOCAL NEED (SLN) PRODUCT REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION OF ALL USES OF CARBOFURAN—Continued

| Registration Number | Company |
|---|---|
| MO930002 | FMC Corporation |
| MS820020 | FMC Corporation |
| MT860007 | FMC Corporation |
| NC800003 | FMC Corporation |
| NE880003 | FMC Corporation |
| NE920006 | FMC Corporation |
| NE920009 | FMC Corporation |
| NE950001 | FMC Corporation |
| NJ980004 | FMC Corporation |
| NM060001 | FMC Corporation |
| NM060002 | FMC Corporation |
| NM780015 | FMC Corporation |
| NM980002 | FMC Corporation |
| OH930001 | FMC Corporation |
| OK810012 | FMC Corporation |
| OK930009 | FMC Corporation |
| OR060016 | FMC Corporation |
| OR060017 | FMC Corporation |
| OR830016 | FMC Corporation |
| OR830036 | FMC Corporation |
| OR910006 | FMC Corporation |
| OR920014 | FMC Corporation |
| PA840005 | FMC Corporation |
| PA940001 | FMC Corporation |
| PR850001 | FMC Corporation |
| PR960003 | FMC Corporation |
| SC790026 | FMC Corporation |
| SC940005 | FMC Corporation |
| SD900013 | FMC Corporation |
| TX030002 | FMC Corporation |
| TX060012 | FMC Corporation |
| TX060013 | FMC Corporation |
| TX810006 | FMC Corporation |
| TX930008 | FMC Corporation |

TABLE 1C.—CARBOFURAN SPECIAL LOCAL NEED (SLN) PRODUCT REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION OF ALL USES OF CARBOFURAN—Continued

| Registration Number | Company |
|---|---|
| TX930011 | FMC Corporation |
| VA780006 | FMC Corporation |
| VA790014 | FMC Corporation |
| VA930001 | FMC Corporation |
| WA860012 | FMC Corporation |
| WA910006 | FMC Corporation |
| WY030002 | FMC Corporation |
| WY900003 | FMC Corporation |

Table 2 of this unit includes the name and address of record for the registrant of the products listed in Table 1 of this unit.

TABLE 2.—REGISTRANT REQUESTING VOLUNTARY CANCELLATION

| EPA Company No. | Company name and address |
|---|---|
| 279 | FMC Corporation<br>Agricultural Products Group<br>1735 Market Street<br>Philadelphia, PA 19103 |

**IV. What is the Agency's Authority for Taking this Action?**

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled or amended to terminate one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. Thereafter, following the public comment period, the Administrator may approve such a request.

**V. Procedures for Withdrawal of Request and Considerations for Reregistration of Carbofuran**

Registrants who choose to withdraw a request for cancellation must submit such withdrawal in writing to the person listed under **FOR FURTHER INFORMATION CONTACT**, postmarked before January 20, 2009. This written withdrawal of the request for cancellation will apply only to the applicable FIFRA section 6(f)(1) request listed in this notice. If the products(s)

have been subject to a previous cancellation action, the effective date of cancellation and all other provisions of any earlier cancellation action are controlling.

**VI. Provisions for Disposition of Existing Stocks**

Existing stocks are those stocks of registered pesticide products which are currently in the United States and which were packaged, labeled, and released for shipment prior to the effective date of the cancellation action.

In any order issued in response to this request for cancellation of product registrations, EPA proposes to include the following provisions for the treatment of any existing stocks of the products identified or referenced in Table 1. The registrant will be allowed to sell and distribute the subject products through the effective date of this cancellation order. In addition, existing stocks of carbofuran products may be sold or used until they are depleted, or until tolerances are revoked.

The Agency intends to allow use on artichokes through December 31, 2010. The Agency is soliciting comment on whether there are sufficient stocks of product to allow for this use, or whether additional carbofuran production will be needed to address this use.

An existing stocks provision was included in a **Federal Register** notice published December 10, 2008 regarding a number of pesticide products, including several carbofuran products. The existing stocks provision in that notice will be superseded by the existing stocks provision in the cancellation order for today's notice.

**List of Subjects**

Environmental protection, Pesticides and pests.

Dated: December 11, 2008.

**Steven Bradbury,**

*Director, Special Review and Reregistration Division, Office of Pesticide Programs.*

[FR Doc. E8–30249 Filed 12–18–08; 8:45 am]

**BILLING CODE 6560–50–S**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2008–0879; FRL–8394–4]**

## Registration Review; 2-((hydroxymethyl)-amino)ethanol Docket Opened for Review and Comment

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

**ACTION:** Notice.

**SUMMARY:** EPA has established a registration review docket for the pesticide, 2-((hydroxymethyl)-amino)ethanol. With this document, EPA is opening the public comment period for this registration review. Registration review is EPA's periodic review of pesticide registrations to ensure that each pesticide continues to satisfy the statutory standard for registration, that is, the pesticide can perform its intended function without unreasonable adverse effects on human health or the environment. Registration review dockets contain information that will assist the public in understanding the types of information and issues that the Agency may consider during the course of registration reviews. Through this program, EPA is ensuring that each pesticide's registration is based on current scientific and other knowledge, including its effects on human health and the environment.

**DATES:** Comments must be received on or before March 19, 2009.

**ADDRESSES:** Submit your comments identified by the docket identification (ID) number for the pesticide provided in the table in Unit III.A., by one of the following methods:

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

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

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

*Instructions*: Direct your comments to the docket ID number listed in the table in Unit III.A. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

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

**FOR FURTHER INFORMATION CONTACT:** *For pesticide specific information contact*: The Chemical Review Manager identified in the table in Unit III.A.

*For general information contact*: Kevin Costello, Special Review and Reregistration Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–5026; fax number: (703) 308–8090; e-mail address: *costello.kevin @epa.gov*.

**SUPPLEMENTARY INFORMATION:**

**I. General Information**

*A. Does this Action Apply to Me?*

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, farmworker, and agricultural advocates;

the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

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

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticide(s) discussed in this document, compared to the general population.

## II. Authority

EPA is initiating its review of the pesticide identified in this document pursuant to section 3(g) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Procedural Regulations for Registration Review at 40 CFR part 155, subpart C. Section 3(g) of FIFRA provides, among other things, that the registrations of pesticides are to be reviewed every 15 years. Under FIFRA section 3(a), a pesticide product may be registered or remain registered only if it meets the statutory standard for registration given in FIFRA section 3(c)(5). When used in accordance with widespread and commonly recognized practice, the pesticide product must perform its intended function without unreasonable adverse effects on the environment; that is, without any unreasonable risk to man or the environment, or a human dietary risk from residues that result from the use of a pesticide in or on food.

## III. Registration Reviews

*A. What Action is the Agency Taking?*

As directed by FIFRA section 3(g), EPA is reviewing the pesticide registration identified in the table in this unit to assure that it continues to satisfy the FIFRA standard for registration—that is, it can still be used without unreasonable adverse effects on human health or the environment. A pesticide's registration review begins when the Agency establishes a docket for the pesticide's registration review case and opens the docket for public review and comment. At present, EPA is opening a registration review docket for the case identified in the following table.

TABLE—REGISTRATION REVIEW DOCKET OPENING

| Registration Review Case Name and Number | Docket ID Number | Chemical Review Manager, Telephone Number, E-mail Address |
|---|---|---|
| 2-((hydroxymethyl)-amino)ethanol (Case 3070) | EPA–HQ–OPP–2008–0879 | Lance Wormell,<br>703-603-0523,<br>*wormell.lance@epa.gov* |

*B. Docket Content*

1. *Review dockets.* The registration review dockets contain information that the Agency may consider in the course of the registration review. The Agency may include information from its files including, but not limited to, the following information:

- An overview of the registration review case status.
- A list of current product registrations and registrants.
- **Federal Register** notices regarding any pending registration actions.
- **Federal Register** notices regarding current or pending tolerances.
- Risk assessments.
- Bibliographies concerning current registrations.
- Summaries of incident data.
- Any other pertinent data or information.

Each docket contains a document summarizing what the Agency currently knows about the pesticide case and a preliminary work plan for anticipated data and assessment needs. Additional documents provide more detailed information. During this public comment period, the Agency is asking that interested persons identify any additional information they believe the Agency should consider during the registration review of this pesticide. The Agency identifies in each docket the areas where public comment is specifically requested, though comment in any area is welcome.

2. *Other related information.* More information on this case, including the

active ingredients for this case, may be located in the registration review schedule on the Agency's website at *http://www.epa.gov/oppsrrd1/registration_review/schedule.htm*. Information on the Agency's registration review program and its implementing regulation may be seen at *http://www.epa.gov/oppsrrd1/registration_review*.

3. *Information submission requirements.* Anyone may submit data or information in response to this document. To be considered during a pesticide's registration review, the submitted data or information must meet the following requirements:

• To ensure that EPA will consider data or information submitted, interested persons must submit the data or information during the comment period. The Agency may, at its discretion, consider data or information submitted at a later date.

• The data or information submitted must be presented in a legible and useable form. For example, an English translation must accompany any material that is not in English and a written transcript must accompany any information submitted as an audiographic or videographic record. Written material may be submitted in paper or electronic form.

• Submitters must clearly identify the source of any submitted data or information.

• Submitters may request the Agency to reconsider data or information that the Agency rejected in a previous review. However, submitters must explain why they believe the Agency should reconsider the data or information in the pesticide's registration review.

• As provided in 40 CFR 155.58, the registration review docket for each pesticide case will remain publicly accessible through the duration of the registration review process; that is, until all actions required in the final decision on the registration review case have been completed.

**List of Subjects**

Environmental protection, Pesticides and pests, antimicrobials, 2-((hydroxymethyl)-amino)ethanol.

Dated: December 11, 2008.

**Joan Harrigan Farrelly,**

*Acting Director, Antimicrobials Division, Office of Pesticide Programs.*

[FR Doc. E8–30015 Filed 12–18–08; 8:45 am]

**BILLING CODE 6560–50–S**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2008–0767 ; FRL–8395–1]**

## Registration Review; 3H-1,2-Dithiol-3-one, 4,5-dichloro Docket Opened for Review and Comment

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

**ACTION:** Notice.

**SUMMARY:** EPA has established registration review dockets for the pesticide listed in the table in Unit III.A. With this document, EPA is opening the public comment period for these registration reviews. Registration review is EPA's periodic review of pesticide registrations to ensure that each pesticide continues to satisfy the statutory standard for registration, that is, the pesticide can perform its intended function without unreasonable adverse effects on human health or the environment. Registration review dockets contain information that will assist the public in understanding the types of information and issues that the Agency may consider during the course of registration reviews. Through this program, EPA is ensuring that each pesticide's registration is based on current scientific and other knowledge, including its effects on human health and the environment.

**DATES:** Comments must be received on or before March 19, 2009.

**ADDRESSES:** Submit your comments identified by the docket identification (ID) number for the specific pesticide of interest provided in the table in Unit III.A., by one of the following methods:

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

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

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

*Instructions*: Direct your comments to the docket ID numbers listed in the table in Unit III.A. for the pesticide you are commenting on. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

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

**FOR FURTHER INFORMATION CONTACT:** *For pesticide specific information contact*: The Chemical Review Manager identified in the table in Unit III.A. for the pesticide of interest.

*For general information contact*: Kevin Costello, Special Review and Reregistration Division (7508P), Office of Pesticide Programs, Environmental

Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–5026; fax number: (703) 308–8090; e-mail address: *costello.kevin @epa.gov*.

**SUPPLEMENTARY INFORMATION:**

## I. General Information

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

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, farmworker, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

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

1. *Submitting CBI*. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments*. When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Environmental justice*. EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticide discussed in this document, compared to the general population.

## II. Authority

EPA is initiating its reviews of the pesticide identified in this document pursuant to section 3(g) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Procedural Regulations for Registration Review at 40 CFR part 155, subpart C. Section 3(g) of FIFRA provides, among other things, that the registrations of pesticides are to be reviewed every 15 years. Under FIFRA section 3(a), a pesticide product may be registered or remain registered only if it meets the statutory standard for registration given in FIFRA section 3(c)(5). When used in accordance with widespread and commonly recognized practice, the pesticide product must perform its intended function without unreasonable adverse effects on the environment; that is, without any unreasonable risk to man or the environment, or a human dietary risk from residues that result from the use of a pesticide in or on food.

## III. Registration Reviews

### *A. What Action is the Agency Taking?*

As directed by FIFRA section 3(g), EPA is reviewing the pesticide registrations identified in the table in this unit to assure that they continue to satisfy the FIFRA standard for registration—that is, they can still be used without unreasonable adverse effects on human health or the environment. A pesticide's registration review begins when the Agency establishes a docket for the pesticide's registration review case and opens the docket for public review and comment. At present, EPA is opening registration review docket for the case identified in the following table.

TABLE—REGISTRATION REVIEW DOCKETS OPENING

| Registration Review Case Name and Number | Docket ID Number | Chemical Review Manager, Telephone Number, E-mail Address |
|---|---|---|
| 3H-1,2-Dithiol-3-one, 4,5-dichloro | EPA–HQ–OPP–2008–0767 | Eliza Blair, (703) 308-7279, *blair.eliza@epa.gov* |

### *B. Docket Content*

1. *Review dockets*. The registration review dockets contain information that the Agency may consider in the course of the registration review. The Agency may include information from its files including, but not limited to, the following information:

- An overview of the registration review case status.
- A list of current product registrations and registrants.
- **Federal Register** notices regarding any pending registration actions.
- **Federal Register** notices regarding current or pending tolerances.
- Risk assessments.
- Bibliographies concerning current registrations.
- Summaries of incident data.
- Any other pertinent data or information.

Each docket contains a document summarizing what the Agency currently knows about the pesticide case and a preliminary work plan for anticipated data and assessment needs. Additional documents provide more detailed information. During this public comment period, the Agency is asking

that interested persons identify any additional information they believe the Agency should consider during the registration reviews of these pesticides. The Agency identifies in each docket the areas where public comment is specifically requested, though comment in any area is welcome.

2. *Other related information.* More information on these cases, including the active ingredients for each case, may be located in the registration review schedule on the Agency's website at *http://www.epa.gov/oppsrrd1/registration_review/schedule/htm.* Information on the Agency's registration review program and its implementing regulation may be seen at *http://www.epa.gov/oppsrrd1/registration_review.*

3. *Information submission requirements.* Anyone may submit data or information in response to this document. To be considered during a pesticide's registration review, the submitted data or information must meet the following requirements:

• To ensure that EPA will consider data or information submitted, interested persons must submit the data or information during the comment period. The Agency may, at its discretion, consider data or information submitted at a later date.

• The data or information submitted must be presented in a legible and useable form. For example, an English translation must accompany any material that is not in English and a written transcript must accompany any information submitted as an audiographic or videographic record. Written material may be submitted in paper or electronic form.

• Submitters must clearly identify the source of any submitted data or information.

• Submitters may request the Agency to reconsider data or information that the Agency rejected in a previous review. However, submitters must explain why they believe the Agency should reconsider the data or information in the pesticide's registration review.

• As provided in 40 CFR 155.58, the registration review docket for each pesticide case will remain publicly accessible through the duration of the registration review process; that is, until all actions required in the final decision on the registration review case have been completed.

**List of Subjects**

Environmental protection, Pesticides and pests, antimicrobials, 3H-1,2-Dithiol-3-one,4,5,-dichloro.

Dated: December 7, 2008.

**Joan Harrigan Farrelly,**

*Acting Director, Antimicrobials Division, Office of Pesticide Programs.*

[FR Doc. E8–30012 Filed 12–18–08; 8:45 am]

**BILLING CODE 6560–50–S**

## FEDERAL COMMUNICATIONS COMMISSION

### Notice of Public Information Collection(s) Being Submitted for Review to the Office of Management and Budget

December 15, 2008.

**SUMMARY:** The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. 3501–3520. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

**DATES:** Written Paperwork Reduction Act (PRA) comments should be submitted on or before January 20, 2009. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

**ADDRESSES:** Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, (202) 395–5887, or via fax at 202–395–5167 or via Internet at *Nicholas_A._Fraser@omb.eop.gov* and to *Judith-B. Herman@fcc.gov,* Federal Communications Commission, or an e-mail to *PRA@fcc.gov.* To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the Web page *http://reginfo.gov/public/do/PRAMain,* (2) look for the section of the Web page called ''Currently Under Review'', (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, and (6) when the list of FCC ICRs currently under review appears, look for the title of this ICR (or its OMB Control Number, if there is one) and then click on the ICR Reference Number to view detailed information about this ICR.

**FOR FURTHER INFORMATION CONTACT:** For additional information or copies of the information collection(s), contact Judith B. Herman at 202–418–0214 or via the Internet at *Judith-B.Herman@fcc.gov.*

**SUPPLEMENTARY INFORMATION:**

*OMB Control Number:* 3060–0329.

*Title:* Section 2.955, Equipment Authorization—Verification (Retention of Records).

*Form No.:* N/A.

*Type of Review:* Extension of a currently approved collection.

*Respondents:* Business or other for-profit and not-for-profit institutions.

*Number of Respondents:* 5,655 respondents; 5,655 responses.

*Estimated Time per Response:* 18 hours (average).

*Frequency of Response:* One time and on occasion reporting requirements, recordkeeping requirement, and third party disclosure requirements.

*Obligation to Respond:* Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. Sections 4(i), 302, 303(g), and 303(r) of the Communications Act of 1934, as amended; 47 U.S.C. sections 154(i), 302 and 303(r).

*Total Annual Burden:* 101,790 hours.

*Total Annual Cost:* $1,131,000.

*Privacy Act Impact Assessment:* N/A.

*Nature and Extent of Confidentiality:* Commission rules require equipment testing to determine performance and compliance with FCC standards. This testing is typically done by independent testing laboratories whose measurement facility has been reviewed by the Commission, or by an accrediting organization recognized by the Commission.

*Needs and Uses:* The Commission will submit this information collection (IC) to the OMB as an extension during this comment period to obtain the full three-year clearance from them. There is

no change in the reporting, recordkeeping and/or third party disclosure requirements. There is no change in the estimated number of respondents/responses, burden hours or annual costs.

Section 2.955 describes for each equipment device subject to verification, the responsible party, as shown in 47 CFR 2.909 shall maintain the records listed as follows:

(1) A record of the original design drawings and specifications and all changes that have been made that may affect compliance with the requirements of § 2.953.

(2) A record of the procedures used for production inspection and testing (if tests were performed) to insure the conformance required by § 2.953. (Statistical production line emission testing is not required.)

(3) A record of the measurements made on an appropriate test site that demonstrates compliance with the applicable regulations in this chapter. The record shall:

(i) Indicate the actual date all testing was performed;

(ii) State the name of the test laboratory, company, or individual performing the verification testing. The Commission may request additional information regarding the test site, the test equipment or the qualifications of the company or individual performing the verification tests;

(iii) Contain a description of how the device was actually tested, identifying the measurement procedure and test equipment that was used;

(iv) Contain a description of the equipment under test (EUT) and support equipment connected to, or installed within, the EUT;

(v) Identify the EUT and support equipment by trade name and model number and, if appropriate, by FCC Identifier and serial number;

(vi) Indicate the types and lengths of connecting cables used and how they were arranged or moved during testing;

(vii) Contain at least two drawings or photographs showing the test set-up for the highest line conducted emission and showing the test set-up for the highest radiated emission. These drawings or photographs must show enough detail to confirm other information contained in the test report. Any photographs used must be focused originals without glare or dark spots and must clearly show the test configuration used;

(viii) List all modifications, if any, made to the EUT by the testing company or individual to achieve compliance with the regulations in this chapter;

(ix) Include all of the data required to show compliance with the appropriate regulations in this chapter; and

(x) Contain, on the test report, the signature of the individual responsible for testing the product along with the name and signature of an official of the responsible party, as designated in § 2.909.

(4) For equipment subject to the provisions in part 15 of this chapter, the records shall indicate if the equipment was verified pursuant to the transition provisions contained in § 15.37 of this chapter.

(b) The records listed in paragraph (a) of this section shall be retained for two years after the manufacture of said equipment item has been permanently discontinued, or until the conclusion of an investigation or a proceeding if the manufacturer or importer is officially notified that an investigation or any other administrative proceeding involving his equipment has been instituted.

The Commission needs and requires the information under FCC Rules at 47 CFR Parts 15 and 18, that RF equipment manufacturers (respondents) ''self determine'' their responsibility for adherence to these rules, as guided by the following criteria:

(a) Whether the RF equipment device that is being marketed complies with the applicable Commission Rules; and

(b) If the operation of the equipment is consistent with the initially documented test results, as reported to the Commission.

The information collection is essential to controlling potential interference to radio communications.

(a) Companies that manufacture RF equipment are the anticipated respondents to this information collection.

(b) This respondent ''public'' generally remains the same, although the types of equipment devices that they manufacture may change in response to changing technologies and to new spectrum allocations made by the Commission.

(c) In addition, the Commission may establish new technical operating standards in response to these changing technologies and in allocating spectrum, which these RF equipment manufacturers must meet to receive their equipment authorization from the FCC.

(d) However, the process that RF equipment manufacturers must follow to verify their compliance, as mandated by 47 CFR Section 2.955 of FCC Rules, will not change despite new technical standards established for specific equipment.

This information collection, therefore, applies to a variety of equipment, which is currently manufactured, may be manufactured in the future, and that operates under varying technical standards.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

[FR Doc. E8–30130 Filed 12–18–08; 8:45 am]

**BILLING CODE 6712–01–P**

## GENERAL SERVICES ADMINISTRATION

**[OMB Control No. 3090–0280]**

### General Services Administration Acquisition Regulation; Information Collection; Tax Adjustment Clause 552.270–30

**AGENCY:** Office of the Chief Acquisition Officer, General Services Administration (GSA).

**ACTION:** Notice of request for comments regarding a renewal to an existing OMB clearance.

**SUMMARY:** Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the General Services Administration will be submitting to the Office of Management and Budget (OMB) a request to review and approve a renewal of a currently approved information collection requirement regarding tax adjustments under leasehold acquisitions. This collection requires contractors to submit information to the Government to substantiate an increase or decrease in real estate taxes under a leasehold acquisition so that the Government can make tax adjustments as necessary to the leasehold acquisition. Information collected under this authority is necessary to assess proper tax adjustments against each leasehold acquisition. The clearance currently expires on April 30, 2009.

Public comments are particularly invited on: Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information shall 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; ways to minimize the burden of the information collection on respondents including through the use of automated collection techniques or other forms of information technology.

**DATES:** Submit comments on or before February 17, 2009.

**FOR FURTHER INFORMATION CONTACT:** Edward Chambers, Procurement Analyst, Contract Policy Division, GSA (202) 501–3221.

**ADDRESSES:** Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the Regulatory Secretariat (VPR), General Services Administration, Room 4041 1800 F Street, NW., Washington, DC 20405. Please cite OMB Control No. 3090–0280, Tax Adjustment Clause 552.270–30, in all correspondence.

**SUPPLEMENTARY INFORMATION:**

**A. Purpose**

The General Services Administration (GSA) has various mission responsibilities related to the acquisition and provision supply, service, and leasehold acquisitions. These mission responsibilities generate requirements that are realized through the solicitation and award of various types of contracts. Individual solicitations and resulting contracts may impose unique information collection and reporting requirements on contractors, not required by regulation, but necessary to evaluate particular program accomplishments, measure success in meeting program objectives, or adjust acquisition requirements. Leasehold acquisitions provide for real estate tax adjustments due to changes in real estate taxes on land and buildings occupied by the Government. In a leasehold acquisition, the lessor shall provide the following information regarding real estate taxes: (1) Any notice which may affect the valuation of land and buildings covered by this lease for real estate tax purposes; (2) Any notice of a tax credit or tax refund related to land and buildings covered by this lease; and (3) Each tax bill related to land and building covered by this lease. The lessor is also required to provide the contracting officer a proper invoice including evidence of payment to receive the tax adjustment. Depending on the leasehold acquisition, the tax adjustment can result in either the lessor receiving a credit or the Government receiving a credit.

**B. Annual Reporting Burden.**

*Respondents*: 7041.
*Responses Per Respondent*: 1.
*Total Responses*: 7041.
*Hours Per Response*: 6.
*Total Burden Hours*: 42,246.
*Obtaining copies of proposals*: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4041, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 3090–0280, Tax Adjustment Clause 552.270–30, in all correspondence.

Dated: December 10, 2008.

**Al Matera,**

*Director,Contract Policy Division.*

[FR Doc. E8–30016 Filed 12–18–08; 8:45 am]

**BILLING CODE 6820–61–S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Notice of the Development of a Web-Based System Used To Request Meetings Regarding Medical Countermeasures to Naturally Occurring or Manmade Threats

**AGENCY:** Department of Health and Human Services, Office of the Secretary.

**ACTION:** Notice.

**SUMMARY:** The Department of Health and Human Services (HHS) is announcing the availability of a new Web-based system, MedicalCountermeasures.gov. MedicalCountermeasures.gov will enable external stakeholders to request meetings with personnel from the organizations that comprise the Public Health Emergency Medical Countermeasures Enterprise (PHEMCE) regarding medical countermeasures to threats to public health, either naturally occurring or manmade. The goal of these meetings is to provide an opportunity for stakeholders to share information regarding medical countermeasures. The system can be accessed from the Web site *https://www.medicalcountermeasures.gov/RequestMeeting.aspx.*

During the BioShield Stakeholders Workshop, HHS Secretary Michael O. Leavitt announced that HHS would develop a Web based system ''through which those in industry and the research and development community can reach the people they need in the federal government, whether they're looking at a basic level of research or are focused on end-stage development.'' In fulfillment of this promise, HHS has developed MedicalCountermeasures.gov.

MedicalCountermeasures.gov enables external stakeholders to request a meeting with federal representatives from participating PHEMCE agencies regarding medical countermeasures they are developing for use in response to a public health emergency. The information will then be routed to personnel within the relevant PHEMCE agencies, which currently include: The National Institutes of Health (NIH), the Office of the Biomedical Advanced Research and Development Authority (BARDA), the Food and Drug Administration (FDA), and the Department of Veterans Affairs (VA). MedicalCountermeasures.gov also provides information on upcoming and past conferences; procurements and grants; regulatory information; and strategic plans from throughout the PHEMCE agencies.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth Jarrett, M.A., Office of the Biomedical Advanced Research and Development, Office of the Assistant Secretary for Preparedness and Response, Department of Health and Human Services, 330 Independence Ave., SW., Room G640, Washington, DC 20201; phone: 202–260–1200; e-mail address: *BARDA@hhs.gov.*

Dated: December 9, 2008.

**W. Craig Vanderwagen,**

*Assistant Secretary for Preparedness and Response, Department of Health and Human Services.*

[FR Doc. E8–30150 Filed 12–18–08; 8:45 am]

**BILLING CODE 4150–37–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Opportunity for Cosponsorship of the Integrated Medical, Public Health, Preparedness, and Response Training Summit

**AGENCY:** Department of Health and Human Services, Office of the Secretary.

**ACTION:** Notice.

**SUMMARY:** The Department of Health and Human Services' Office of the Assistant Secretary for Preparedness and Response (ASPR) and Office of the Surgeon General (OSG) announce the opportunity for both private sector and non-profit entities to cosponsor an annual training summit. The focus of this training is medical and public health preparedness and response during disasters and emergencies. Potential cosponsors must have a mutual interest in the subject matter, the capability to provide logistical and educational support, and be willing to participate substantively in the cosponsored activity.

**DATES:** To receive consideration, a request to participate as a cosponsor must be received by the close of business on February 2, 2009. Requests will meet the deadline if they are either (1) received on or before the deadline

date; or (2) postmarked on or before the deadline date. Private metered postmarks will not be acceptable as proof of timely mailing. Hand-delivered requests must be received by 5 p.m. on the deadline date. Requests that are received after the deadline date will be returned to the sender.

**ADDRESSES:** Notification of interest and proposal for cosponsorship should be sent to Leslie Beck, National Disaster Medical System, 330 Independence Ave., SW, Room G–644, Washington, DC 20201 or if mailing by FedEx/UPS please send them to Leslie Beck, 409 Third Street, SW., Suite 330, Washington, DC 20024. Phone number: (202) 205–5929, fax number: (800) 872–5945. Notifications and proposals may also be submitted by electronic mail to *leslie.beck@hhs.gov.*

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information on the training and cosponsorship should be directed to Leslie Beck, National Disaster Medical System, 330 Independence Ave., SW., Room G–644, Washington, DC 20201 or if mailing by FedEx/UPS please send them to Leslie Beck, 409 Third Street, SW., Suite 330, Washington, DC 20024. Phone number: (202) 205–5929, fax number: (800) 872–5945, e-mail: *leslie.beck@hhs.gov.*

**SUPPLEMENTARY INFORMATION:**

**Description**

The Integrated Medical, Public Health, Preparedness, and Response Training Summit brings together several national-level entities within the Department of Health and Human Services (HHS) that have, in the past, held separate organizational meetings, training summits and leadership conferences. These entities collectively organized a joint training summit scheduled to be held in April, 2009. These organizations include the U.S. Public Health Service (PHS), National Disaster Medical System (NDMS), Medical Reserve Corps (MRC) and the Emergency System for Advance Registration of Volunteer Health Professionals (ESAR–VHP). The combination into an integrated Training Summit permits coordination, collaboration and interaction amongst the target audience—the leaders and members of these response partner organizations. The Training Summit will enhance the knowledge, skills, and abilities of participants, which in turn will improve their competency to deliver public health and medical care services during emergencies and disasters of any origin. Networking with these expert faculty members and fellow participants, many of whom are the nation's leaders in the area of public health emergencies, will give access to the latest in emergency response and coordination capabilities.

These organizations are authorized under sections 203, 319I, 2812, and 2813 of the Public Health Service Act, among other HHS authorities.

**Requirements of Cosponsorship**

ASPR and OSG are seeking a cosponsor(s) for the 2010 national training summit for full-time, intermittent, and other potential Federal, State and local responders, as well as the leaders of the various component organizations. The summit will focus on skills development, knowledge enhancement and information sharing regarding the variety of support services necessary during a public health emergency.

Following the training summit, participants will be better trained for their respective missions and will understand how other public health and medical response components contribute to the full spectrum of care available during an emergency.

Cosponsoring organizations must have a substantive interest in the goals of the training summit and are expected to be active participants. Cosponsorship involves joint development, support, implementation, and evaluation of the training summit with the ASPR, OSG and other cosponsors.

The ASPR and OSG are seeking a cosponsor(s) to partner in ways that accord with its particular circumstances. For example, a cosponsor may assist ASPR and OSG by:

(1) Participating in the development of the training curriculum, planning of educational demonstrations, and designation of professional organizations and experts in those specific activities;

(2) Participating in the review, development, and approval of all materials produced for educational purposes and promotion of the event; and all materials, signage, press releases, etc. that mention the cosponsorship;

(3) Participating in the coordination of logistical concerns; e.g., training location, training structure, insurance, etc.

A copy of the Department of Health and Human Services guidelines on cosponsorship is available upon request. HHS will reserve the right to determine both the form and the content of the information provided to the training participants.

**Availability of Funds**

There are no Federal funds available for this cosponsorship. All cosponsors agree to not use the event as a vehicle to sell or promote products or services. Any incidental promotional materials cannot imply that the HHS endorses any products or services.

**Eligibility for Cosponsorship**

To be eligible, an interested party must be: (1) Be a public or a private non-profit or for-profit organization or corporation, (2) be an entity that, by virtue of its nature and purpose, has a legitimate interest in the subject matter, (3) agree to sign a cosponsorship agreement with the HHS which will set forth the details of the cosponsored activity, including the requirements that any fees raised should not be designed to exceed the cosponsor's costs, and fees collected by the cosponsor should be limited to the amount necessary to cover the cosponsor's related operating expenses and (4) participate substantively in the training summit (not just provide funding or logistical support).

**Cosponsorship Proposal**

Each cosponsorship proposal should contain a description of: (1) The entity or organization; (2) its background in training and educational activities; (3) its proposed involvement in the cosponsored activity to include evidence of a substantive interest; and (4) plan for implementation with timeline(s). Selected cosponsors shall furnish the personnel, materials, equipment and funding necessary to carry out their activities in cosponsoring the 2010 training summit.

**Evaluation Criteria**

In exploring potential cosponsors for the training summit, ASPR and OSG will use the following evaluation criteria, as appropriate and relevant, to determine whether HHS will engage in a cosponsorship with particular entities:

(1) Requester's qualifications and capability to fulfill cosponsorship responsibilities;

(2) Requester's experience in administering large national training programs;

(3) Requester's specific work previously performed or currently being performed, with particular emphasis on those national programs/projects dealing with educational activities with the Federal Government, schools, organizations, and individuals;

(4) Requester's personnel: Name, professional qualifications and specific experience of key personnel who would be available to work on these projects;

(5) The ability of the interested party to arrange for the funding of the development and implementation of the training summit. The requester's description of financial management to include the discussion of experience in developing an annual budget and collecting and managing monies from organizations and/or individuals;

(6) Requester's proposed plan for managing the training program, including such financial aspects as cost of venue, materials, promotion, distribution and program management.

**Other Information**

Prior to the selection of the cosponsors, HHS staff will meet separately with those interested parties who best meet the evaluation criteria. Moreover, other federal agencies may be involved in the cosponsorship process. As a general rule, restrictions will apply to the use of any HHS logos, so as to avoid suggestions that HHS, or any other department or agency of the Federal Government, endorses any of the products involved in the training summit. Once details of the program have been mutually agreed upon, cosponsors will be required to enter into a cosponsorship agreement with the Department of Health and Human Services setting forth the rights and responsibilities of the cosponsor(s) and HHS, especially the right of HHS to approve training messages.

Dated: December 8, 2008.

**Craig Vanderwagon,**

*Assistant Secretary for Preparedness and Response, U.S. Department of Health and Human Services.*

[FR Doc. E8–30151 Filed 12–18–08; 8:45 am]

**BILLING CODE 4150–37–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[Document Identifier: CMS–339 and CMS–R–144/CMS–368]**

### Agency Information Collection Activities: Proposed Collection; Comment Request

**AGENCY:** Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS) is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Medicare Provider Cost Report Reimbursement Questionnaire; *Use:* Form CMS–339 must be completed by all providers that submit full cost reports to the Medicare intermediary under Title XVIII of the Social Security Act. It is designed to answer pertinent questions about key reimbursement concepts found in the cost report and to gather information necessary to support certain financial and statistical entries on the cost report. The questionnaire is used by the Medicare intermediaries as a tool to help them arrive at a prompt and equitable settlement of all of the various types of provider cost reports (hospitals, skilled nursing facilities (SNFs), home health agencies (HHAs), etc.) and sometimes preclude the need for a comprehensive on-site audit. *Form Number:* CMS–339 (OMB# 0938–0301); *Frequency:* Annually; *Affected Public:* Business or other for-profit and Not-for-profit institutions; *Number of Respondents:* 38,429; *Total Annual Responses:* 38,429; *Total Annual Hours:* 431,148.

2. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* State Medicaid Drug Rebate; *Use:* Section 1927 of the Social Security Act requires each State Medicaid agency to report quarterly prescription drug utilization information to drug manufacturers and to CMS. As part of this information, the State Medicaid agencies are required to report the total Medicaid rebate amount they claim they are owed by each drug manufacturer for each covered prescription drug product each quarter. *Form Number:* CMS–R–144 and CMS–368 (OMB# 0938–0582); *Frequency:* Quarterly; *Affected Public:* State, Local or Tribal Governments; *Number of Respondents:* 51; *Total Annual Responses:* 204; *Total Annual Hours:* 9,389.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS' Web Site at *http://www.cms.hhs.gov/PaperworkReductionActof1995,* or E-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office on (410) 786–1326.

In commenting on the proposed information collections please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in one of the following ways by February 17, 2009:

1. *Electronically.* You may submit your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number_, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Dated: December 12, 2008.

**Michelle Shortt,**

*Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.*

[FR Doc. E8–30160 Filed 12–18–08; 8:45 am]

**BILLING CODE 4120–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[Document Identifier: CMS–10175, CMS–10236, and CMS–179]**

### Agency Information Collection Activities: Submission for OMB Review; Comment Request

**AGENCY:** Centers for Medicare & Medicaid Services.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any

of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the Agency's function; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* Reinstatement without change of a previously approved collection; *Title of Information Collection:* Certification Statement for Electronic File Interchange Organizations (EFIOs); *Use:* Health care providers can currently obtain a National Provider Identifier (NPI) via a paper application or over the Internet through the National Plan and Provider Enumeration System (NPPES). These applications must be submitted individually, on a per-provider basis. The Electronic File Interchange (EFI) process allows provider-designated electronic file interchange organizations (EFIOs) to capture multiple providers' NPI application information on a single electronic file for submission to NPPES. This process is also referred to as ''bulk enumeration.'' To ensure that the EFIO has the authority to act on behalf of each provider and complies with other Federal requirements, an authorized official of the EFIO must sign a certification statement and mail it to the Centers for Medicare and Medicaid Services (CMS). *Form Number:* CMS–10175 (OMB# 0938–0984); *Frequency:* Once; *Affected Public:* Private Sector—Business or other for-profits; *Number of Respondents:* 300; *Total Annual Responses:* 300; *Total Annual Hours:* 300.

2. *Type of Information Collection Request:* New collection; *Title of Information Collection:* Disclosure of Financial Relationships Report (''DFRR''); *Use:* Section 1877(f) of the Social Security Act requires that each entity providing covered items or services for which payment may be made shall provide the Secretary with information concerning the entity's ownership and investment interests, and compensation arrangements, in such form, manner, and at such times as the Secretary shall specify. The DFRR collection instrument will be used by CMS to (1) identify arrangements that potentially may not be in compliance with the physician self-referral statute and implementing regulations; and (2) to identify examples and areas of non-compliance that may assist us in any future rulemaking concerning the reporting requirements and other physician self-referral provisions. *Form Number:* CMS–10236 (OMB# 0938–New); *Frequency:* Once; *Affected Public:* Private Sector—Business or other for-profits and Not-for-profit institutions; *Number of Respondents:* 400; *Total Annual Responses:* 400; *Total Annual Hours:* 40,000.

3. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Transmittal and Notice of Approval of State Plan Material and Medicaid State Plan—Base Plan, Attachments and Supplemental Pages and Supporting Regulations in 42 CFR 430.10–430.20 and 440.167; *Use:* The Medicaid State base plan pages and attachments are documents utilized by State and territorial agencies which have the responsibility for administering the Medicaid program. The Medicaid State plan is comprised of ''pages'' and organized by subject matter which includes Medicaid eligibility services, payment for services, and general, financial and personnel administration. When States seek to change selected pages of their State plans, the page(s) are transmitted to CMS for review and approval by the CMS Central and Regional Offices prior to amending its State plan. *Form Number:* CMS–179 (OMB# 0938–0193); *Frequency:* Once and as needed; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 56; *Total Annual Responses:* 4,681; *Total Annual Hours:* 9,271.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS Web Site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995*, or E-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov*, or call the Reports Clearance Office on (410) 786–1326.

To be assured consideration, comments and recommendations for the proposed information collections must be received by the OMB desk officer at the address below, no later than 5 p.m. on *January 20, 2009.*

OMB, Office of Information and Regulatory Affairs, Attention: CMS Desk Officer, New Executive Office Building, Room 10235, Washington, DC 20503, Fax Number: (202) 395–6974.

Dated: December 12, 2008.

**Michelle Shortt,**

*Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.*

[FR Doc. E8–30327 Filed 12–18–08; 8:45 am]

**BILLING CODE 4120–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[CMS–2295–N]**

**RIN 0938–AP20**

## Deeming Notice for American Society for Histocompatibility and Immunogenetics (ASHI) as an Accrediting Organization Under the Clinical Laboratory Improvement Amendments of 1988

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Notice.

**SUMMARY:** The American Society for Histocompatibility and Immunogenetics (ASHI) was granted deeming authority as an accrediting organization for clinical laboratories under the Clinical Laboratory Improvement Amendments of 1988 (CLIA) program on March 25, 2005. The deeming authority was granted for the CLIA specialty of Histocompatibility and the subspecialty ABO/Rh. In this notice, we approve and grant ASHI deeming authority for the additional CLIA subspecialty of General Immunology.

**DATES:** *Effective Date:* This notice is effective from December 19, 2008 until March 25, 2011.

**FOR FURTHER INFORMATION CONTACT:** Penelope Meyers, (410) 786–3366.

**SUPPLEMENTARY INFORMATION:**

### I. Background

On October 31, 1988, the Congress enacted the Clinical Laboratory Improvement Amendments of 1988 (CLIA), Public Law 100–578. CLIA amended section 353 of the Public Health Service Act. We issued a final rule implementing the accreditation provisions of CLIA on July 31, 1992 (57 FR 33992). Under the CLIA program, CMS may grant deeming authority to an accreditation organization that accredits clinical laboratories if the organization meets certain requirements. Among other requirements, an organization's requirements for laboratories accredited under its program must be equal to or more stringent than the applicable CLIA program requirements in 42 CFR part

493 (Laboratory Requirements). This requirement and others in subpart E of that part (Accreditation by a Private, Nonprofit Accreditation Organization or Exemption Under an approved State Laboratory Program) specify the requirements an accreditation organization must meet to be approved by CMS as an accreditation organization under CLIA.

## II. Notice of Approval of Deeming Authority for ASHI in the Subspecialty of General Immunology

In this notice, we approve ASHI as an organization that may accredit laboratories for purposes of establishing their compliance with CLIA requirements in the subspecialty of General Immunology. We have examined the initial ASHI application and all subsequent submissions to determine their accreditation program's equivalency with the requirements for approval of an accreditation organization under subpart E of part 493. We have determined that ASHI meets or exceeds the applicable CLIA requirements. We have also determined that the ASHI program will ensure that its accredited laboratories will meet or exceed the applicable requirements in subparts H, K and M. Therefore, by this notice we grant ASHI approval as an accreditation organization under subpart E of part 493, for the period stated in the ''*Effective Date*'' section of this notice for the subspecialty area of General Immunology. As a result of this determination, any laboratory that is accredited by ASHI during the time period stated in the ''*Effective Date*'' section of this notice for the approved subspecialty of General Immunology is deemed to meet the CLIA requirements for laboratories found in part 493 of our regulations and, therefore, is generally not subject to routine inspections by a State survey agency to determine its compliance with CLIA requirements. The accredited laboratory, however, is subject to validation and complaint investigation surveys performed by CMS, or its agent(s).

## III. Evaluation of ASHI Request for Approval as an Accreditation Organization Under CLIA in the Subspecialty of General Immunology

The following describes the process used to determine that the ASHI accreditation program for the subspecialty of General Immunology met the necessary requirements to be approved by CMS, and that, as such, CMS may approve ASHI as an accreditation program with deeming authority under the CLIA program.

- ASHI formally applied to CMS for approval as an accreditation organization under CLIA for the subspecialty of General Immunology. In reviewing these materials, CMS found as follows for each applicable subpart of the CLIA regulations:

*Subpart E—Accreditation by a Private, Nonprofit Accreditation Organization or Exemption Under an Approved State Laboratory Program*

ASHI submitted its mechanism for monitoring compliance with all requirements equivalent to condition-level requirements within the scope of the subspecialty area of General Immunology; a list of all its current laboratories and the expiration date of their accreditation; and a detailed comparison of the individual accreditation requirements with the comparable condition-level requirements. ASHI's proposed policies and procedures for oversight of laboratories performing General Immunology testing would be the same as those previously approved by CMS for laboratory oversight in the matters of inspection, monitoring proficiency testing (PT) performance, investigating complaints, and making PT information available. ASHI's proposed requirements for monitoring and inspecting General Immunology laboratories would be the same as those previously approved by CMS for laboratories in the areas of accreditation organization data management, the inspection process, procedures for removal or withdrawal of accreditation, notification requirements, and accreditation organization resources. The requirements of ASHI are equal to the requirements of the CLIA regulations.

ASHI's application and supplemental materials demonstrate that ASHI's accreditation program for General Immunology met the subpart E requirements.

*Subpart H—Participation in Proficiency Testing for Laboratories Performing Nonwaived Testing*

ASHI's application materials demonstrate that the requirements in ASHI's accreditation program for the subspecialty of General Immunology are equal to the CLIA requirements at § 493.837. Both CLIA regulations and ASHI standards require accredited laboratories to participate in a CMS-approved PT program for any of the tests listed in subpart I. Additionally, ASHI's requirements exceed the CLIA requirements in that it requires laboratories to participate in non-regulated PT programs when available.

ASHI's application and supplemental materials demonstrate that ASHI's accreditation program for General Immunology met or exceeds the subpart H requirements.

*Subpart K—Quality System for Nonwaived Testing*

The quality control requirements of ASHI have been evaluated against the requirements of the CLIA regulations. ASHI standards contain additional, specific quality control requirements for General Immunology testing. Therefore, the ASHI requirements are more stringent than the CLIA requirements at § 493.1208.

ASHI's application and supplemental materials demonstrate that ASHI's accreditation program for General Immunology exceeds the subpart K requirements.

*Subpart M—Personnel for Nonwaived Testing*

We have determined that the ASHI requirements are equal to the CLIA requirements at § 493.1441 through § 493.1495 (applicable to laboratories performing testing in the subspecialty of General Immunology).

ASHI's application and supplemental materials demonstrate that ASHI's accreditation program for General Immunology met the subpart M requirements.

## IV. Federal Validation Inspections and Continuing Oversight

The Federal validation inspections of ASHI accredited laboratories may be conducted on a representative sample basis or in response to substantial allegations of noncompliance (that is, complaint inspections). The outcome of those validation inspections, performed by CMS or our agents, the State survey agencies, will be our principal means for verifying that the laboratories accredited by ASHI remain in compliance with CLIA requirements. This Federal monitoring is an ongoing process.

## V. Removal of Approval as an Accrediting Organization

Our regulations provide that we may rescind the approval of an accreditation organization, such as that of ASHI, for cause, before the end of the effective date of approval. If we determine that ASHI has failed to adopt, maintain and enforce requirements that are equal to, or more stringent than, the CLIA requirements, or that systemic problems exist in its monitoring, inspection or enforcement processes, we may impose a probationary period, not to exceed 1 year, in which ASHI would be allowed

to address any identified issues. Should ASHI be unable to address the identified issues within that time frame, CMS may, in accordance with the applicable regulations, revoke ASHI's deeming authority under CLIA.

Should circumstances result in our withdrawal of ASHI's approval, we will publish a notice in the **Federal Register** explaining the basis for removing its approval.

### VI. Collection of Information Requirements

This notice does not impose any information collection and record keeping requirements subject to the Paperwork Reduction Act (PRA). Consequently, it does not need to be reviewed by the Office of Management and Budget (OMB) under the authority of the PRA. The requirements associated with the accreditation process for clinical laboratories under the Clinical Laboratory Improvement Amendments of 1988 (CLIA) program, and the implementing regulations in 42 CFR part 493, subpart E, are currently approved under OMB control number 0938–0686.

**Authority:** Section 353(p) of the Public Health Service Act (42 U.S.C. 263a).

Dated: December 4, 2008.

**Kerry Weems,**

*Acting Administrator, Centers for Medicare & Medicaid Services.*

[FR Doc. E8–29659 Filed 12–18–08; 8:45 am]

**BILLING CODE 4120–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

## Centers for Medicare & Medicaid Services

**[CMS–2274–N]**

**RIN 0938–AP09**

## Medicaid Program; Fiscal Year Disproportionate Share Hospital Allotments and Disproportionate Share Hospital Institutions for Mental Disease Limits

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS

**ACTION:** Notice.

**SUMMARY:** This notice announces the final Federal share disproportionate share hospital (DSH) allotments for Federal fiscal year (FFY) 2007 and the preliminary Federal share DSH allotments for FFY 2009. This notice also announces the final FFY 2007 and the preliminary FFY 2009 limitations on aggregate DSH payments that States may make to institutions for mental disease and other mental health facilities. In addition, this notice includes background information describing the methodology for determining the amounts of States' FFY DSH allotments.

**DATES:** *Effective Date:* This notice is effective on 60 days after the date of publication in the **Federal Register**. The final allotments and limitations set forth in this notice are effective for the fiscal years specified.

**FOR FURTHER INFORMATION CONTACT:** Richard Strauss, (410) 786–2019.

**SUPPLEMENTARY INFORMATION:**

### I. Background

*A. Disproportionate Share Hospital Allotments for Federal Fiscal Year 2003*

Under section 1923(f)(3) of the Social Security Act (the Act), States' Federal fiscal year (FFY) 2003 disproportionate share hospital (DSH) allotments were calculated by increasing the amounts of the FFY 2002 allotments for each State (as specified in the chart, entitled ''DSH Allotment (in millions of dollars),'' contained in section 1923(f)(2) of the Act) by the percentage change in the Consumer Price Index for all Urban Consumers (CPI–U) for the prior fiscal year. The allotment, determined in this way, is subject to the limitation that an increase to a State's DSH allotment for a fiscal year cannot result in the DSH allotment exceeding the greater of the State's DSH allotment for the previous fiscal year or 12 percent of the State's total medical assistance expenditures for the allotment year (this is referred to as the 12 percent limit).

Most States' *actual* FY 2002 allotments were determined in accordance with the provisions of section 1923(f)(4) of the Act. However, as indicated previously, the calculation of States' FFY 2003 allotments was *not* based on the actual FFY 2002 DSH allotments; rather, section 1923(f)(3) of the Act requires that the States' FY 2003 allotments be determined using the amount of the States' FY 2002 allotments specified in the chart in section 1923(f)(2) of the Act. The exception to this is the calculation of the FFY 2003 DSH allotments for certain ''Low-DSH States'' (defined in section 1923(f)(5) of the Act). Under the Low-DSH State provision, there is a special calculation methodology for the Low-DSH States only. Under this methodology, the FFY 2003 allotments were determined by using (that is, increasing) States' actual FFY 2002 DSH allotments (not their FFY 2002 allotments specified in the chart in section 1923(f)(2) of the Act) by the percentage change in the CPI–U for the previous fiscal year.

*B. DSH Allotments for FFY 2004*

Section 1001(a) of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (Pub. L. 108–173, enacted on December 8, 2003) amended section 1923(f)(3) of the Act to provide for a ''Special, Temporary Increase in Allotments on a One-Time, Non-Cumulative Basis.'' Under this provision, States' FFY 2004 DSH allotments were determined by increasing their FFY 2003 allotments by 16 percent, and the fiscal year DSH allotment amounts so determined were not subject to the 12 percent limit.

*C. DSH Allotments for Non-Low DSH States for FFY 2005, and Fiscal Years Thereafter*

Under the methodology contained in section 1923(f)(3)(C) of the Act, as amended by section 1001(a)(2) of the MMA, the non-Low-DSH States' DSH allotments for FFY 2005 and subsequent fiscal years continue at the same level as the States' DSH allotments for FFY 2004 until a ''fiscal year specified'' occurs. The ''fiscal year specified'' is the first fiscal year for which the Secretary estimates that a State's DSH allotment equals (or no longer exceeds) the DSH allotment as would have been determined under the statute in effect before the enactment of the MMA. We determine whether the fiscal year specified has occurred under a special parallel process. Specifically, under this parallel process, a ''parallel'' DSH allotment is determined for FFYs after 2003 by increasing the State's DSH allotment for the previous fiscal year by the percentage change in the CPI–U for the prior fiscal year, subject to the 12 percent limit. This is the methodology as would otherwise have been applied under section 1923(f)(3)(A) of the Act notwithstanding the application of the provisions of MMA. The ''fiscal year specified,'' is the fiscal year in which the parallel DSH allotment calculated under this special parallel process finally equals or exceeds the FY 2004 DSH allotment, as determined under the MMA provisions. Once the fiscal year specified occurs for a State, that State's fiscal year DSH allotment will be calculated by increasing the State's previous actual fiscal year DSH allotment (which would be equal to the FY 2004 DSH allotment) by the percentage change in the CPI–U for the previous fiscal year, subject to the 12 percent limit. The following example illustrates how the fiscal year DSH allotment would be calculated for fiscal years after FFY 2004.

Example—In this example, we are determining the parallel FFY 2009 DSH

allotment. A State's actual FFY 2003 DSH allotment is $100 million. Under the MMA, this State's actual FFY 2004 DSH allotment would be $116 million ($100 million increased by 16 percent). The State's DSH allotment for FFY 2005 and subsequent fiscal years would continue at the $116 million FFY 2004 DSH allotment for fiscal years following FFY 2004 until the ''fiscal year specified'' occurs. Under the separate parallel process, we determine whether the fiscal year specified has occurred by calculating the State's DSH allotments in accordance with the statute in effect before the enactment of the MMA. Under this special process, we would continue to determine the State's parallel DSH allotment for each fiscal year by increasing the State's parallel DSH allotment for the previous fiscal year (as also determined under the special parallel process) by the percentage change in the CPI–U for the previous fiscal year, and subject to the 12 percent limit. Assume for purposes of this example that, in accordance with this special parallel process, the State's parallel FFY 2008 DSH allotment was determined to be $115 million and the percentage change in the CPI–U for FFY 2008 (the previous fiscal year) relevant for the calculation of the FFY 2009 DSH allotment was 4.0 percent. That is, the percentage change for the CPI–U for FFY 2008, the year before FFY 2009, was 4.0 percent. Therefore, the State's special parallel process FFY 2009 DSH allotment amount would be calculated by increasing the special parallel process FFY 2008 DSH allotment amount of $115 million by 4.0 percent; this results in a parallel process DSH allotment process amount for FFY 2009 of $119.6 million. Since $119.6 million is greater than $116 million (the actual FFY 2004 DSH allotment calculated under the MMA), we would determine that FFY 2009 is the ''fiscal year specified'' (the first year that the FFY 2004 allotment equals or no longer exceeds the parallel process allotment). Since FY 2009 is the fiscal year specified, we would then determine the State's FFY 2009 allotment by increasing the State's *actual* FFY 2008 DSH allotment ($116 million) by the percentage change in the CPI–U for FFY 2008 (4.0 percent). Therefore, the State's FFY 2009 DSH allotment would be $120.6 million ($116 million increased by 4.0 percent); for purposes of this example, the application of the 12 percent limit has no effect. Furthermore, for FFY 2009 and thereafter, the State's DSH allotment would be calculated under the provisions of section 1923(f)(3)(A) of the Act by increasing the State's previous fiscal year's DSH allotment by the percentage change in the CPI–U for the previous fiscal year, subject to the 12 percent limit.

However, as amended by section 1001(b)(4) of the MMA, section 1923(f)(5)(B) of the Act also contains criteria for determining whether a State is a Low-DSH State, beginning with FFY 2004. This provision is described in section I.D.

*D. DSH Allotments for Low-DSH States for FFY 2004 and Fiscal Years Thereafter*

Section 1001(b)(1) of the MMA amended section 1923(f)(5) of the Act regarding the calculation of the fiscal year DSH allotments for ''Low-DSH'' States for FFY 2004 and subsequent fiscal years. Specifically, under section 1923(f)(5)(B) of the Act, as amended by section 1001(b)(4) of the MMA, a State is considered a Low-DSH State for FFY 2004 if its total DSH payments under its State plan for FFY 2000 (including Federal and State shares) as reported to CMS as of August 31, 2003, are greater than 0 percent and less than 3 percent of the State's total FFY 2000 expenditures under its State plan for medical assistance. For States that meet the new Low-DSH criteria, their FFY 2004 DSH allotments are calculated by increasing their FFY 2003 DSH allotments by 16 percent. Therefore, for FFY 2004, Low-DSH States' fiscal year DSH allotments are calculated in the same way as the DSH allotments for regular States, which under section 1923(f)(3) of the Act, get the special temporary increase for FFY 2004.

Furthermore, for States meeting the MMA's Low-DSH definition, the DSH allotments for FFYs 2005 through 2008 will continue to be determined by increasing the previous fiscal year's DSH allotment by 16 percent. The Low-DSH States' DSH allotments for FFYs 2004 through 2008 are not subject to the 12 percent limit. The Low-DSH States' DSH allotments for FFYs 2009 and subsequent fiscal years are calculated by increasing those States' DSH allotments for the prior fiscal year by the percentage change in the CPI–U for that prior fiscal year. For FFYs 2009 and thereafter, the DSH allotments so determined would be subject to the 12 percent limit.

*E. Institutions for Mental Diseases DSH Limits for FFYs 1998 and Thereafter*

Under section 1923(h) to the Act, Federal financial participation (FFP) is not available for DSH payments to institutions for mental diseases (IMDs) and other mental health facilities that are in excess of State-specific aggregate limits. Under this provision, this aggregate limit for DSH payments to IMDs and other mental health facilities is the lesser of a State's FFY 1995 total computable (State and Federal share) IMD and other mental health facility DSH expenditures applicable to the State's FFY 1995 DSH allotment (as reported on the Form CMS–64 as of January 1, 1997), or the amount equal to the product of the State's current year total computable DSH allotment and the applicable percentage.

Each State's IMD limit on DSH payments to IMDs and other mental health facilities was calculated by first determining the State's total computable DSH expenditures attributable to the FFY 1995 DSH allotment for mental health facilities and inpatient hospitals. This calculation was based on the total computable DSH expenditures reported by the State on the Form CMS–64 as mental health DSH and inpatient hospital as of January 1, 1997. We then calculate an ''applicable percentage.'' The applicable percentage for FFY 1998 through FFY 2000 (1995 IMD DSH percentage) is calculated by dividing the total computable amount of IMD and mental health DSH expenditures applicable to the State's FFY 1995 DSH allotment by the total computable amount of all DSH expenditures (mental health facility plus inpatient hospital) applicable to the FFY 1995 DSH allotment. For FFY 2001 and thereafter, the applicable percentage is defined as the lesser of the applicable percentage as calculated above (for FFYs 1998 through 2001) or 50 percent for FFY 2001; 40 percent for FFY 2002; and 33 percent for each subsequent FFY.

The applicable percentage is then applied to each State's total computable FFY DSH allotment for the current FFY. The State's total computable FFY DSH allotment is calculated by dividing the State's Federal share DSH allotment for the FFY by the State's Federal medical assistance percentage (FMAP) for that FFY.

In the final step of the calculation of the IMD DSH Limit, the State's total computable IMD DSH limit for the FFY is set at the lesser of the product of a State's current fiscal year total computable DSH allotment and the applicable percentage for that fiscal year, or the State's FFY 1995 total computable IMD and other mental health facility DSH expenditures applicable to the State's FFY 1995 DSH allotment as reported on the Form CMS–64.

The MMA legislation did not amend the Medicaid statute with respect to the calculation of the IMD DSH limit.

*F. Publication in the* ***Federal Register*** *of Preliminary and Final Notice for DSH Allotments and IMD DSH Limits*

In general, we initially determine States' DSH allotments and IMD DSH limits for a fiscal year using estimates of medical assistance expenditures, including DSH expenditures in their Medicaid programs. These estimates are provided by States each year on the August quarterly Medicaid budget reports (Form CMS–37) before the Federal fiscal year for which the DSH allotments and IMD DSH limits are being determined. The DSH allotments and IMD DSH limits determined using these estimates are referred to as *''preliminary.''* Only after we receive States' reports of the actual related medical assistance expenditures through the quarterly expenditure report (Form CMS–64), which occurs after the end of the fiscal year, are the ''final'' DSH Allotments and IMD DSH limits determined.

As indicated in section I.F. of this notice, the notice published in the **Federal Register** on October 3, 2006, included the announcement of the *preliminary* FFY 2007 DSH allotments (based on estimates), and the preliminary FFYs 2007 IMD DSH limits (since they were based on the preliminary DSH allotments for FFYs 2007). The notice published in the **Federal Register** on December 28, 2007 announced the final FFY 2006 DSH allotments and the final FFY 2006 IMD DSH limits (since they were based on the actual expenditures related to those years), and the *preliminary* FFY 2008 allotments (based on estimates), and the preliminary FFYs 2008 IMD DSH limits (since they were based on the preliminary DSH allotments for FFYs 2008).

This notice announces the *final* FFY 2007 DSH allotments and the *final* FFY 2007 IMD DSH limits (since these are now based on the actual expenditures for those fiscal years), the *preliminary* FFY 2009 DSH allotments (based on estimates), and the *preliminary* IMD DSH limits for FFY 2009 (since they are based on the preliminary DSH allotments for FFY 2009). This notice does not include the final FFY 2008 DSH allotments or the final FFY 2008 IMD DSH limits, since the associated actual expenditures for FFY 2008 are not available at this time.

*G. DSH Allotment Provisions for Certain States*

1. DSH Allotments for the District of Columbia

The provisions of section 6054 of the Deficit Reduction Act (DRA) of 2005 Public Law 109–171, enacted February 8, 2006) affected the determination of the DSH allotment for the District of Columbia. Under section 6054 of the DRA, for purposes of determining only the FFY 2006 and subsequent fiscal year DSH allotments for the District of Columbia, the table in section 1923(f)(2) of the Act is amended by increasing the FFY DSH allotment amounts indicated in that table for the District of Columbia for FFYs 2000, 2001, and 2002 to $49 million for each of those fiscal years. Before the DRA amendment, the amount in the chart in section 1923(f)(2) of the Act for the District of Columbia for each of those fiscal years was $32 million. This DRA provision increases the fiscal year DSH allotment for the District of Columbia effective with the FFY 2006 DSH allotment. This change is because the DSH allotments for FFY 2003 were based on the amounts of States' DSH allotments for FFY 2002 as contained in the chart in section 1923(f)(2) of the Act. Since (for purposes of ultimately determining the FFY 2006 allotment) the DRA provision increased the FFY 2002 allotment for the District of Columbia, as indicated above, the FFY 2003 allotment was increased. Furthermore, for this purpose, the FFY 2004 allotment for the District of Columbia would then have been determined by increasing the FFY 2003 allotment (as so determined) by 16 percent. For fiscal years subsequent to FFY 2006, the DSH allotments are determined as described above. The final FFY 2007 DSH allotment and the preliminary FFY 2009 DSH allotment for the District of Columbia contained in this notice reflect the provision of section 6054 of the DRA.

As described below, in accordance with section 6054 of the DRA, the final FFY 2007 DSH allotment for the District of Columbia is $57,692,600. As amended by section 6054 of the DRA, the FFY 2002 DSH allotment amount for the District of Columbia contained in the chart in section 1923(f)(2) of the Act was increased to $49,000,000. In accordance with section 1923(f)(3)(A) of the Act, the FFY 2003 DSH allotment is determined by increasing the $49,000,000 DSH Allotment for FFY 2002 (as referenced in section 1923(f)(2) of the Act) by the percentage change in the CPI–U for 2002 (in this case, 1.5 percent) to $49,735,000. In accordance with section 1923(f)(3)(C)(i) of the Act, the FFY 2004 DSH allotment for DC would be determined by increasing the $49,735,000 FFY 2003 DSH allotment amount by 16 percent to $57,692,600. In accordance with the provisions of section 1923(f)(3)(C)(ii) of the Act, as applicable for other Non-Low DSH States under the ''parallel'' process described above, the District of Columbia's DSH allotments for FFYs 2005 and following fiscal years would remain at $57,692,600 until the fiscal year specified occurs. In accordance with section 6054 of the DRA, the District of Columbia's DSH allotment was actually increased as described above, effective beginning with FFY 2006 to the $57,692,600 amount. The final FY 2007 DSH allotment for DC is also $57,692,600.

2. DSH Allotments for the State of Tennessee.

Section 1923(f)(6)(A) of the Act, as amended by section 404 of Public Law 109–432 (enacted on December 20, 2006), section 204 of Public Law 110–173 (enacted on December 29, 2007), and section 202 of Public Law 110–275 (enacted on July 15, 2008) provides for the determination of a DSH allotment for the State of Tennessee for FY 2007, FY 2008, FY 2009, and for a period in FY 2010. In accordance with this provision, Tennessee's DSH allotment for each of these fiscal years is the greater of $280 million and the FY 2007 Federal medical assistance percentage of the DSH payment adjustments reflected in the State's TennCare Demonstration Project for the demonstration year ending in 2006. In accordance with this provision, the State's Federal share DSH allotment for FY 2007, FY 2008, and FY 2009 was determined to be $305,451,928. Furthermore, Tennessee's DSH allotment for the period October 1, 2009, through December 31, 2009, is one-fourth of this amount; that is, $76,362,982. Section 1923(f)(6)(A)(ii) of the Act further limits the amount of Federal funds that are available for DSH payments that Tennessee may make in each fiscal year to 30 percent of the DSH allotment. In this regard, the limit on the DSH payments that the State of Tennessee may make is effectively $91,635,578 (30 percent of $305,451,928) for each FY 2007 through FY 2009, and $22,908,895 (30 percent of $76,362,982) for the period October 1, 2009, through December 31, 2009.

3. DSH Allotments for the State of Hawaii

Section 1923(f)(6)(B) of the Act, as amended by section 404 of Public Law 109–432, section 204 of Public Law 110–173, and section 202 of Public Law 110–275 provides for a DSH allotment for the State of Hawaii for FY 2007, FY 2008, FY 2009, and for a period in FY 2010. In accordance with this provision, Hawaii's DSH allotment for FY 2007, FY 2008, and FY 2009 is $10 million.

Furthermore, Hawaii's DSH allotment for the period October, 1, 2009, through December 31, 2009, is $2.5 million.

## II. Provisions of the Notice

### *A. Calculation of the Final FFY 2007 Federal Share State DSH Allotments and the Preliminary FFY 2009 Federal Share State DSH Allotments*

Chart 1 of the Addendum to this notice provides the States' ''final'' FFY 2007 DSH allotments. The final FFY 2007 DSH allotments for each State were computed in accordance with the provisions of the Medicaid statute as amended by the MMA. As required by the provisions of the MMA, the final FFY 2004 DSH allotments for the ''Low-DSH'' States and all the other States were calculated by increasing the FFY 2003 DSH allotments by 16 percent. In the notice published on March 26, 2004 notice published in the **Federal Register** (69 FR 15850), we explained the definition and determination of the ''Low-DSH'' States under the MMA provisions. However, for following fiscal years, the DSH allotments are determined under a process which incorporates a parallel process described in section I.C. of this notice. Under that parallel process, States final FFY 2007 DSH allotments were determined using the States' expenditure reports (Form CMS–64) for FFY 2007.

### *B. Calculation of the Preliminary FFY 2009 Federal Share State DSH Allotments*

Chart 2 of the Addendum to this notice provides the States' ''preliminary'' FFY 2009 DSH allotments. These preliminary allotments were determined using the States' August 2008 expenditure estimates submitted by the States on the Form CMS–37, and the currently available percentage change in the consumer price index for all urban consumers (all items; U.S. city average), for the previous fiscal year (that is, for FY 2008). The final FFY 2009 DSH allotments for each State will be published following receipt of the States' four quarterly Medicaid expenditure reports (Form CMS–64) for FFY 2009.

As discussed previously, in determining non-Low DSH States' DSH allotments for fiscal years after FY 2004 under section 1923(f)(3)(C) of the Act for DSH allotments, we have been determining States' DSH allotments under a ''parallel'' process. Under the parallel process, for each fiscal year for each State we have been determining whether the ''Fiscal Year Specified'' (as defined in section 1923(f)(3)(D) of the Act) has occurred. Under section 1923(f)(3)(D) of the Act, the Fiscal Year Specified is determined separately for each State and ''is the first fiscal year for which the Secretary estimates that the DSH allotment for that State will equal (or no longer exceed) the DSH allotment for that State under the law as in effect before the date of enactment'' of MMA. The process in effect prior to the enactment in MMA is the process described in section 1923(f)(3)(A) of the Act; under this process each States' DSH allotment since FY 2003 is increased by the CPIU increase for the prior fiscal year and the result is then compared to the State's FY 2004 DSH allotment, as determined under section 1923(f)(3)(C)(i) of the Act (under which the States' FY 2003 DSH allotments were increased by 16 percent). In other words, the Fiscal Year Specified for a State is the fiscal year when the FY 2004 allotment is no longer greater than the parallel process DSH allotment.

We are reiterating the parallel process provision because for all non-Low DSH States (except one), we have determined that FY 2009 is the ''Fiscal Year Specified''. Therefore, as indicated in section 1923(f)(3)(C)(ii) of the Act, the FY 2009 DSH allotment for all non-Low DSH States (except one)is equal to the prior FY 2008 DSH allotment increased by the CPIU increase for FY 2008 (4.0 percent). Chart 2 reflects this. For the non-Low DSH States for which the FY 2009 is the Fiscal Year Specified, the FY 2010 and subsequent fiscal year DSH allotments will be calculated by increasing the prior fiscal year DSH allotment by the CPIU increase for the prior fiscal year.

For Low-DSH States, the FY 2009 DSH allotment is calculated using the same methodology as for the non-Low DSH States for which the Fiscal year specified has occurred. That is, for FY 2009 and following fiscal years, the DSH allotment for Low-DSH States is calculated by increasing the prior fiscal year DSH allotment by the CPIU increase for the prior fiscal year.

### *C. Calculation of the FFYs 2007 and FFY 2009 IMD DSH Limits*

Section 1923(h) of the Act specifies the methodology to be used to establish the limits on the amount of DSH payments that a State can make to IMDs and other mental health facilities. FFP is not available for IMD or DSH payments that exceed the lesser of the State's FFY 1995 total computable mental health DSH expenditures applicable to the State's FFY 1995 DSH allotment as reported to us on the Form CMS–64 as of January 1, 1997; or the amount equal to the product of the State's current FFY total computable DSH allotment and the applicable percentage. We are publishing the final FFY 2007 IMD DSH limit, and the preliminary FFY 2009 IMD DSH limit, along with an explanation of the calculation of these limits.

For FFY 2003 and following fiscal years, the applicable percentage is the lesser of 33 percent or the 1995 DSH IMD percentage of the amount computed for FFY 2000. This percentage was applied to the State's fiscal year total computable DSH allotment. This result was then compared to the State's FFY 1995 total computable mental health DSH expenditures applicable to the State's FFY 1995 DSH allotment as reported on the Form CMS–64 as of January 1, 1997. The lesser of these two amounts was the State's limitation on total computable IMD/DSH expenditures for FFY 2003 and following fiscal years.

Charts 3 and 4 of the Addendum to this notice detail each State's final IMD/DSH limitation for FFY 2007 and the preliminary IMD/DSH limitation for FFY 2009, respectively, in accordance with section 1923(h) of the Act.

## III. Collection of Information Requirements

This document does not impose information collection and recordkeeping requirements. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 35).

## IV. Regulatory Impact Statement

We have examined the impact of this rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), and Executive Order 13132.

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). This notice does reach the economic threshold and thus is considered a major rule. We note that the total preliminary FY 2009 DSH

allotments announced in this notice are about $385 million greater than the total preliminary FY 2008 DSH allotments, which were announced in the **Federal Register** published on December 28, 2008 (72 FR 73831). As described previously, this change in allotment is a result of the application of the explicit provisions of the Medicaid statute, which requires that for the ''fiscal year specified'' the fiscal year DSH allotments for non-Low DSH states be calculated by increasing the previous fiscal year's DSH allotment by the increase in the CPI–U for the prior fiscal year. Except for one State, for all non-Low DSH States FY 2009 is the fiscal year specified, and therefore, the FY 2009 DSH allotment for these states must be calculated by increasing the FY 2008 DSH allotments by the CPI–U for FY 2008 (in this case 4 percent). Additionally, in accordance with the Medicaid statute, the calculation of all Low-DSH states' FY 2009 allotments reflects this CPI–U increase. After application of these statutory provisions, the resulting total FY 2009 DSH allotments are about $385 million more than the total FY 2008 DSH allotments; this notice announces those amounts.

The RFA requires agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $6.5 million to $31.5 million in any 1 year. Individuals and States are not included in the definition of a small entity. We are not preparing an analysis for the RFA because we have determined, and the Secretary certifies, that this notice will not have significant economic impact on a substantial number of small entities. Specifically, the effects of the various controlling statutes on providers are not impacted by a result of any independent regulatory impact and not this notice. The purpose of the notice is to announce the latest distributions as required by the statute.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Core-Based Statistical Area for Medicaid payment regulations and has fewer than 100 beds. We are not preparing analysis for section 1102(b) of the Act because we have determined and the Secretary certifies that this notice will not have a significant impact on the operations of a substantial number of small rural hospitals.

In addition, the MMA set statutorily defined limits on the amount of Federal share DSH expenditures available for FFY 2004 and subsequent fiscal years. Specifically, section 1001 of the MMA increased the DSH allotment for States beginning with fiscal year 2004. While overall the statute mandated some increases in DSH payments, we do not believe that this notice will have a significant economic impact on a substantial number of small entities.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. That threshold level is currently approximately $130 million. This notice will have no consequential effect on State, local, or tribal governments or on the private sector.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. Since this notice does not impose any costs on State or local governments, the requirements of E.O. 13132 are not applicable.

*Accounting Statement*

As required by OMB Circular A–4 (available at), in the table below, we have prepared an accounting statement showing the classification of the estimated expenditures associated with the provisions of this notice. This table provides our best estimate of the increase in the Federal share of States' Medicaid DSH payments resulting from of the application of the provisions of the Medicaid statute relating to the calculation of States' fiscal year DSH allotments and the increase in such fiscal year DSH allotments from FY 2008 to FY 2009.

TABLE—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES, FROM THE FY 2008 TO FY 2009

[In millions]

| Category | Transfers |
|---|---|
| Annualized Monetized Transfers. | $385 |
| From Whom To Whom? | Federal Government to States |

In accordance with the provisions of Executive Order 12866, this notice was reviewed by the Office of Management and Budget.

**Addendum**

This addendum contains the charts 1 through 4 (proceeded by associated keys) that are referred to in the preamble of this notice.

KEY TO CHART 1—FINAL DSH ALLOTMENTS FOR FY 2007

[Key to the chart of the final FFY 2007 DSH allotments. The final FFY 2007 DSH allotments for the regular states are presented in the top section of this chart and the final FFY 2007 DSH allotments for the Low-DSH states are presented in the bottom section of the chart.]

| Column | Description |
|---|---|
| For Non-Low-DSH States: | |
| Column A | State. |
| Column B | Final FY 2004 DSH Allotments—This column contains the final Federal share FFY 2004 DSH Allotments. |
| Column C | FY 2007 DSH Allotment—This column contains the final Federal share FFY 2007 DSH Allotments. |
| Column D | MMA Low-DSH Status—This column indicates the MMA Low-DSH Status of each State. |
| For Low-DSH States: | |
| Column A | State. |
| Column B | Prior FY DSH Allotments—This column contains the final FFY 2006 DSH Allotments. |

## KEY TO CHART 1—FINAL DSH ALLOTMENTS FOR FY 2007—Continued

[Key to the chart of the final FFY 2007 DSH allotments. The final FFY 2007 DSH allotments for the regular states are presented in the top section of this chart and the final FFY 2007 DSH allotments for the Low-DSH states are presented in the bottom section of the chart.]

| Column | Description |
|---|---|
| Column C | FY 2007 DSH Allotments—This column contains the final Federal share FFY 2007 DSH Allotments = Column B multiplied by 1.16. |
| Column D | MMA Low-DSH Status—This column indicates the MMA Low-DSH Status of each State. |

## KEY TO CHART 2—PRELIMINARY DSH ALLOTMENT FOR FISCAL YEAR 2009

[Key to the chart of the preliminary FY 2009 DSH allotments. The preliminary FY 2009 DSH allotments for the Non-Low DSH states are presented in the top section of this chart, and preliminary FY 2009 DSH allotments for the Low-DSH states are presented in the bottom section of this chart.]

| Column | Description |
|---|---|
| Column A | State. |
| Column B | 1923(f)(3)(D) Test Met.<br>This column indicates whether the ''Fiscal Year Specified'' has occurred, determined in accordance with section 1923(f)(3)(D) of the Act. ''YES'' indicates the Fiscal Year Specified has occurred; ''NOT MET'' indicates that the Fiscal Year Specified has not occurred; and ''NA'' indicates that this provision is not applicable. |
| Columns C–K | For Non-Low DSH States entries in Columns C through K are only for States meeting the ''Fiscal Year Specified'' test (''YES'' in Column B). |
| Column C | FY 2009 FMAPS.<br>This column contains the States' FY 2009 Federal Medical Assistance Percentages. |
| Column D | FY 2008 DSH Allotment For States Meeting Test.<br>This column contains the States' FY 2008 DSH Allotments. |
| Column E | FY 2008 Allotments × CPIU Increase: 1.04.<br>This column contains the amount in Column D increased by the increase in the CPIU for the prior fiscal year (4.0 percent). |
| Column F | FY 2009 TC MAP Exp. Incl. DSH.<br>This column contains the amount of the States' projected FY 2009 total computable medical assistance expenditures including DSH expenditures. |
| Column G | FY 2009 TC DSH Expenditures.<br>This column contains the amount of the States' projected FY 2009 total computable DSH expenditures. |
| Column H | FY 2009 TC MAP Exp. Net of DSH.<br>This column contains the amount of the States' projected FY 2009 total computable medical assistance expenditures net of DSH expenditures, calculated as the amount in Column F minus the amount in Column G. |
| Column I | 12% AMOUNT.<br>This column contains the amount of the ''12 percent limit'' in Federal share, determined in accordance with the provisions of section 1923(f)(3) of the Act. |
| Column J | Greater of FY 2008 Allotment or 12% Limit.<br>This column contains the greater of the State's prior fiscal year (FY 2008) DSH allotment or the amount of the 12% Limit, determined as the maximum of the amount in Column D or Column I. |
| Column K | FY 2009 DSH Allotment.<br>This column contains the States' FY 2009 DSH allotments, determined as the minimum of the amount in Column J or Column E. For Non-Low DSH States that have not met the ''Fiscal Year Year Specified'' test (entry in Column B is ''NOT MET''), the amount in Column K is equal to the State's FY 2004 DSH allotment. For States for which the entry in Column B is ''NA'', the amount in Column K is determined in accordance with the provisions of section 1923(f)(6) of the Act. |

## KEY TO CHART 3—FINAL FFY 2007 IMD DSH LIMITS

[Key to the Chart of the FFY 2007 IMD Limitations. The final FFY 2007 IMD DSH Limits for the regular States are presented in the top section of this chart and the final FFY IMD DSH Limits for the Low-DSH States are presented in the bottom section of the chart.]

| Column | Description |
|---|---|
| Column A | State. |
| Column B | Inpatient Hospital Services FY 95 DSH Total Computable. This column contains the States' total computable FFY 1995 inpatient hospital DSH expenditures as reported on the Form CMS–64. |

## KEY TO CHART 3—FINAL FFY 2007 IMD DSH LIMITS—Continued

[Key to the Chart of the FFY 2007 IMD Limitations. The final FFY 2007 IMD DSH Limits for the regular States are presented in the top section of this chart and the final FFY IMD DSH Limits for the Low-DSH States are presented in the bottom section of the chart.]

| Column | Description |
|---|---|
| Column C | IMD and Mental Health Services FY 95 DSH Total Computable. This column contains the total computable FFY 1995 mental health facility DSH expenditures as reported on the Form CMS–64 as of January 1, 1997. |
| Column D | Total Inpatient & IMD & Mental Health FY 95 DSH Total Computable, Col B + C. This column contains the total computation of all inpatient hospital DSH expenditures and mental health facility DSH expenditures for FFY 1995 as reported on the Form CMS–64 as of January 1, 1997 (representing the sum of Column B and Column C). |
| Column E | Applicable Percentage Col C/D. This column contains the ''applicable percentage'' representing the total computable FFY 1995 mental health facility DSH expenditures divided by total computable all inpatient hospital and mental health facility DSH expenditures for FFY 1995 (the amount in Column C divided by the amount in Column D). Per section 1923(h)(2)(A)(ii)(II) of the Act, for FFYs after FY 2002, the applicable percentage can be no greater than 33 percent. |
| Column F | FY 2007 Federal Share DSH Allotment. This column contains the States' final FFY 2007 DSH allotments. |
| Column G | FFY 2007 FMAP. |
| Column H | FY 2007 DSH Allotments in TC. Col. F/G. This column contains the FFY 2007 total computable DSH Allotment (determined as Column F/Column G). |
| Column I | Col E × Col H in TC. This column contains the applicable percent of FFY 2007 total computable DSH allotment (calculated as Column E × Column H). |
| Column J | FY 2007 IMD DSH Limit Total Computable. Lesser of Col. C or I. The column contains the lesser of Column I or C. |
| Column K | FY 2007 IMD DSH Limit Federal Share, Col. G × J. This column contains the total computable IMD DSH Limit from Col. J and converts that amount into a Federal share (calculated as Col. G × Col. J). |
| Column L | LOW DSH Status. This column contains Low DSH status for each State. |

## KEY TO CHART 4—PRELIMINARY FFY 2009 IMD DSH LIMITS

[Key to the Chart of the FFY 2009 IMD Limitations. The preliminary FFY 2009 IMD DSH Limits for the regular States are presented in the top section of this chart and the preliminary FFY 2009 IMD DSH Limits for the Low-DSH States are presented in the bottom section of the chart.]

| Column | Description |
|---|---|
| Column A | State. |
| Column B | Inpatient Hospital Services FY 95 DSH Total Computable. This column contains the States' total computable FFY 1995 inpatient hospital DSH expenditures as reported on the Form CMS–64. |
| Column C | IMD and Mental Health Services FY 95 DSH Total Computable. This column contains the total computable FFY 1995 mental health facility DSH expenditures as reported on the Form CMS–64 as of January 1, 1997. |
| Column D | Total Inpatient & IMD & Mental Health FY 95 DSH Total Computable, Col. B + C. This column contains the total computation of all inpatient hospital DSH expenditures and mental health facility DSH expenditures for FFY 1995 as reported on the Form CMS–64 as of January 1, 1997 (representing the sum of Column B and Column C). |
| Column E | Applicable Percentage Col. C/D. This column contains the ''applicable percentage'' representing the total Computable FFY 1995 mental health facility DSH expenditures divided by total computable all inpatient hospital and mental health facility DSH expenditures for FFY 1995 (the amount in Column C divided by the amount in Column D). Per section 1923(h)(2)(A)(ii)(II) of the Act, for FFYs after FY 2002, the applicable percentage can be no greater than 33 percent. |
| Column F | FY 2009 Federal Share DSH Allotment. This column contains the States' preliminary FFY 2009 DSH allotments. |
| Column G | FFY 2009 FMAP. |
| Column H | FY 2009 DSH Allotment Total Computable Col. F/G. This column contains FFY 2009 total computable DSH allotment (determined as Column F/Column G). |
| Column I | Col E × Col H in TC. This column contains the applicable percent of FFY 2009 total computable DSH allotment (calculated as Column E × Column H). |
| Column J | FY 2009 IMD DSH Limit Total Computable. Lesser of Col. C or I. The column contains the lesser of Column I or C. |
| Column K | FY 2009 IMD DSH Limit Federal Share, Col. G × J. This column contains the total computable IMD DSH Limit from Col. J and converts that amount into a Federal share (calculated as Col. G × Col. J). |
| Column L | Low DSH Status. This column contains Low DSH status for each State. |

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| CHART 1 - FINAL DSH ALLOTMENTS FOR FY: | | 2007 | |
|---|---|---|---|
| A | B | C | D |
| STATE | FINAL FY 2004 DSH ALLOTMENTS | FY 2007 DSH ALLOTMENTS | MMA LOW DSH STATUS |
| ALABAMA | $289,640,400 | $289,640,400 | N/A |
| ARIZONA | $95,369,400 | $95,369,400 | N/A |
| CALIFORNIA | $1,032,579,800 | $1,032,579,800 | N/A |
| COLORADO | $87,127,600 | $87,127,600 | N/A |
| CONNECTICUT | $188,384,000 | $188,384,000 | N/A |
| DISTRICT OF COLUMBIA | $37,676,800 | $57,692,600 | N/A |
| FLORIDA | $188,384,000 | $188,384,000 | N/A |
| GEORGIA | $253,141,000 | $253,141,000 | N/A |
| HAWAII* | $0 | $10,000,000 | N/A |
| ILLINOIS | $202,512,800 | $202,512,800 | N/A |
| INDIANA | $201,335,400 | $201,335,400 | N/A |
| KANSAS | $38,854,200 | $38,854,200 | N/A |
| KENTUCKY | $136,578,400 | $136,578,400 | N/A |
| LOUISIANA | $731,960,000 | $731,960,000 | N/A |
| MAINE | $98,901,600 | $98,901,600 | N/A |
| MARYLAND | $71,821,400 | $71,821,400 | N/A |
| MASSACHUSETTS | $287,285,600 | $287,285,600 | N/A |
| MICHIGAN | $249,608,800 | $249,608,800 | N/A |
| MISSISSIPPI | $143,642,800 | $143,642,800 | N/A |
| MISSOURI | $446,234,600 | $446,234,600 | N/A |
| NEVADA | $43,563,800 | $43,563,800 | N/A |
| NEW HAMPSHIRE | $150,800,000 | $150,800,000 | N/A |
| NEW JERSEY | $606,361,000 | $606,361,000 | N/A |
| NEW YORK | $1,512,959,000 | $1,512,959,000 | N/A |
| NORTH CAROLINA | $277,866,400 | $277,866,400 | N/A |
| OHIO | $382,655,000 | $382,655,000 | N/A |
| PENNSYLVANIA | $528,652,600 | $528,652,600 | N/A |
| RHODE ISLAND | $61,224,800 | $61,224,800 | N/A |
| SOUTH CAROLINA | $308,478,800 | $308,478,800 | N/A |
| TENNESSEE* | $0 | $305,451,928 | N/A |
| TEXAS | $900,711,000 | $900,711,000 | N/A |
| VERMONT | $21,193,200 | $21,193,200 | N/A |
| VIRGINIA | $82,519,327 | $82,519,327 | N/A |
| WASHINGTON | $174,255,200 | $174,255,200 | N/A |
| WEST VIRGINIA | $63,579,600 | $63,579,600 | N/A |
| SUBTOTAL | $9,895,858,327 | $10,231,326,055 | |
| | | | |
| LOW DSH STATES | | | |
| STATE | PRIOR FY ALLOTMENTS (FY 2006) | PRIOR FY ALLOTMENTS X FACTOR: 1.16 | |
| ALASKA | $14,258,785 | $16,540,191 | LOW DSH |
| ARKANSAS | $30,196,447 | $35,027,879 | LOW DSH |
| DELAWARE | $6,337,238 | $7,351,196 | LOW DSH |
| IDAHO | $11,506,251 | $13,347,251 | LOW DSH |
| IOWA | $27,566,797 | $31,977,485 | LOW DSH |
| MINNESOTA | $52,282,212 | $60,647,366 | LOW DSH |
| MONTANA | $7,945,543 | $9,216,830 | LOW DSH |
| NEBRASKA | $19,808,755 | $22,978,156 | LOW DSH |
| NEW MEXICO | $14,258,785 | $16,540,191 | LOW DSH |
| NORTH DAKOTA | $6,686,387 | $7,756,209 | LOW DSH |
| OKLAHOMA | $25,348,951 | $29,404,783 | LOW DSH |
| OREGON | $31,686,189 | $36,755,979 | LOW DSH |
| SOUTH DAKOTA | $7,731,253 | $8,968,253 | LOW DSH |
| UTAH | $13,732,589 | $15,929,803 | LOW DSH |
| WISCONSIN | $66,172,975 | $76,760,651 | LOW DSH |
| WYOMING | $158,430 | $183,779 | LOW DSH |
| TOTAL LOW DSH STATES | $335,677,587 | $389,386,002 | |
| | | | |
| NATIONAL TOTAL | $10,231,535,914 | $10,620,712,057 | |

FOOTNOTES:

* Hawaii and Tennessee DSH allotments determined under section 1923(f)(6) of the Act; under this section, Tennessee's DSH payments are limited to 30% of DSH allotment.

CHART 2 - PRELIMINARY DSH ALLOTI

| A | B | C | D | E | F | G | H | I |
|---|---|---|---|---|---|---|---|---|
| STATE | 1923(f)(3)(D) Test Met /1 | FY 2009 FMAPS | FY 2008 DSH Allotment For States Meeting Test /2 | FY 2008 Allotments x CPIU increase: 1.04 | FY 2009 TC MAP Exp. Incl. DSH | FY 2009 TC DSH Expenditures | FY 2009 TC MAP Exp. Net of DSH Col F - G | "12% AMOUNT" =COL H x .12/(1-.12/COL C) (In FS) |
| ALABAMA | YES | 67 98% | $289,640,400 | $301,226,016 | $4,252,915,000 | $423,714,000 | $3,829,201,000 | $558,904,467 |
| ARIZONA | YES | 65.77% | $95,369,400 | $99,184,176 | $8,329,359,000 | $144,062,000 | $8,185,297,000 | $1,201,443,891 |
| CALIFORNIA | YES | 50.00% | $1,032,579,800 | $1,073,882,992 | $41,386,718,000 | $2,065,160,000 | $39,321,558,000 | $6,208,667,053 |
| COLORADO | YES | 50 00% | $87,127,600 | $90,612,704 | $3,565,940,000 | $174,029,000 | $3,391,911,000 | $535,564,895 |
| CONNECTICUT | YES | 50 00% | $188,384,000 | $195,919,360 | $4,831,467,000 | $276,134,000 | $4,555,333,000 | $719,263,105 |
| DISTRICT OF COLUMBIA /3 | YES | 70 00% | $57,692,600 | $60,000,304 | $1,682,372,000 | $69,556,000 | $1,612,816,000 | $233,580,248 |
| FLORIDA | YES | 55.40% | $188,384,000 | $195,919,360 | $14,406,092,000 | $347,243,000 | $14,058,849,000 | $2,153,530,603 |
| GEORGIA | YES | 64.49% | $253,141,000 | $263,266,640 | $7,665,991,000 | $408,490,000 | $7,257,501,000 | $1,070,000,929 |
| HAWAII /4 | NA | NA | NA | NA | NA | NA | NA | NA |
| ILLINOIS | YES | 50.32% | $202,512,800 | $210,613,312 | $10,969,905,000 | $212,557,000 | $10,757,348,000 | $1,695,124,482 |
| INDIANA | YES | 64.26% | $201,335,400 | $209,388,816 | $5,945,360,000 | $246,969,000 | $5,698,391,000 | $840,823,434 |
| KANSAS | YES | 60.08% | $38,854,200 | $40,408,368 | $2,336,706,000 | $66,713,000 | $2,269,993,000 | $340,385,639 |
| KENTUCKY | YES | 70 13% | $136,578,400 | $142,041,536 | $5,069,126,000 | $194,833,000 | $4,874,293,000 | $705,661,451 |
| LOUISIANA | NOT MET | NA | NA | NA | NA | NA | NA | NA |
| MAINE | YES | 64.41% | $98,901,600 | $102,857,664 | $2,385,294,000 | $149,714,000 | $2,235,580,000 | $329,693,664 |
| MARYLAND | YES | 50 00% | $71,821,400 | $74,694,256 | $6,646,611,000 | $111,241,000 | $6,535,370,000 | $1,031,900,526 |
| MASSACHUSETTS | YES | 50.00% | $287,285,600 | $298,777,024 | $12,177,805,000 | $0 | $12,177,805,000 | $1,922,811,316 |
| MICHIGAN | YES | 60 27% | $249,608,800 | $259,593,152 | $9,964,289,000 | $427,404,000 | $9,536,885,000 | $1,428,932,403 |
| MISSISSIPPI | YES | 75 84% | $143,642,800 | $149,388,512 | $3,966,262,000 | $189,735,000 | $3,776,527,000 | $538,368,060 |
| MISSOURI | YES | 63 19% | $446,234,600 | $464,083,984 | $7,859,273,000 | $699,636,000 | $7,159,637,000 | $1,060,560,567 |
| NEVADA | YES | 50 00% | $43,563,800 | $45,306,352 | $1,390,056,000 | $78,926,000 | $1,311,130,000 | $207,020,526 |
| NEW HAMPSHIRE | YES | 50 00% | $150,800,000 | $156,832,000 | $1,370,274,000 | $245,774,000 | $1,124,500,000 | $177,552,632 |
| NEW JERSEY | YES | 50 00% | $606,361,000 | $630,615,440 | $10,311,519,000 | $1,212,722,000 | $9,098,797,000 | $1,436,652,158 |
| NEW YORK | YES | 50 00% | $1,512,959,000 | $1,573,477,360 | $52,028,036,000 | $2,738,161,000 | $49,289,875,000 | $7,782,611,842 |
| NORTH CAROLINA | YES | 64.60% | $277,866,400 | $288,981,056 | $10,818,763,000 | $452,093,000 | $10,366,670,000 | $1,527,802,773 |
| OHIO | YES | 62.14% | $382,655,000 | $397,961,200 | $14,288,405,000 | $641,393,000 | $13,647,012,000 | $2,029,577,963 |
| PENNSYLVANIA | YES | 54.52% | $528,652,600 | $549,798,704 | $17,401,213,000 | $753,449,000 | $16,647,764,000 | $2,561,531,778 |
| RHODE ISLAND | YES | 52 59% | $61,224,800 | $63,673,792 | $1,962,587,000 | $119,038,000 | $1,843,549,000 | $286,628,949 |
| SOUTH CAROLINA | YES | 70 07% | $308,478,800 | $320,817,952 | $4,414,900,000 | $440,244,000 | $3,974,656,000 | $575,520,880 |
| TENNESSEE /4 | NA | NA | NA | NA | NA | NA | NA | NA |
| TEXAS | YES | 59.44% | $900,711,000 | $936,739,440 | $23,585,002,000 | $1,515,330,000 | $22,069,672,000 | $3,318,266,367 |
| VERMONT | YES | 59 45% | $21,193,200 | $22,040,928 | $1,174,271,000 | $35,649,000 | $1,138,622,000 | $171,189,238 |
| VIRGINIA | YES | 50.00% | $82,519,327 | $85,820,100 | $5,866,487,000 | $189,669,000 | $5,676,818,000 | $896,339,684 |
| WASHINGTON | YES | 50.94% | $174,255,200 | $181,225,408 | $7,025,160,000 | $317,280,000 | $6,707,880,000 | $1,053,002,796 |
| WEST VIRGINIA | YES | 73.73% | $63,579,600 | $66,122,784 | $2,451,058,000 | $86,233,000 | $2,364,825,000 | $338,944,203 |
| TOTAL | | | $9,183,914,127 | $9,551,270,692 | $307,529,216,000 | $15,033,151,000 | $292,496,065,000 | $44,936,958,522 |

| LOW DSH STATES | | FY 2009 FMAPS | Prior FY 2008 Allotments | FY 2008 Allotment x CPIU Increase: 1.04 | | | | |
|---|---|---|---|---|---|---|---|---|
| ALASKA | | 50.53% | $19,186,622 | $19,954,087 | $1,173,025,000 | $30,269,000 | $1,142,756,000 | $179,839,483 |
| ARKANSAS | | 72.81% | $40,532,340 | $42,257,634 | $3,744,044,000 | $53,939,000 | $3,690,105,000 | $530,195,452 |
| DELAWARE | | 50.00% | $8,527,387 | $8,868,482 | $1,279,645,000 | $6,011,000 | $1,273,634,000 | $201,100,105 |
| IDAHO | | 69 77% | $15,482,811 | $16,102,123 | $1,290,110,000 | $25,742,000 | $1,264,368,000 | $183,240,343 |
| IOWA | | 62 62% | $37,093,883 | $38,577,638 | $2,979,088,000 | $49,189,000 | $2,929,899,000 | $434,935,461 |
| MINNESOTA | | 50 00% | $70,350,945 | $73,164,983 | $7,342,070,000 | $149,520,000 | $7,192,550,000 | $1,135,665,789 |
| MONTANA | | 68 04% | $10,691,523 | $11,119,184 | $876,424,000 | $17,947,000 | $858,477,000 | $125,076,606 |
| NEBRASKA | | 59 54% | $26,654,661 | $27,720,847 | $1,742,297,000 | $30,046,000 | $1,712,251,000 | $257,334,685 |
| NEW MEXICO | | 70.88% | $19,186,622 | $19,954,087 | $3,259,863,000 | $26,012,000 | $3,233,851,000 | $467,150,867 |
| NORTH DAKOTA | | 63 15% | $8,997,202 | $9,357,090 | $603,495,000 | $1,611,000 | $601,884,000 | $89,170,615 |
| OKLAHOMA | | 65.90% | $34,109,548 | $35,473,930 | $3,905,897,000 | $49,678,000 | $3,856,219,000 | $565,769,571 |
| OREGON | | 62.45% | $42,636,936 | $44,342,413 | $3,604,019,000 | $48,441,000 | $3,555,578,000 | $528,156,621 |
| SOUTH DAKOTA | | 62.55% | $10,403,173 | $10,819,300 | $680,378,000 | $1,201,000 | $679,177,000 | $100,848,715 |
| UTAH | | 70.71% | $18,478,571 | $19,217,714 | $1,641,765,000 | $27,847,000 | $1,613,918,000 | $233,255,272 |
| WISCONSIN | | 59.38% | $89,042,355 | $92,604,049 | $5,605,973,000 | $65,088,000 | $5,540,885,000 | $833,307,939 |
| WYOMING | | 50.00% | $213,184 | $221,711 | $564,710,000 | $110,000 | $564,600,000 | $89,147,368 |
| TOTAL LOW DSH STATES | | | $451,687,763 | $469,755,274 | $40,292,903,000 | $582,651,000 | $39,710,152,000 | $5,964,194,894 |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| TOTAL | | | $9,635,601,890 | $10,021,025,966 | $347,822,019,000 | $15,615,802,000 | $332,206,217,000 | $50,891,153,417 |

FOOTNOTES:

/1 "YES", if FY 2009 or prior fiscal year is the "Fiscal Year Specified", as determined under section 1923(f)(3)(D) of the Social Security Act; "NOT MET", if Fiscal Year Specified has not occurred, and "NA" for States that this provision is not applicable.

/2 For Non-Low DSH States, entries in Columns C through Column K are only for States meeting the "Fiscal Year Specified" test ("YES" in Column B). The entry in Column D is the actual prior year (FY 2008) DSH allotment, and for States that FY 2009 is the Fiscal Year Specified, the prior FY 2008 DSH allotment was equal to the FY 2004 allotment.

/3 The actual FY 2004 D.C DSH allotment was $37,676,000. However, under section 6054 of DRA, for purposes of establishing the actual FY 2006 DSH allotment for D.C., the FY 2004 DSH allotment for D.C. was recalculated as $57,692,600 .

/4 Hawaii and Tennessee DSH allotments determined under section 1923(f)(6) of the Act; under this section, Tennessee's DSH payments are limited to 30% of DSH allotment.

| | | | | | | | CHART 3 - FINAL IMD DSH LIMIT FOR FY: | | | 2007 | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| A | B | C | D | E | F | G | H | I | J | K | L |
| STATE | INPATIENT HOSPITAL SERVICES FY 95 DSH TOTAL COMPUTABLE | IMD AND MENTAL HEALTH SERVICES FY 95 DSH TOTAL COMPUTABLE | TOTAL INPATIENT & IMD & MENTAL HEALTH FY 95 DSH TOTAL COMPUTABLE Col B + C | APPLICABLE PERCENT Col C/D | FY 2007 ALLOTMENT IN FS | FY 2007 FMAP | FY 2007 ALLOTMENTS IN TC Col F/G | COL E * COL H IN TC | FY 2007 TC IMD LIMIT (Lesser of Col I or Col C) | FY 2007 IMD LIMIT IN FS Col G x J | MMA LOW DSH STATUS |
| ALABAMA | $413,006,229 | $4,451,770 | $417,457,999 | 1.07% | $289,640,400 | 68.85% | $420,683,224 | $4,486,164 | $4,451,770 | $3,065,044 | N/A |
| ARIZONA | $93,916,100 | $28,474,900 | $122,391,000 | 23.27% | $95,369,400 | 66.47% | $143,477,358 | $33,380,750 | $28,474,900 | $18,927,266 | N/A |
| CALIFORNIA | $2,189,879,543 | $1,555,919 | $2,191,435,462 | 0.071% | $1,032,579,800 | 50.00% | $2,065,159,600 | $1,466,263 | $1,466,263 | $733,132 | N/A |
| COLORADO | $173,900,441 | $594,776 | $174,495,217 | 0.34% | $87,127,600 | 50.00% | $174,255,200 | $593,958 | $593,958 | $296,979 | N/A |
| CONNECTICUT | $303,359,275 | $105,573,725 | $408,933,000 | 25.82% | $188,384,000 | 50.00% | $376,768,000 | $97,269,727 | $97,269,727 | $48,634,863 | N/A |
| DISTRICT OF COLUMBIA | $39,532,234 | $6,545,136 | $46,077,370 | 14.20% | $57,692,800 | 70.00% | $82,418,000 | $11,707,201 | $6,545,136 | $4,581,595 | N/A |
| FLORIDA | $184,468,014 | $149,714,986 | $334,183,000 | 33.00% | $188,384,000 | 58.76% | $320,599,047 | $105,797,686 | $105,797,686 | $62,156,729 | N/A |
| GEORGIA | $407,343,557 | $0 | $407,343,557 | 0.00% | $253,141,000 | 61.97% | $408,489,592 | $0 | $0 | $0 | N/A |
| HAWAII | $0 | $0 | $0 | 0.00% | $10,000,000 | 57.55% | $17,376,195 | $0 | $0 | $0 | N/A |
| ILLINOIS | $315,868,508 | $89,408,276 | $405,276,784 | 22.06% | $202,512,800 | 50.00% | $405,025,600 | $89,352,862 | $89,352,862 | $44,676,431 | N/A |
| INDIANA | $79,960,783 | $153,566,302 | $233,527,085 | 33.00% | $201,335,400 | 62.61% | $321,570,676 | $106,118,323 | $106,118,323 | $66,440,682 | N/A |
| KANSAS | $11,587,208 | $76,663,508 | $88,250,716 | 33.00% | $38,854,200 | 60.25% | $64,488,295 | $21,281,139 | $21,281,139 | $12,821,886 | N/A |
| KENTUCKY | $158,804,908 | $37,443,073 | $196,247,981 | 19.08% | $136,578,400 | 69.58% | $196,289,738 | $37,451,040 | $37,443,073 | $26,052,890 | N/A |
| LOUISIANA | $1,078,512,169 | $132,917,149 | $1,211,429,318 | 10.97% | $731,960,000 | 69.69% | $1,050,308,509 | $115,239,090 | $115,239,090 | $80,310,122 | N/A |
| MAINE | $99,957,958 | $60,958,342 | $160,916,300 | 33.00% | $98,901,600 | 63.27% | $156,316,738 | $51,584,523 | $51,584,523 | $32,637,528 | N/A |
| MARYLAND | $22,226,467 | $120,873,531 | $143,099,998 | 33.00% | $71,821,400 | 50.00% | $143,642,800 | $47,402,124 | $47,402,124 | $23,701,062 | N/A |
| MASSACHUSETTS | $469,853,946 | $105,635,054 | $575,289,000 | 18.36% | $287,285,600 | 50.00% | $574,571,200 | $105,503,251 | $105,503,251 | $52,751,625 | N/A |
| MICHIGAN | $133,258,800 | $304,765,552 | $438,024,352 | 33.00% | $249,608,800 | 56.38% | $442,725,789 | $146,099,510 | $146,099,510 | $82,370,904 | N/A |
| MISSISSIPPI | $182,608,033 | $0 | $182,608,033 | 0.00% | $143,642,800 | 75.89% | $189,277,639 | $0 | $0 | $0 | N/A |
| MISSOURI | $521,946,524 | $207,234,618 | $729,181,142 | 28.42% | $446,234,600 | 61.60% | $724,406,818 | $205,877,746 | $205,877,746 | $126,820,692 | N/A |
| NEVADA | $73,560,000 | $0 | $73,560,000 | 0.00% | $43,563,800 | 53.98% | $80,778,419 | $0 | $0 | $0 | N/A |
| NEW HAMPSHIRE | $92,675,916 | $94,753,948 | $187,429,864 | 33.00% | $150,800,000 | 50.00% | $301,600,000 | $99,528,000 | $94,753,948 | $47,376,974 | N/A |
| NEW JERSEY | $736,742,539 | $357,370,461 | $1,094,113,000 | 32.66% | $606,361,000 | 50.00% | $1,212,722,000 | $396,111,755 | $357,370,461 | $178,685,231 | N/A |
| NEW YORK | $2,418,869,368 | $605,000,000 | $3,023,869,368 | 20.01% | $1,512,959,000 | 50.00% | $3,025,918,000 | $605,409,880 | $605,000,000 | $302,500,000 | N/A |
| NORTH CAROLINA | $193,201,966 | $236,072,627 | $429,274,593 | 33.00% | $277,866,400 | 64.52% | $430,667,060 | $142,120,136 | $142,120,136 | $91,695,912 | N/A |
| OHIO | $535,731,956 | $93,432,758 | $629,164,714 | 14.85% | $382,655,000 | 59.66% | $641,392,893 | $95,248,678 | $93,432,758 | $55,741,983 | N/A |
| PENNSYLVANIA | $388,207,319 | $579,199,682 | $967,407,001 | 33.00% | $528,652,600 | 54.39% | $971,966,538 | $320,748,958 | $320,748,958 | $174,455,358 | N/A |
| RHODE ISLAND | $108,503,167 | $2,397,833 | $110,901,000 | 2.16% | $61,224,800 | 52.35% | $116,952,818 | $2,526,682 | $2,397,833 | $1,255,266 | N/A |
| SOUTH CAROLINA | $366,681,364 | $72,076,341 | $438,757,705 | 16.43% | $308,478,800 | 69.54% | $443,599,080 | $72,871,651 | $72,076,341 | $50,121,888 | N/A |
| TENNESSEE | $0 | $0 | $0 | 0.00% | $305,451,928 | 63.65% | $479,893,053 | $0 | $0 | $0 | N/A |
| TEXAS | $1,220,515,401 | $292,513,592 | $1,513,028,993 | 19.33% | $900,711,000 | 60.78% | $1,481,920,039 | $286,499,304 | $286,498,304 | $174,134,277 | N/A |
| VERMONT | $19,979,252 | $9,071,297 | $29,050,549 | 31.23% | $21,193,200 | 58.93% | $35,963,345 | $11,229,881 | $9,071,297 | $5,345,715 | N/A |
| VIRGINIA | $129,313,480 | $7,770,268 | $137,083,748 | 5.67% | $82,519,327 | 50.00% | $165,038,654 | $9,354,826 | $7,770,268 | $3,885,134 | N/A |
| WASHINGTON | $171,725,815 | $163,836,435 | $335,562,250 | 33.00% | $174,255,200 | 50.12% | $347,675,979 | $114,733,073 | $114,733,073 | $57,504,216 | N/A |
| WEST VIRGINIA | $66,962,606 | $18,887,045 | $85,849,651 | 22.00% | $63,579,600 | 72.82% | $87,310,629 | $19,208,462 | $18,887,045 | $13,753,546 | N/A |
| TOTAL | $13,402,460,846 | $4,118,758,904 | $17,521,219,750 | | $10,231,326,055 | | $18,101,248,545 | $3,356,204,642 | $3,295,362,504 | $1,843,444,921 | |
| | | | | | | | | | | | |
| LOW DSH STATES | | | | | | | | | | | |
| ALASKA | $2,506,827 | $17,611,765 | $20,118,592 | 33.00% | $16,540,191 | 57.58% | $28,725,584 | $9,479,443 | $9,479,443 | $5,458,263 | LOW DSH |
| ARKANSAS | $2,422,649 | $819,351 | $3,242,000 | 25.27% | $35,027,879 | 73.37% | $47,741,419 | $12,065,694 | $819,351 | $601,159 | LOW DSH |
| DELAWARE | $0 | $7,069,000 | $7,069,000 | 33.00% | $7,351,196 | 50.00% | $14,702,392 | $4,851,789 | $4,851,789 | $2,425,895 | LOW DSH |
| IDAHO | $2,081,429 | $0 | $2,081,429 | 0.00% | $13,347,251 | 70.36% | $18,969,942 | $0 | $0 | $0 | LOW DSH |
| IOWA | $12,011,250 | $0 | $12,011,250 | 0.00% | $31,977,485 | 61.98% | $51,593,232 | $0 | $0 | $0 | LOW DSH |
| MINNESOTA | $24,240,000 | $5,257,214 | $29,497,214 | 17.82% | $60,647,366 | 50.00% | $121,294,732 | $21,618,054 | $5,257,214 | $2,628,607 | LOW DSH |
| MONTANA | $237,048 | $0 | $237,048 | 0.00% | $9,216,830 | 69.11% | $13,336,464 | $0 | $0 | $0 | LOW DSH |
| NEBRASKA | $6,449,102 | $1,811,337 | $8,260,439 | 21.93% | $22,978,156 | 57.93% | $39,665,382 | $8,697,767 | $1,811,337 | $1,049,308 | LOW DSH |
| NEW MEXICO | $6,490,015 | $254,786 | $6,744,801 | 3.78% | $16,540,191 | 71.93% | $22,994,844 | $868,634 | $254,786 | $183,268 | LOW DSH |
| NORTH DAKOTA | $214,523 | $988,478 | $1,203,001 | 33.00% | $7,756,209 | 64.72% | $11,984,254 | $3,954,804 | $988,478 | $639,743 | LOW DSH |
| OKLAHOMA | $20,019,969 | $3,273,248 | $23,293,217 | 14.05% | $29,404,783 | 68.14% | $43,153,463 | $6,064,085 | $3,273,248 | $2,230,391 | LOW DSH |
| OREGON | $11,437,908 | $19,975,092 | $31,413,000 | 33.00% | $36,755,979 | 61.07% | $60,186,637 | $19,861,590 | $19,861,590 | $12,129,473 | LOW DSH |
| SOUTH DAKOTA | $321,120 | $751,299 | $1,072,419 | 33.00% | $8,968,253 | 62.92% | $14,253,422 | $4,703,629 | $751,299 | $472,717 | LOW DSH |
| UTAH | $3,621,116 | $934,586 | $4,555,702 | 20.51% | $15,929,803 | 70.14% | $22,711,438 | $4,659,171 | $934,586 | $655,519 | LOW DSH |
| WISCONSIN | $6,609,524 | $4,492,011 | $11,101,535 | 33.00% | $76,760,651 | 57.47% | $133,566,471 | $44,076,935 | $4,492,011 | $2,581,559 | LOW DSH |
| WYOMING | $0 | $0 | $0 | 0.00% | $183,779 | 52.91% | $347,343 | $0 | $0 | $0 | LOW DSH |
| TOTAL LOW DSH STATES | $98,662,480 | $63,238,167 | $161,900,647 | | $389,386,002 | | $645,227,036 | $140,901,595 | $52,775,132 | $31,055,901 | |
| | | | | | | | | | | | |
| TOTAL | $13,501,123,326 | $4,181,997,071 | $17,683,120,397 | | $10,620,712,057 | | $18,746,475,582 | $3,497,106,237 | $3,348,137,636 | $1,874,500,822 | |

| CHART 4 - PRELIMINARY IMD DSH LIMIT FOR FY: 2009 | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| A | B | C | D | E | F | G | H | I | J | K | L |
| STATE | INPATIENT HOSPITAL SERVICES FY 95 DSH TOTAL COMPUTABLE | IMD AND MENTAL HEALTH SERVICES FY 95 DSH TOTAL COMPUTABLE | TOTAL INPATIENT & IMD & MENTAL HEALTH FY 95 DSH TOTAL COMPUTABLE Col B + C | APPLICABLE PERCENT Col C/D | FY 2009 ALLOTMENT IN FS | FY 2009 FMAP | FY 2009 ALLOTMENTS IN TC Col F/G | COL E * COL H IN TC | FY 2009 TC IMD LIMIT (Lesser of Col I or Col C) | FY 2009 IMD LIMIT IN FS Col G x J | MMA LOW DSH STATUS |
| ALABAMA | $413,006,229 | $4,451,770 | $417,457,999 | 1.07% | $301,226,016 | 67.98% | $443,109,782 | $4,725,320 | $4,451,770 | $3,026,313 | N/A |
| ARIZONA | $93,916,100 | $28,474,900 | $122,391,000 | 23.27% | $99,184,176 | 65.77% | $150,804,586 | $35,085,468 | $28,474,900 | $18,727,942 | N/A |
| CALIFORNIA | $2,189,879,543 | $1,555,919 | $2,191,435,462 | 0.071% | $1,073,882,992 | 50.00% | $2,147,765,984 | $1,524,914 | $1,524,914 | $762,457 | N/A |
| COLORADO | $173,900,441 | $594,776 | $174,495,217 | 0.34% | $90,612,704 | 50.00% | $181,225,408 | $617,716 | $594,776 | $297,388 | N/A |
| CONNECTICUT | $303,359,275 | $105,573,725 | $408,933,000 | 25.82% | $195,919,360 | 50.00% | $391,838,720 | $101,160,516 | $101,160,516 | $50,580,258 | N/A |
| DISTRICT OF COLUMBIA | $39,532,234 | $6,545,136 | $46,077,370 | 14.20% | $60,000,304 | 70.00% | $85,714,720 | $12,175,485 | $6,545,136 | $4,581,595 | N/A |
| FLORIDA | $184,468,014 | $149,714,986 | $334,183,000 | 33.00% | $195,919,360 | 55.40% | $353,645,054 | $116,702,868 | $116,702,868 | $64,653,389 | N/A |
| GEORGIA | $407,343,557 | $0 | $407,343,557 | 0.00% | $263,266,640 | 64.49% | $408,228,625 | $0 | $0 | $0 | N/A |
| HAWAII | $0 | $0 | $0 | 0.00% | $10,000,000 | 55.11% | $18,145,527 | $0 | $0 | $0 | N/A |
| ILLINOIS | $315,868,506 | $89,408,276 | $405,276,784 | 22.06% | $210,613,312 | 50.32% | $418,547,917 | $92,336,026 | $89,408,276 | $44,990,244 | N/A |
| INDIANA | $79,960,783 | $153,566,902 | $233,527,085 | 33.00% | $209,388,816 | 64.26% | $325,846,275 | $107,529,271 | $107,529,271 | $69,098,309 | N/A |
| KANSAS | $11,567,208 | $76,663,508 | $88,250,716 | 33.00% | $40,408,368 | 60.06% | $67,257,603 | $22,195,009 | $22,195,009 | $13,334,761 | N/A |
| KENTUCKY | $158,804,908 | $37,443,073 | $196,247,981 | 19.08% | $142,041,536 | 70.13% | $202,540,334 | $38,643,620 | $37,443,073 | $26,258,827 | N/A |
| LOUISIANA | $1,078,512,169 | $132,917,149 | $1,211,429,318 | 10.97% | $731,960,000 | 71.31% | $1,026,447,904 | $112,621,122 | $112,621,122 | $80,310,122 | N/A |
| MAINE | $99,957,958 | $60,958,342 | $160,916,300 | 33.00% | $102,857,664 | 64.41% | $159,692,073 | $52,698,384 | $52,698,384 | $33,943,029 | N/A |
| MARYLAND | $22,226,467 | $120,873,531 | $143,099,998 | 33.00% | $74,694,256 | 50.00% | $149,388,512 | $49,298,209 | $49,298,209 | $24,649,104 | N/A |
| MASSACHUSETTS | $469,653,946 | $105,635,054 | $575,289,000 | 18.36% | $298,777,024 | 50.00% | $597,554,048 | $109,723,381 | $105,635,054 | $52,817,527 | N/A |
| MICHIGAN | $133,258,800 | $304,765,552 | $438,024,352 | 33.00% | $259,593,152 | 60.27% | $430,717,027 | $142,136,619 | $142,136,619 | $85,665,740 | N/A |
| MISSISSIPPI | $182,608,033 | $0 | $182,608,033 | 0.00% | $149,388,512 | 75.84% | $196,978,523 | $0 | $0 | $0 | N/A |
| MISSOURI | $521,946,524 | $207,234,618 | $729,181,142 | 28.42% | $464,063,984 | 63.19% | $734,426,308 | $208,725,304 | $207,234,618 | $130,951,555 | N/A |
| NEVADA | $73,560,000 | $0 | $73,560,000 | 0.00% | $45,306,352 | 50.00% | $90,612,704 | $0 | $0 | $0 | N/A |
| NEW HAMPSHIRE | $92,675,916 | $94,753,948 | $187,429,864 | 33.00% | $156,832,000 | 50.00% | $313,664,000 | $103,509,120 | $94,753,948 | $47,376,974 | N/A |
| NEW JERSEY | $736,742,539 | $357,370,461 | $1,094,113,000 | 32.66% | $630,615,440 | 50.00% | $1,261,230,880 | $411,956,225 | $357,370,461 | $178,685,231 | N/A |
| NEW YORK | $2,418,869,368 | $605,000,000 | $3,023,869,368 | 20.01% | $1,573,477,360 | 50.00% | $3,146,954,720 | $629,626,275 | $605,000,000 | $302,500,000 | N/A |
| NORTH CAROLINA | $193,201,966 | $236,072,627 | $429,274,593 | 33.00% | $288,981,056 | 64.60% | $447,339,096 | $147,621,902 | $147,621,902 | $95,363,748 | N/A |
| OHIO | $535,731,956 | $93,432,758 | $629,164,714 | 14.85% | $397,961,200 | 62.14% | $640,426,778 | $95,105,207 | $93,432,758 | $58,059,116 | N/A |
| PENNSYLVANIA | $388,207,319 | $579,199,682 | $967,407,001 | 33.00% | $549,798,704 | 54.52% | $1,008,434,894 | $332,783,515 | $332,783,515 | $181,433,572 | N/A |
| RHODE ISLAND | $108,503,157 | $2,397,833 | $110,901,000 | 2.16% | $63,673,792 | 52.59% | $121,075,855 | $2,617,827 | $2,397,833 | $1,261,020 | N/A |
| SOUTH CAROLINA | $366,881,364 | $72,076,341 | $438,757,705 | 16.43% | $320,817,952 | 70.07% | $457,853,506 | $75,213,279 | $72,076,341 | $50,503,892 | N/A |
| TENNESSEE | $0 | $0 | $0 | 0.00% | $305,451,928 | 64.28% | $475,189,683 | $0 | $0 | $0 | N/A |
| TEXAS | $1,220,515,401 | $292,513,592 | $1,513,028,993 | 19.33% | $936,739,440 | 59.44% | $1,575,941,184 | $304,676,393 | $292,513,592 | $173,970,079 | N/A |
| VERMONT | $19,979,252 | $9,071,297 | $29,050,549 | 31.23% | $22,040,928 | 59.45% | $37,074,732 | $11,576,921 | $9,071,297 | $5,392,886 | N/A |
| VIRGINIA | $129,313,480 | $7,770,268 | $137,083,748 | 5.67% | $85,820,100 | 50.00% | $171,640,200 | $9,729,019 | $7,770,268 | $3,885,134 | N/A |
| WASHINGTON | $171,725,815 | $163,836,435 | $335,562,250 | 39.00% | $181,225,408 | 50.94% | $355,762,481 | $117,401,619 | $117,401,619 | $59,804,385 | N/A |
| WEST VIRGINIA | $66,962,606 | $18,887,045 | $85,849,651 | 22.00% | $66,122,784 | 73.73% | $89,682,333 | $19,730,240 | $18,887,045 | $13,925,418 | N/A |
| TOTAL | $13,402,460,846 | $4,118,758,904 | $17,521,219,750 | | $10,598,682,620 | | $18,682,757,954 | $3,469,446,776 | $3,336,735,092 | $1,876,710,015 | |
| | | | | | | | | | | | |
| LOW DSH STATES | | | | | | | | | | | |
| ALASKA | $2,506,827 | $17,611,765 | $20,118,592 | 33.00% | $19,954,087 | 50.53% | $39,489,584 | $13,031,563 | $13,031,563 | $6,584,849 | LOW DSH |
| ARKANSAS | $2,422,649 | $819,351 | $3,242,000 | 25.27% | $42,257,634 | 72.81% | $58,038,228 | $14,668,008 | $819,351 | $596,569 | LOW DSH |
| DELAWARE | $0 | $7,069,000 | $7,069,000 | 33.00% | $8,868,482 | 50.00% | $17,736,964 | $5,853,198 | $5,853,198 | $2,926,599 | LOW DSH |
| IDAHO | $2,081,429 | $0 | $2,081,429 | 0.00% | $16,102,123 | 69.77% | $23,078,863 | $0 | $0 | $0 | LOW DSH |
| IOWA | $12,011,250 | $0 | $12,011,250 | 0.00% | $38,577,638 | 62.62% | $61,605,937 | $0 | $0 | $0 | LOW DSH |
| MINNESOTA | $24,240,000 | $5,257,214 | $29,497,214 | 17.82% | $73,164,963 | 50.00% | $146,329,966 | $26,080,021 | $5,257,214 | $2,628,607 | LOW DSH |
| MONTANA | $237,048 | $0 | $237,048 | 0.00% | $11,119,184 | 68.04% | $16,342,128 | $0 | $0 | $0 | LOW DSH |
| NEBRASKA | $6,449,102 | $1,811,337 | $8,260,439 | 21.93% | $27,720,847 | 59.54% | $46,558,359 | $10,209,249 | $1,811,337 | $1,078,470 | LOW DSH |
| NEW MEXICO | $6,490,015 | $254,786 | $6,744,801 | 3.78% | $19,954,087 | 70.88% | $28,151,929 | $1,063,444 | $254,786 | $180,592 | LOW DSH |
| NORTH DAKOTA | $214,523 | $968,478 | $1,203,001 | 33.00% | $9,357,090 | 63.15% | $14,817,245 | $4,889,691 | $968,478 | $624,224 | LOW DSH |
| OKLAHOMA | $20,019,969 | $3,273,248 | $23,293,217 | 14.05% | $35,473,930 | 65.90% | $53,829,938 | $7,564,380 | $3,273,248 | $2,157,070 | LOW DSH |
| OREGON | $11,437,908 | $19,975,092 | $31,413,000 | 33.00% | $44,342,413 | 62.46% | $71,004,665 | $23,431,539 | $19,975,092 | $12,474,445 | LOW DSH |
| SOUTH DAKOTA | $321,120 | $751,298 | $1,072,419 | 33.00% | $10,819,300 | 62.55% | $17,297,042 | $5,708,024 | $751,298 | $469,938 | LOW DSH |
| UTAH | $3,821,116 | $934,586 | $4,555,702 | 20.51% | $19,217,714 | 70.71% | $27,178,212 | $5,575,513 | $934,586 | $660,946 | LOW DSH |
| WISCONSIN | $6,609,524 | $4,492,011 | $11,101,535 | 33.00% | $92,604,049 | 59.38% | $155,951,581 | $51,464,022 | $4,492,011 | $2,667,366 | LOW DSH |
| WYOMING | $0 | $0 | $0 | 0.00% | $221,711 | 50.00% | $443,422 | $0 | $0 | $0 | LOW DSH |
| TOTAL LOW DSH STATES | $98,662,480 | $63,238,167 | $161,900,647 | | $469,755,272 | | $777,894,066 | $169,538,651 | $57,442,163 | $33,049,565 | |
| | | | | | | | | | | | |
| TOTAL | $13,501,123,326 | $4,181,997,071 | $17,683,120,397 | | $11,068,437,892 | | $19,460,612,020 | $3,638,985,427 | $3,394,177,255 | $1,909,759,580 | |

**BILLING CODE 4120–01–C**

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

Dated: September 25, 2008.

**Kerry Weems,**

*Acting Administrator, Centers for Medicare & Medicaid Services.*

Dated: October 14, 2008.

**Michael O. Leavitt,**

*Secretary.*

**Editorial Note:** This document was received in the Office of the Federal Register on Tuesday, December 16, 2008.

[FR Doc. E8–30267 Filed 12–18–08; 8:45 am]

**BILLING CODE 4120–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

## Centers for Medicare & Medicaid Services

**[CMS–1409–N]**

## Medicare Program; First Semi-Annual Meeting of the Advisory Panel on Ambulatory Payment Classification Groups—February 18–20, 2009

**AGENCY:** Centers for Medicare & Medicaid Services, Department of Health and Human Services.

**ACTION:** Notice.

**SUMMARY:** This notice announces the first semi-annual meeting of the Advisory Panel on Ambulatory Payment Classification (APC) Groups (the Panel) for 2009. The purpose of the Panel is to review the APC groups and their associated weights and to advise the Secretary of the Department of Health and Human Services (DHHS) (the Secretary) and the Administrator of the Centers for Medicare & Medicaid Services (CMS) (the Administrator) concerning the clinical integrity of the APC groups and their associated weights. We will consider the Panel's advice as we prepare the proposed and final rules that would update the hospital Outpatient Prospective Payment System (OPPS) for CY 2010.

**DATES:** *Meeting Dates:* We are scheduling the first semi-annual meeting in 2009 for the following dates and times:

- Wednesday, February 18, 2009, 1 p.m. to 5 p.m. (e.s.t.) [1]
- Thursday, February 19, 2009, 8 a.m. to 5 p.m. (e.s.t.) [1]
- Friday, February 20, 2009, 8 a.m. to 12 noon (e.s.t.) [2]

*Deadlines:*

*Deadline for Hardcopy Comments/ Suggested Agenda Topics*—5 p.m. (e.s.t.), Thursday, January 15, 2009

*Deadline for Hardcopy Presentations*—5 p.m. (e.s.t.), Thursday, January 15, 2009

*Deadline for Attendance Registration*—5 p.m. (e.s.t.), Wednesday, February 11, 2009

*Deadline for Special Accommodations*—5 p.m. (e.s.t.), Wednesday, February 11, 2009

*Submission of Materials to the Designated Federal Officer (DFO):*

Because of staffing and resource limitations, we cannot accept written comments and presentations by FAX, nor can we print written comments and presentations received electronically for dissemination at the meeting.

Only hardcopy comments and presentations can be reproduced for public dissemination. All hardcopy presentations *must be accompanied by Form CMS–20017 (revised 01/07).* The form is now available through the CMS Forms Web site. The Uniform Resource Locator (URL) for linking to this form is as follows: *http://www.cms.hhs.gov/cmsforms/downloads/cms20017.pdf.*

Presenters must use the most recent copy of CMS–20017 (updated 01/07) at the above URL. Additionally, presenters must *clearly* explain the action(s) that they are requesting CMS to take in the appropriate section of the form. They must also clarify their relationship to the organization that they represent in the presentation.

**Note:** Issues that are vague, or that are outside the scope of the APC Panel's purpose, will not be considered for presentations and comments. There will be no exceptions to this rule. We appreciate your cooperation on this matter.

We are also requiring electronic versions of the written comments and presentations, in addition to the hardcopies.

In summary, presenters and/or commenters must do the following:

- Send both electronic and hardcopy versions of their presentations and written comments by the prescribed deadlines.
- Send electronic transmissions to the e-mail address below.
- Do not send pictures of patients in any of the documents unless their faces have been blocked out.
- Do not send documents electronically that have been archived.
- Mail (or send by courier) to the DFO all hardcopies, accompanied by Form CMS–20017 (revised 01/07), if they are presenting, as specified in the **FOR FURTHER INFORMATION CONTACT** section of this notice.
- Commenters are not required to send Form CMS–20017 with their written comments.

**ADDRESSES:** The meeting will be held in the Auditorium, CMS Central Office, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

**FOR FURTHER INFORMATION CONTACT:** For further information, contact: Shirl Ackerman-Ross, DFO, CMS, CMM, HAPG, DOC, 7500 Security Boulevard, Mail Stop C4–05–17, Baltimore, MD 21244–1850. Phone: (410) 786–4474.

**Note:** We recommend that you advise couriers of the following information: When delivering hardcopies of presentations to CMS, if no one answers at the above phone number, please call (410) 786–4532 or (410) 786–9316.

E-mail address for comments, presentations, and registration requests is *CMS APCPanel@cms.hhs.gov.*

**Note:** There is NO underscore in this e-mail address; there is a SPACE between CMS and APCPanel.

News media representatives must contact our Public Affairs Office at (202) 690–6145.

*Advisory Committees' Information Lines:*

The phone numbers for the CMS Federal Advisory Committee Hotline are 1–877–449–5659 (toll free) and (410) 786–9379 (local).

WEB SITES:

The following information is available on the CMS Web site at *http://www.cms.hhs.gov/FACA/05_AdvisoryPanelonAmbulatoryPaymentClassificationGroups.asp#TopOfPage* in order to obtain the following information:

**Note:** There is an UNDERSCORE after FACA/05 (like this_); there is no space.

- Additional information on the APC meeting agenda topics
- Updates to the Panel's activities
- Copies of the current Charter
- Membership requirements.

You may also search information about the APC Panel and its membership in the FACA database at the following URL: *https://www.fido.gov/facadatabase/public.asp.*

**SUPPLEMENTARY INFORMATION:**

## I. Background

The Secretary is required by section 1833(t)(9)(A) of the Social Security Act (the Act) to consult with an expert, outside advisory panel on the clinical integrity of the APC groups and weights established under the Medicare hospital OPPS.

The APC Panel meets up to three times annually. The Charter requires that the Panel must be fairly balanced in its membership in terms of the points of view represented and the functions to be performed. The Panel consists of up to 15 members who are representatives of providers and a Chair.

Each Panel member must be employed full-time by a hospital, hospital system, or other Medicare provider subject to payment under the OPPS. The Secretary or Administrator selects the Panel membership based upon either self-nominations or nominations submitted by Medicare providers and other interested organizations.

All members must have technical expertise to enable them to participate fully in the Panel's work. Such expertise encompasses hospital payment systems; hospital medical care delivery systems; provider billing systems; APC groups; Current Procedural Terminology codes; and alpha-numeric Health Care Common Procedure Coding System codes; and the use of, and payment for, drugs, medical devices, and other services in the outpatient setting, as well as other forms of relevant expertise. Details regarding membership requirements for the APC Panel are found on the CMS and FACA Web sites as listed above.

[1] The times listed in this notice are approximate times; consequently, the meetings may last longer than listed in this notice—but will not begin before the posted times.

[2] If the business of the Panel concludes on Thursday, February 19, 2009, there will be no Friday (February 20, 2009) meeting.

The Panel presently consists of the following members:

- E.L. Hambrick, M.D., J.D., Chair, a CMS Medical Officer.
- Gloryanne Bryant, B.S., RHIA, RHIT, CCS.
- Patrick A. Grusenmeyer, Sc.D., FACHE.
- Kathleen Graham, R.N., MSHA, CPHQ, ACM.
- Judith T. Kelly, B.S.H.A., RHIT, RHIA, CCS.
- Michael D. Mills, PhD.
- Thomas M. Munger, M.D., FACC.
- Agatha L. Nolen, D.Ph., M.S.
- Randall A. Oyer, M.D.
- Beverly Khnie Philip, M.D.
- Russ Ranallo, M.S., B.S.
- James V. Rawson, M.D.
- Michael A. Ross, M.D., FACEP.
- Patricia Spencer-Cisek, M.S., APRN–BC, AOCN®.
- Kim Allen Williams, M.D., FACC, FABC.
- Robert M. Zwolak, M.D., PhD., FACS.

**II. Agenda**

The agenda for the February 2009 meeting will provide for discussion and comment on the following topics as designated in the Panel's Charter:

- Addressing whether procedures within an APC group are similar both clinically and in terms of resource use.
- Evaluating APC group weights.
- Reviewing the packaging of OPPS services and costs, including the methodology and the impact on APC groups and payment.
- Removing procedures from the inpatient list for payment under the OPPS.
- Using single and multiple procedure claims data for CMS's determination of APC group weights.
- Addressing other technical issues concerning APC group structure.

**Note:** The subject matter before the Panel will be limited to these and related topics. Issues related to calculation of the OPPS conversion factor, charge compression, pass-through payments, or wage adjustments are not within the scope of the Panel's purpose. Therefore, these issues will not be considered for presentations and/or comments. There will be no exceptions to this rule. We appreciate your cooperation on this matter.

The Panel may use data collected or developed by entities and organizations, other than DHHS and CMS, in conducting its review. We recommend organizations submit data for the Panel's and CMS staff's review.

**III. Written Comments and Suggested Agenda Topics**

Send hardcopy and electronic written comments and suggested agenda topics to the DFO at the address indicated above. The DFO must receive these items by 5 p.m. (e.s.t.), Thursday, January 15, 2009. There will be no exceptions. We appreciate your cooperation on this matter.

The written comments and suggested agenda topics submitted for the February 2009 APC Panel meeting must fall within the subject categories outlined in the Panel's Charter and as listed in the Agenda section of this notice.

**IV. Oral Presentations**

Individuals or organizations wishing to make 5-minute oral presentations must submit hardcopy and electronic versions of their presentations to the DFO by 5 p.m. (e.s.t.), Thursday, January 15, 2009, for consideration.

The number of oral presentations may be limited by the time available. Oral presentations should not exceed 5 minutes in length for an individual or an organization.

The Chair may further limit time allowed for presentations due to the number of oral presentations, if necessary.

**V. Presenter and Presentation Information**

All presenters must submit Form CMS–20017 (revised 01/07). Hardcopies are required for oral presentations; however, electronic submissions of Form CMS–20017 are optional. The DFO must receive the following information from those wishing to make oral presentations:

- Form CMS–20017 completed with all pertinent information identified on the first page of the presentation.
- One hardcopy of presentation.
- Electronic copy of presentation.
- Personal registration information as described in the Meeting Attendance section below.
- Those persons wishing to submit comments only must send hardcopy and electronic versions of their comments, but they are not required to submit Form CMS–20017.

**VI. Oral Comments**

In addition to formal oral presentations, there will be opportunity during the meeting for public oral comments, which will be limited to 1 minute for each individual and a total of 3 minutes per organization.

**VII. Meeting Attendance**

The meeting is open to the public; however, attendance is limited to space available. Attendance will be determined on a first-come, first-served basis.

Persons wishing to attend this meeting, which is located on Federal property, must e-mail the DFO to register in advance no later than 5 p.m. (e.s.t.), Wednesday, February 11, 2009. A confirmation will be sent to the requester(s) via return e-mail.

The following personal information must be e-mailed to the DFO by the date and time above:

- Name(s) of attendee(s);
- Title(s);
- Organization;
- E-mail address(es); and
- Telephone number(s).

**VIII. Security, Building, and Parking Guidelines**

The following are the security, building, and parking guidelines:

- Persons attending the meeting including presenters must be registered and on the attendance list by the prescribed date.
- Individuals who are not registered in advance will not be permitted to enter the building and will be unable to attend the meeting.
- Attendees must present photographic identification to the Federal Protective Service or Guard Service personnel before entering the building.
- Security measures include inspection of vehicles, inside and out, at the entrance to the grounds.
- In addition, all persons entering the building must pass through a metal detector.
- All items brought into CMS including personal items, for example desktops, cell phones, and palm pilots, are subject to physical inspection.
- The public may enter the building 30 to 45 minutes before the meeting convenes each day.
- All visitors must be escorted in areas other than the lower and first-floor levels in the Central Building.
- The main-entrance guards will issue parking permits and instructions upon arrival at the building.

**IX. Special Accommodations**

Individuals requiring sign-language interpretation or other special accommodations must send a request for these services to the DFO by 5 p.m. (e.s.t.), Wednesday, February 11, 2009.

**Authority:** (Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program).

Dated: December 4, 2008.

**Kerry Weems,**

*Acting Administrator, Centers for Medicare & Medicaid Services.*

[FR Doc. E8–30001 Filed 12–18–08; 8:45 am]

**BILLING CODE 4120–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[CMS–3209–N]**

### Medicare Program; Meeting of the Medicare Evidence Development & Coverage Advisory Committee—February 25, 2009

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Notice of meeting.

**SUMMARY:** This notice announces that a public meeting of the Medicare Evidence Development & Coverage Advisory Committee (MEDCAC) (''Committee'') will be held on Wednesday, February 25, 2009. The Committee generally provides advice and recommendations concerning the adequacy of scientific evidence needed to determine whether certain medical items and services can be covered under the Medicare statute. This meeting will focus on the requirements for evidence to determine if diagnostic use of genomic testing in beneficiaries with signs or symptoms of disease improves health outcomes in Medicare beneficiaries. The meeting will also discuss the various kinds of evidence that are useful to support requests for Medicare coverage in this field. This meeting is open to the public in accordance with the Federal Advisory Committee Act (5 U.S.C. App. 2, section 10(a)).

**DATES:** *Meeting Date:* This meeting will be held on Wednesday, February 25, 2009 from 7:30 a.m. until 4:30 p.m., eastern standard time (e.s.t).

*Deadline for Submission of Written Comments:* Written comments must be received at the address specified in the **ADDRESSES** section of this notice by 5 p.m., e.s.t on January 29, 2009. Once submitted all comments are final.

*Deadlines for Speaker Registration and Presentation Materials:* The deadline to register to be a speaker and to submit powerpoint presentation materials and writings that will be used in support of an oral presentation, is 5 p.m., e.s.t. on January 29, 2009. Speakers may register by phone or via e-mail by contacting the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice. Presentation materials must be received at the address specified in the **ADDRESSES** section of this notice.

*Deadline for All Other Attendees Registration:* Individuals may register by phone or via e-mail by contacting the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice by 5 p.m., e.s.t. on Wednesday, February 18, 2009.

*Deadline for Submitting a Request for Special Accommodations:* Persons attending the meeting who are hearing or visually impaired, or have a condition that requires special assistance or accommodations, are asked to contact the Executive Secretary as specified in the **FOR FURTHER INFORMATION CONTACT** section of this notice no later than 5 p.m., e.s.t. Friday, February 18, 2009.

**ADDRESSES:** *Meeting Location:* The meeting will be held in the main auditorium of the Centers for Medicare & Medicaid Services, 7500 Security Blvd, Baltimore, MD 21244.

*Submission of Presentations and Comments:* Presentation materials and written comments that will be presented at the meeting must be submitted via e-mail to *MedCACpresentations@cms.hhs.gov* or by regular mail to the contact listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice by the date specified in the **DATES** section of this notice.

**FOR FURTHER INFORMATION CONTACT:** Maria Ellis, Executive Secretary for MEDCAC, Centers for Medicare & Medicaid Services, Office of Clinical Standards and Quality, Coverage and Analysis Group, C1–09–06, 7500 Security Boulevard, Baltimore, MD, 21244 or contact Ms. Ellis by phone at 410–786–0309 or via e-mail at *Maria.Ellis@cms.hhs.gov*

**SUPPLEMENTARY INFORMATION:**

#### I. Background

MEDCAC, formerly known as the Medicare Coverage Advisory Committee (MCAC), provides advice and recommendations to CMS regarding clinical issues. (For more information on MCAC, see the December 14, 1998 **Federal Register** (63 FR 68780.)) This notice announces the February 25, 2009, public meeting of the Committee. During this meeting, the Committee will discuss the requirements for evidence to determine if diagnostic uses of genomic testing in beneficiaries with signs or symptoms of disease improves health outcomes in Medicare beneficiaries. Background information about this topic, including panel materials, are available at *http://ww.cms.hhs.gov/coverage.* We encourage the participation of appropriate organizations with expertise in the evidence regarding this use of genomic testing.

#### II. Meeting Format

This meeting is open to the public. The Committee will hear oral presentations from the public for approximately 45 minutes. The Committee may limit the number and duration of oral presentations to the time available. Your comments should focus on issues specific to the list of topics that we have proposed to the Committee. The list of research topics to be discussed at the meeting will be available on the following Web site prior to the meeting: *http://www.cms.hhs.gov/mcd/index_list.asp?list_type=mcac*. We require that you declare at the meeting whether you have any financial involvement with manufacturers (or their competitors) of any items or services being discussed.

The Committee will deliberate openly on the topics under consideration. Interested persons may observe the deliberations, but the Committee will not hear further comments during this time except at the request of the chairperson. The Committee will also allow a 15-minute unscheduled open public session for any attendee to address issues specific to the topics under consideration. At the conclusion of the day, the members will vote and the Committee will make its recommendation(s) to CMS.

#### III. Registration Instructions

CMS' Coverage and Analysis Group is coordinating meeting registration. While there is no registration fee, individuals must register to attend. You may register by contacting the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice by the deadline listed in the **DATES** section of this notice. Please provide your full name (as it appears on your state-issued driver's license), address, organization, telephone, fax number(s), and e-mail address. You will receive a registration confirmation with instructions for your arrival at the CMS complex or you will be notified the seating capacity has been reached.

#### IV. Security, Building, and Parking Guidelines

This meeting will be held in a Federal government building; therefore, Federal security measures are applicable. We recommend that confirmed registrants arrive reasonably early, but no earlier

than 45 minutes prior to the start of the meeting, to allow additional time to clear security. Security measures include the following:

- Presentation of government-issued photographic identification to the Federal Protective Service or Guard Service personnel.
- Inspection of vehicle's interior and exterior (this includes engine and trunk inspection) at the entrance to the grounds. Parking permits and instructions will be issued after the vehicle inspection.
- Inspection, via metal detector or other applicable means of all persons brought entering the building. We note that all items brought into CMS, whether personal or for the purpose of presentation or to support a presentation, are subject to inspection. We cannot assume responsibility for coordinating the receipt, transfer, transport, storage, set-up, safety, or timely arrival of any personal belongings or items used for presentation or to support a presentation.

**Note:** Individuals who are not registered in advance will not be permitted to enter the building and will be unable to attend the meeting. The public may not enter the building earlier than 30 to 45 minutes prior to the convening of the meeting.

All visitors must be escorted in areas other than the lower and first floor levels in the Central Building.

**Authority:** 5 U.S.C. App. 2, section 10(a).

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: December 11, 2008.

**Barry M. Straube,**

*Chief Medical Officer and Director, Office of Clinical Standards and Quality, Centers for Medicare & Medicaid Services.*

[FR Doc. E8–30162 Filed 12–18–08; 8:45 am]

**BILLING CODE 4120–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2008–N–0635]**

### Agency Information Collection Activities; Proposed Collection; Comment Request; Emergency Shortages Data Collection System (formerly ''Emergency Medical Device Shortages Program Survey'')

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

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the Emergency Shortages Data Collection System.

**DATES:** Submit written or electronic comments on the collection of information by February 17, 2009.

**ADDRESSES:** Submit electronic comments on the collection of information to *http://www.regulations.gov*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:** Denver Presley, Jr., Office of Information Management (HFA–710), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–796–3793.

**SUPPLEMENTARY INFORMATION:** Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

**Emergency Shortages Data Collection System (formerly ''Emergency Medical Device Shortages Program Survey'')—Federal Food, Drug, and Cosmetic Act, Section 903(d)(2) (OMB Control Number 0910–0491)—Extension**

Under section 903(d)(2) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 393(d)(2)), the Commissioner of FDA is authorized to implement general powers (including conducting research) to carry out effectively the mission of FDA. Subsequent to the events of September 11, 2001, and as part of broader counter-terrorism and emergency preparedness activities, FDA's Center for Devices and Radiological Health (CDRH) began developing operational plans and interventions that would enable CDRH to anticipate and respond to medical device shortages that might arise in the context of federally-declared disasters/emergencies or regulatory actions. In particular, CDRH identified the need to acquire and maintain detailed data on domestic inventory, manufacturing capabilities, distribution plans, and raw material constraints for medical devices that would be in high demand, and/or would be vulnerable to shortages in specific disaster/emergency situations, or following specific regulatory actions. Such data could support prospective risk assessment, help inform risk mitigation strategies, and support real-time decisionmaking by the Department of Health and Human Services during actual emergencies or emergency preparedness exercises.

''The Emergency Medical Device Shortages Program Survey'' was developed in 2002 to support the acquisition of such data from medical device manufacturers. In 2004, CDRH changed the process for the data collection, and the electronic database in which the data were stored and was formally renamed the ''Emergency Shortages Data Collection System'' (ESDCS). Recognizing that some of the data collected may be commercially confidential, access to the ESDCS is restricted to members of the FDA Emergency Shortage Team (EST) and senior management with a need-to-

know. At this time, the need-to-know senior management personnel are limited to 5 senior managers. Further, the data are used by this defined group only for decisionmaking and planning in the context of a federally-declared disaster/emergency, an official emergency preparedness exercise, or a potential public health risk posed by nondisaster-related device shortage.

The data procurement process consists of an initial scripted telephone call to a regulatory officer at a registered manufacturer of one or more key medical devices being tracked in the emergency shortages data collection system. In this initial call, the intent and goals of the data collection effort are described, and the specific data request is made. After the initial call, one or more additional followup calls and/or electronic mail correspondence may be required to verify/validate data sent from the manufacturer, confirm receipt and/or request additional detail. Although the regulatory officer is the agent who is initially contacted, they may designate an alternate representative within their organization to correspond subsequently with the CDRH EST member who is collecting or verifying/validating the data.

Because of the dynamic nature of the medical device industry, particularly with respect to specific product lines, manufacturing capabilities and raw material/subcomponent sourcing, it is necessary to update the data in the ESDCS at regular intervals. This is done on a weekly basis, but efforts are made to limit the frequency of outreach to a specific manufacturer to no more than every 4 months.

The ESDCS will only include those medical devices for which there will likely be high demand during a specific emergency/disaster, or for which there are sufficiently small numbers of manufacturers such that disruption of manufacture or loss of one or more of these manufacturers would create a shortage.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

| Section of the Act | No. of Respondents | Annual Frequency per Response | Total Annual Responses | Hours per Response | Total Hours |
|---|---|---|---|---|---|
| 903(d)(2) | 125 | 3 | 375 | 0.5 | 188 |

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

FDA based the burden estimates in Table 1 of this document on past experience with direct contact with the medical device manufacturers, and anticipated changes in the medical device manufacturing patterns for the specific devices being monitored. FDA estimates that approximately 125 manufacturers would be contacted by telephone and/or electronic mail 3 times per year to either obtain primary data or to verify/validate data. Because the data being requested represent data elements that are monitored or tracked by manufacturers as part of routine inventory management activities, it is anticipated that for most manufacturers, the estimated time required of manufacturers to complete the data request will not exceed 30 minutes per request cycle.

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*.

Dated: December 11, 2008.

**Jeffrey Shuren,**

*Associate Commissioner for Policy and Planning.*

[FR Doc. E8–30155 Filed 12–18–08; 8:45 am]

**BILLING CODE 4160–01–S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2008–N–0631]**

### Agency Information Collection Activities; Proposed Collection; Comment Request; Medical Device Recall Authority

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

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on information collection requirements for medical device recall authority.

**DATES:** Submit written or electronic comments on the collection of information by February 17, 2009.

**ADDRESSES:** Submit electronic comments on the collection of information to *http://www.regulations.gov*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:** Denver Presley, Jr., Office of Information Management (HFA–710), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–796–3793.

**SUPPLEMENTARY INFORMATION:** Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether

the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

**Medical Device Recall Authority—21 CFR Part 810 (OMB Control Number 0910–0432)—Extension**

This collection of information implements section 518(e) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360h) and part 810 (21 CFR part 810) for the medical device recall authority provisions. Section 518(e) of the act provides FDA with the authority to issue an order requiring an appropriate person, including manufacturers, importers, distributors, and retailers of a device, if FDA finds that there is reasonable probability that the device intended for human use would cause serious adverse health consequences or death to: (1) Immediately cease distribution of such device, (2) immediately notify health professionals and device-user facilities of the order, and (3) instruct such professionals and facilities to cease use of such device.

Further, the provisions under section 518(e) of the act sets out a three-step procedure for issuance of a mandatory device recall order which are: (1) If there is a reasonable probability that a device intended for human use would cause serious, adverse health consequences or death, FDA may issue a cease distribution and notification order requiring the appropriate person to immediately: (a) Cease distribution of the device, (b) notify health professionals and device user facilities of the order, and (c) instruct those professionals and facilities to cease use of the device, (2) FDA will provide the person named in the cease distribution and notification order with the opportunity for an informal hearing on whether the order should be modified, vacated, or amended to require a mandatory recall of the device and, (3) after providing the opportunity for an informal hearing, FDA may issue a mandatory recall order if the agency determines that such an order is necessary.

The information collected under the recall authority provisions will be used by FDA to: (1) Ensure that all devices entering the market are safe and effective, (2) accurately and immediately detect serious problems with medical devices, and (3) remove dangerous and defective devices from the market.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

| 21 CFR Section | No. of Respondents | Annual Frequency per Response | Total Annual Responses | Hours per Response | Total Hours |
|---|---|---|---|---|---|
| 810.10(d) | 2 | 1 | 2 | 8 | 16 |
| 810.11(a) | 1 | 1 | 1 | 8 | 8 |
| 810.12(a-b) | 1 | 1 | 1 | 8 | 8 |
| 810.14 | 2 | 1 | 2 | 16 | 32 |
| 810.15(a-c) | 2 | 1 | 2 | 12 | 24 |
| 810.15(d) | 2 | 1 | 2 | 4 | 8 |
| 810.15(e) | 10 | 1 | 10 | 1 | 10 |
| 810.16(a-b) | 2 | 12 | 24 | 40 | 960 |
| 810.17(a) | 2 | 1 | 2 | 8 | 16 |
| Total | | | | | 1,082 |

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

| 21 CFR Section | No. of Recordkeepers | Annual Frequency per Recordkeeping | Total Annual Records | Hours per Record | Total Hours |
|---|---|---|---|---|---|
| 810.15(b) | 2 | 1 | 1 | 8 | 8 |

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Explanation for Burden Estimates:

The burden estimates for Tables I and II are based on FDA's experience with voluntary recalls under part 810 of the regulations. FDA expects no more than two mandatory recalls per year, as most recalls are done voluntarily. Since the last time this collection of information was submitted to OMB for renewal/approval, there have been no mandatory recalls.

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*.

Dated: December 15, 2008.

**Jeffrey Shuren,**

*Associate Commissioner for Policy and Planning.*

[FR Doc. E8–30280 Filed 12–18–08; 8:45 am]

**BILLING CODE 4160–01–S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2008–N–0641]**

### Agency Information Collection Activities; Proposed Collection; Comment Request; Voluntary Hazard Analysis and Critical Control Point Manuals for Operators and Regulators of Retail and Food Service Establishments

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

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the information collection provisions of the agency's Voluntary Hazard Analysis and Critical Control Point Manuals for Operators and Regulators of Retail and Food Service Establishments.

**DATES:** Submit written or electronic comments on the collection of information by February 17, 2009.

**ADDRESSES:** Submit electronic comments on the collection of information to *http://www.regulations.gov*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:** Jonna Capezzuto, Office of Information Management (HFA–710), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–796–3794.

**SUPPLEMENTARY INFORMATION:** Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

**Voluntary Hazard Analysis and Critical Control Point Manuals for Operators and Regulators of Retail and Food Service Establishments (OMB Control Number 0910–0578)—Extension**

The Operator's Manual contains information and recommendations for operators of retail and foodservice establishments who wish to develop and implement a voluntary food safety management system based on Hazard Analysis and Critical Control Point (HACCP) principles. Operators may decide to incorporate some or all of the principles presented in the manual into their existing food safety management systems. The recordkeeping practices discussed in the manual are voluntary and may include documenting certain activities, such as monitoring and verification, which the operator may or may not deem necessary to ensure food safety. The manual includes optional worksheets to assist operators in developing and validating a voluntary food safety management system.

The Regulator's Manual contains recommendations for State, local, and tribal regulators on conducting risk-based inspections of retail and foodservice establishments, including recommendations about recordkeeping practices that can assist operators in preventing foodborne illness. These recommendations may lead to voluntary actions by operators based on consultation with regulators. For example, an operator may develop a risk control plan as an intervention strategy for controlling specific out-of-control foodborne illness risk factors identified during an inspection. Further, the manual contains recommendations to assist regulators when evaluating voluntary food safety management systems in retail and foodservice establishments. Such evaluations typically consist of the following two components: (1) Validation (assessing whether the establishment's voluntary food safety management system is adequate to control food safety hazards) and (2) verification (assessing whether the establishment is following its voluntary food safety management system). The manual includes a sample entitled ''Verification Inspection Checklist'' to assist regulators when conducting verification inspections of establishments with voluntary food safety management systems.

Types of operator records discussed in the manuals and listed in the following burden estimates include: (1) Food safety management systems (plans that delineate the formal procedures to follow to control all food safety hazards in an operation); (2) risk control plans (HACCP-based, goal-oriented plans for achieving active managerial control over specific out-of-control foodborne illness risk factors); (3) hazard analysis (written assessment of the significant food safety hazards associated with foods prepared in the establishment); (4) prerequisite programs (written policies or procedures, including but not limited to, standard operating procedures, training protocols, and buyer specifications that address maintenance of basic operational and sanitation conditions); (5) monitoring (records showing the observations or measurements that are made to help determine if critical limits are being met and maintained); (6) corrective action (records indicating the activities that are completed whenever a critical limit is not met); (7) ongoing verification (records showing the procedures that are followed to ensure that monitoring and other functions of the food safety management system are being implemented properly); and (8)

validation (records indicating that scientific and technical information is collected and evaluated to determine if the food safety management system, when properly implemented, effectively controls the hazards).

All recommendations in both manuals are voluntary. For simplicity and to avoid duplicate estimates for operator recordkeeping practices that are discussed in both manuals, the burden for all collection of information recommendations for retail and foodservice operators are estimated together in table 1 of this document, regardless of the manual in which they appear. Collection of information recommendations for regulators in the Regulator's Manual are listed separately in table 2 of this document.

*Description of Respondents*: The likely respondents to this collection of information are operators and regulators of retail and foodservice establishments.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL RECORDKEEPING BURDEN FOR OPERATORS [1]

| Types of Records | No. of Recordkeepers | Annual Frequency of Recordkeeping | Total Annual Records | Hours per Recordkeeper | Total Hours |
|---|---|---|---|---|---|
| Prerequisite Program Records | [2] 100,000 | 365 | 36,500,000 | 0.1 | 3,650,000 |
| Monitoring Records | [2] 100,000 | 365 | 36,500,000 | 0.3 | 10,950,000 |
| Corrective Action Records | [2] 100,000 | 365 | 36,500,000 | 0.1 | 3,650,000 |
| Ongoing Verification Records (includes calibration records) | [2] 100,000 | 365 | 36,500,000 | 0.1 | 3,650,000 |
| Validation Records | [2] 50,000 | 1 | 50,000 | 4 | 200,000 |
| Annual Burden [3]: | | | | | 22,100,000 |
| Risk Control Plan | 50,000 | 1 | 50,000 | 2 | 100,000 |
| Monitoring Records | 100,000 | 90 | 9,000,000 | 0.3 | 2,700,000 |
| Corrective Action Records | 100,000 | 90 | 9,000,000 | 0.1 | 900,000 |
| Ongoing Verification Records (includes calibration records) | 100,000 | 90 | 9,000,000 | 0.1 | 900,000 |
| Annual Burden [4] | | | | | 4,600,000 |
| Total Annual Burden for Operators | | | | | 26,700,000 |

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] Annual burden.
[3] Burden for developing and implementing a food safety management system based on the Operator's Manual.
[4] Annual burden for developing and implementing a risk control plan based on the Regulator's Manual.

The burden for these activities may vary among retail and foodservice operators depending on the type and number of products involved, the complexity of an establishment's operation, the nature of the equipment or instruments required to monitor critical control points, and the extent to which an operator uses the Operator's Manual and/or the Regulator's Manual. The estimate does not include collections of information that are a usual and customary part of an operator's normal activities. FDA has established as a goal to have 50,000 (0.05 percent) of the approximately one million U.S. retail and foodservice operators implement the recommendations outlined in the 2 manuals. This target figure is used in calculating the burden in tables 1 and 2 of this document because the agency lacks data on how to base an estimate of how many retail and foodservice establishments are likely to use one or more of the manuals to voluntarily implement a comprehensive food safety management system based on HACCP principles or a risk control plan for out-of-control processes identified during an inspection. FDA's estimate of the total number of retail and foodservice establishments is based on numbers obtained from the two major trade organizations representing these industries, the Food Marketing Institute, and the National Restaurant Association, respectively.

The hour burden estimates in table 1 of this document for operators who follow the HACCP-based recommendations in the Operator's Manual are based on the estimated average annual information collection burden for mandatory HACCP rules, including seafood HACCP (60 FR 65096 at 65178; December 18, 1995) and juice HACCP (66 FR 6138 at 6202; January 19, 2001). FDA estimates that once the system is in place, the annual frequency of records is based on 365 operating days per year. Assuming there is one recordkeeper per shift of operation, the agency estimates that two recordkeepers per day would be needed to conduct monitoring, corrective action, recordkeeping, and verification outlined in the system. The agency further estimates that validation will be conducted once per year, based on menu or food list changes, changes in distributors, or changes in food preparation processes used. The validation will require a total of 4 labor hours.

The second set of estimates in table 1 of this document shows the annual burden for developing and implementing a risk control plan to control specific out-of-control foodborne illness risk factors identified during an inspection by a State, local, or tribal regulatory authority. If an operator decides to use a risk control plan as recommended in the Regulator's Manual, one person from the establishment is needed to work with the regulator to develop the written

plan. FDA estimates that two recordkeepers per day (one recordkeeper for each shift) would be needed to conduct monitoring, corrective action, recordkeeping, and verification outlined in the risk control plan. The estimated duration of implementation for a risk control plan is 90 days, which is the minimum recommended time to achieve long-term behavior change.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN FOR REGULATORS [1]

| Types of Records | No. of Recordkeepers | Annual Frequency of Recordkeeping | Total Annual Records | Hours per Recordkeeper | Total Hours |
|---|---|---|---|---|---|
| Voluntary Food Safety Management System Evaluation (includes validation, verification, and completion of verification inspection checklist) | 50,000 | 1 | 50,000 | 16 | 800,000 |
| Total Annual Burden for Regulators | | | | | 800,000 |

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

It is difficult to predict the number of State, local, and tribal regulatory jurisdictions that will use the Regulator's Manual. But, FDA anticipates that retail and foodservice establishments which voluntarily develop and implement a food safety management system based on the Operator's Manual will request their regulatory authorities to conduct an evaluation of their system. The estimates in table 2 of this document for the annual burden to State, local, and tribal regulators that follow the recommendations in the Regulator's Manual were calculated based on the usual time needed for one person to evaluate a voluntarily-implemented food safety management system and record the findings. The number of times an inspector may be asked by an operator to evaluate a voluntarily-implemented system is not expected to exceed once per year.

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*.

Dated: December 11, 2008.

**Jeffrey Shuren,**

*Associate Commissioner for Policy and Planning.*

[FR Doc. E8–30278 Filed 12–18–08; 8:45 am]

**BILLING CODE 4160–01–S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2008–N–0617]**

### Determination That RUBRAMIN PC (Cyanocobalamin) Injection and Ten Other Drug Products Were Not Withdrawn From Sale for Reasons of Safety or Effectiveness

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

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) has determined that the eleven drug products listed in this document were not withdrawn from sale for reasons of safety or effectiveness. This determination means that FDA will not begin procedures to withdraw approval of abbreviated new drug applications (ANDAs) that refer to the drug products, and it will allow FDA to continue to approve ANDAs that refer to the products as long as they meet relevant legal and regulatory requirements.

**FOR FURTHER INFORMATION CONTACT:** Olivia Pritzlaff, Center for Drug Evaluation and Research (HFD–7), Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 6308, Silver Spring, MD 20993–0002, 301–796–3601.

**SUPPLEMENTARY INFORMATION:** In 1984, Congress enacted the Drug Price Competition and Patent Term Restoration Act of 1984 (Public Law 98–417) (the 1984 amendments), which authorized the approval of duplicate versions of drug products approved under an ANDA procedure. ANDA sponsors must, with certain exceptions, show that the drug for which they are seeking approval contains the same active ingredient in the same strength andosage form as the ''listed drug,'' which is a version of the drug that was previously approved. Sponsors of ANDAs do not have to repeat the extensive clinical testing otherwise necessary to gain approval of a new drug application (NDA). The only clinical data required in an ANDA are data to show that the drug that is the subject of the ANDA is bioequivalent to the listed drug.

The 1984 amendments include what is now section 505(j)(7) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 355(j)(7)), which requires FDA to publish a list of all approved drugs. FDA publishes this list as part of the ''Approved Drug Products With Therapeutic Equivalence Evaluations,'' which is generally known as the ''Orange Book.'' Under FDA regulations, a drug is withdrawn from the list if the agency withdraws or suspends approval of the drug's NDA or ANDA for reasons of safety or effectiveness, or if FDA determines that the listed drug was withdrawn from sale for reasons of safety or effectiveness (21 CFR 314.162).

Under § 314.161(a) (21 CFR 314.161(a)), the agency must determine whether a listed drug was withdrawn from sale for reasons of safety or effectiveness: (1) Before an ANDA that refers to that listed drug may be approved; (2) whenever a listed drug is voluntarily withdrawn from sale and ANDAs that refer to the listed drug have been approved; and (3) when a person petitions for such a determination under 21 CFR 10.25(a) and 10.30. Section 314.161(d) provides that if FDA determines that a listed drug was withdrawn from sale for reasons of safety or effectiveness, the agency will initiate proceedings that could result in the withdrawal of approval of the ANDAs that refer to the listed drug.

FDA has become aware that the drug products listed in the table in this document are no longer being marketed. (As requested by the applicant, FDA withdrew approval of NDA 6–799 for RUBRAMIN PC (cyanocobalamin)

Injection in the **Federal Register** of November 7, 2007 (72 FR 62858).)

| Application No. | Drug | Applicant |
|---|---|---|
| NDA 6–799 | RUBRAMIN PC (cyanocobalamin) Injection, 1 milligram (mg)/milliliter (mL) | Bristol Myers Squibb Co., P.O. Box 4500, Princeton, NJ 08543–4500 |
| NDA 10–060 | FLORINEF (fludrocortisone acetate) Tablets, 0.1 mg | King Pharmaceuticals, Inc., 501 Fifth St., Bristol, TN 37620 |
| NDA 11–613 | IONAMIN (phentermine resin complex) Extended-Release Capsules, equivalent to (EQ) 15 mg and 30 mg base | UCB, Inc., 1950 Lake Park Dr., Smyrna, GA 30080 |
| NDA 17–849 | BRETHINE (terbutaline sulfate) Tablets, 2.5 mg and 5 mg | AAIPharma, LLC, 2320 Scientific Park Dr., Wilmington, NC 28405 |
| NDA 17–970 | NOLVADEX (tamoxifen citrate) Tablets, EQ 10 mg and 20 mg base | AstraZeneca Pharmaceuticals, 1800 Concord Pike, P.O. Box 8355, Wilmington, DE 19803–8355 |
| NDA 19–058 | TENORMIN (atenolol) Injection, 0.5 mg/mL | Do. |
| NDA 19–645 | TORADOL (ketorolac tromethamine) Tablets, 10 mg | Hoffman-La Roche, Inc., 340 Kingsland St., Nutley, NJ 07110–1199 |
| NDA 19–778 | PRINZIDE (hydrochlorothiazide and lisinopril) Tablets, 25mg/20mg | Merck Research Laboratories, P.O. Box 1000, IG2C–50, North Wales, PA19454–1009 |
| NDA 19–816 | ORUVAIL (ketoprofen) Extended-Release Capsules, 100 mg, 150 mg, and 200 mg | Wyeth Pharmaceuticals, P.O. Box 8299, Philadelphia, PA 19101–8299 |
| NDA 19–880 | PARAPLATIN (carboplatin) for Injection, 50 mg/vial, 150 mg/vial, and 450 mg/vial | Bristol Myers Squibb Co. |
| NDA 50–582 | DORYX (doxycycline hyclate) Delayed-Release Capsules, EQ 75 mg and 100 mg base | F.H. Faulding and Co., c/o Warner Chilcott, Inc., Rockaway 80 Corporate Center, 100 Enterprise Dr., suite 280, Rockaway, NJ 07866 |

FDA has reviewed its records and, under § 314.161, has determined that the drug products listed in this document were not withdrawn from sale for reasons of safety or effectiveness. Accordingly, the agency will continue to list the drug products listed in this document in the ''Discontinued Drug Product List'' section of the Orange Book. The ''Discontinued Drug Product List'' identifies, among other items, drug products that have been discontinued from marketing for reasons other than safety or effectiveness.

Approved ANDAs that refer to the NDAs listed in this document are unaffected by the discontinued marketing of the products subject to those NDAs. Additional ANDAs that refer to these products may also be approved by the agency if they comply with relevant legal and regulatory requirements. If FDA determines that labeling for these drug products should be revised to meet current standards, the agency will advise ANDA applicants to submit such labeling.

Dated: December 11, 2008.

**Jeffrey Shuren,**

*Associate Commissioner for Policy and Planning.*

[FR Doc. E8–30154 Filed 12–18–08; 8:45 am]

**BILLING CODE 4160–01–S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2008–D–0118]**

### Guidance for Industry on Diabetes Mellitus—Evaluating Cardiovascular Risk in New Antidiabetic Therapies to Treat Type 2 Diabetes; Availability

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

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the availability of a guidance for industry entitled ''Diabetes Mellitus—Evaluating Cardiovascular Risk in New Antidiabetic Therapies to Treat Type 2 Diabetes.'' This guidance makes recommendations about how to demonstrate that a new antidiabetic therapy to treat type 2 diabetes is not associated with an unacceptable increase in cardiovascular risk. We are issuing this guidance for immediate implementation to ensure that relevant issues related to minimizing cardiovascular risk are considered by all sponsors who have ongoing drug development programs for type 2 diabetes.

**DATES:** Submit written or electronic comments on agency guidances at any time.

**ADDRESSES:** Submit written requests for single copies of this guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 2201, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. Submit written comments on the guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit

electronic comments to *http://www.regulations.gov*. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

**FOR FURTHER INFORMATION CONTACT:** Mary Parks, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, rm. 3362, Silver Spring, MD 20993–0002, 301–796–2290.

**SUPPLEMENTARY INFORMATION:**

## I. Background

FDA is announcing the availability of a guidance for industry entitled ''Diabetes Mellitus—Evaluating Cardiovascular Risk in New Antidiabetic Therapies to Treat Type 2 Diabetes.'' Diabetes mellitus is associated with an increased risk of cardiovascular disease. Reducing long-term cardiovascular complications in patients with diabetes should be an important goal of disease management. There are compelling data in patients with type 2 diabetes supporting a reduced risk of microvascular complications with improved long-term glycemic control. This guidance makes recommendations about how to demonstrate that a new antidiabetic therapy to treat type 2 diabetes is not associated with an unacceptable increase in cardiovascular risk.

On March 3, 2008, FDA issued the draft guidance for industry entitled ''Diabetes Mellitus: Developing Drugs and Therapeutic Biologics for Treatment and Prevention'' (73 FR 11420). On July 1 and 2, 2008, the Endocrinologic and Metabolic Drugs Advisory Committee met to discuss the role of cardiovascular assessment in the premarketing and postmarketing settings for drugs and therapeutic biologics developed for the treatment of type 2 diabetes mellitus. After considering the discussion at this meeting as well as other available data and information, we have determined that concerns about cardiovascular risk should be more thoroughly addressed during drug development. We are issuing this guidance to ensure that our recommendations reach all sponsors who may submit applications for approval of drugs to treat type 2 diabetes mellitus.

We are issuing this level 1 guidance for immediate implementation, consistent with FDA's good guidance practices regulation (21 CFR 10.115). FDA is not seeking comment before implementing this guidance because of the need to immediately notify sponsors with ongoing development programs of the need to address cardiovascular risk in ongoing drug development programs. If FDA receives comments on this guidance, it will consider the comments and incorporate final recommendations into the final version of the March 2008 draft guidance.

This guidance represents the agency's current thinking on evaluating cardiovascular risk in new antidiabetic therapies to treat type 2 diabetes. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

## II. The Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 312 have been approved under 0910–0014, and the collections of information in 21 CFR part 314 have been approved under 0910–0001.

## III. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Please note that on January 15, 2008, the FDA Division of Dockets Management Web site transitioned to the Federal Dockets Management System (FDMS). FDMS is a Government-wide, electronic docket management system. Electronic comments or submissions will be accepted by FDA only through FDMS at *http://www.regulations.gov*.

## IV. Electronic Access

Persons with access to the Internet may obtain the document at either *http://www.fda.gov/cder/guidance/index.htm* or *http://www.regulations.gov*.

Dated: December 1, 2008.

**Jeffrey Shuren,**

*Associate Commissioner for Policy and Planning.*

[FR Doc. E8–30086 Filed 12–17–08; 11:15 am]

**BILLING CODE 4160–01–S**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Center for Scientific Review, Special Emphasis Panel, Prevention, Interventions: Alcohol, Diabetes and Smoking.

*Date:* January 6, 2009.

*Time:* 1 p.m. to 2:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Telephone Conference Call)

*Contact Person:* Anna L. Riley, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3114, MSC 7759, Bethesda, MD 20892, 301–435–2889, *rileyann@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* Center for Scientific Review, Special Emphasis Panel, Member Conflicts in Microbiology.

*Date:* January 8–9, 2009.

*Time:* 8:30 a.m. to 3 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Virtual Meeting)

*Contact Person:* Guangyong Ji, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3211, MSC 7808, Bethesda, MD 20892, 301–435–1146.

This notice is being published less than 15 days prior to the meeting due to the timing

limitations imposed by the review and funding cycle.

*Name of Committee:* Center for Scientific Review, Special Emphasis Panel, EPIC Member Conflicts SEP.

*Date:* January 15, 2009.

*Time:* 10:30 a.m. to 2:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Virtual Meeting)

*Contact Person:* Elisabeth Koss, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3152, MSC 7770, Bethesda, MD 20892, (301) 435–1721, *kosse@csr.nih.gov*.

*Name of Committee:* Center for Scientific Review, Special Emphasis Panel, Infectious Diseases and Microbiology Member SEP.

*Date:* January 21–22, 2009.

*Time:* 9 a.m. to 9 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Virtual Meeting)

*Contact Person:* Soheyla Saadi, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3211, MSC 7808, Bethesda, MD 20892, 301–435–0903, *saadisoh@csr.nih.gov*.

*Name of Committee:* Digestive Sciences Integrated Review Group, Hepatobiliary Pathophysiology Study Section.

*Date:* February 2–3, 2009.

*Time:* 8 a.m. to 6 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* DoubleTree Hotel & Executive Meeting Center, 8120 Wisconsin Avenue, Bethesda, MD 20814.

*Contact Person:* Rass M. Shayiq, PhD., Scientific Review Officer, Center for Scientific Review, National Institute of Health, 6701 Rockledge Drive, Room 2182, MSC 7818, Bethesda, MD 20892, (301) 435–2359, *shayiqr@csr.nih.gov*.

*Name of Committee:* Cardiovascular Sciences Integrated Review Group, Lung Injury, Repair, and Remodeling Study Section.

*Date:* February 2–3, 2009.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

*Contact Person:* Ghenima Dirami, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4112, MSC 7814, Bethesda, MD 20892, 301–594–1321, *diramig@csr.nih.gov*.

*Name of Committee:* Oncological Sciences Integrated Review Group, Clinical Oncology Study Section.

*Date:* February 2–3, 2009.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications

*Place:* Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015.

*Contact Person:* Malaya Chatterjee, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 192, MSC 7804, Bethesda, MD 20892, 301–451–0131, *chatterm@csr.nih.gov*.

*Name of Committee:* Brain Disorders and Clinical Neuroscience Integrated Review Group, Anterior Eye Disease Study Section.

*Date:* February 2–3, 2009.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* InterContinental Mark Hopkins Hotel, 999 California Street, San Francisco, CA 94108.

*Contact Person:* Jerry L. Taylor, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5202, MSC 7846, Bethesda, MD 20892, 301–435–1175, *taylorje@csr.nih.gov*.

*Name of Committee:* Molecular, Cellular and Developmental Neuroscience, Integrated Review Group, Molecular Neuropharmacology and Signaling Study Section.

*Date:* February 2–3, 2009.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Sir Francis Drake Hotel, 450 Powell Street at Suffer, San Francisco, CA 94102.

*Contact Person:* Deborah L. Lewis, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4118, MSC 7850, Bethesda, MD 20892, 301–435–1224, *lewisdeb@csr.nih.gov*.

*Name of Committee:* Integrative, Functional and Cognitive Neuroscience, Integrated Review Group, Cognitive Neuroscience Study Section.

*Date:* February 2, 2009.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Bahia Resort Hotel, 998 W. Mission Bay Drive, San Diego, CA 92109.

*Contact Person:* Judith A. Finkelstein, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5178, MSC 7844, Bethesda, MD 20892, 301–435–1249, *finkelsj@csr.nih.gov*.

*Name of Committee:* Digestive Sciences Integrated Review Group, Gastrointestinal Cell and Molecular Biology Study Section.

*Date:* February 2, 2009.

*Time:* 8 a.m. to 6 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

*Contact Person:* Najma Begum, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2186, MSC 7818, Bethesda, MD 20892, 301–435–1243, *begumn@csr.nih.gov*.

*Name of Committee:* Cardiovascular Sciences Integrated Review Group, Atherosclerosis and Inflammation of the Cardiovascular System Study Section.

*Date:* February 2–3, 2009.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015.

*Contact Person:* Larry Pinkus, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4132, MSC 7802, Bethesda, MD 20892, (301) 435–1214, *pinkusl@csr.nih.gov*.

*Name of Committee:* Integrative, Functional and Cognitive Neuroscience, Integrated Review Group, Biological Rhythms and Sleep Study Section.

*Date:* February 2, 2009.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Bahia Resort Hotel, 998 W. Mission Bay Drive, San Diego, CA 92109.

*Contact Person:* Michael Selmanoff, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1208, MSC 7844, Bethesda, MD 20892, 301–435–1119, *mselmanoff@csr.nih.gov*.

*Name of Committee:* Integrative, Functional and Cognitive Neuroscience, Integrated Review Group, Neurotoxicology and Alcohol Study Section.

*Date:* February 2–3, 2009.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Bahia Resort Hotel, 998 W. Mission Bay Drive, San Diego, CA 92109.

*Contact Person:* Brian Hoshaw, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5181, MSC 7844, Bethesda, MD 20892, 301–435–1033, *hoshawb@csr.nih.gov*.

*Name of Committee:* Risk, Prevention and Health Behavior, Integrated Review Group Behavioral Medicine, Interventions and Outcomes Study Section.

*Date:* February 2–3, 2009.

*Time:* 8:30 a.m. to 4:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Mayflower Park Hotel, 405 Olive Way, Seattle, WA 98101.

*Contact Person:* Lee S. Mann, JD, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3186, MSC 7848, Bethesda, MD 20892, 301–435–0677, *mannl@csr.nih.gov*.

*Name of Committee:* Integrative, Functional and Cognitive Neuroscience, Integrated Review Group Somatosensory and Chemosensory Systems Study Section.

*Date:* February 3–4, 2009.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Bahia Resort Hotel, 998 W. Mission Bay Drive, San Diego, CA 92109.

*Contact Person:* Daniel R. Kenshalo, PhD, Scientific Review Officer, Center for

Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5182, MSC 7844, Bethesda, MD 20892, 301–435–1255, *kenshalod@csr.nih.gov*.

*Name of Committee:* Integrative, Functional and Cognitive Neuroscience, Integrated Review Group Neuroendocrinology, Neuroimmunology, and Behavior Study Section.

*Date:* February 3–4, 2009.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Bahia Resort Hotel, 998 W. Mission Bay Drive, San Diego, CA 92109.

*Contact Person:* Michael Selmanoff, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3134, MSC 7844, Bethesda, MD 20892, 301–435–1119, *mselmanoff@csr.nih.gov*.

*Name of Committee:* Genes, Genomes, and Genetics, Integrated Review Group, Molecular Genetics C Study Section.

*Date:* February 3–4, 2009.

*Time:* 8 a.m to 11 a.m.

*Agenda:* To review and evaluate grant applications

*Place:* One Washington Circle Hotel, One Washington Circle, Washington, DC 20037

*Contact Person:* Barbara Whitmarsh, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2206, MSC 7890, Bethesda, MD 20892, 301–435–4511, *whitmarshb@csr.nih.gov*.

*Name of Committee:* Biological Chemistry and Macromolecular, Biophysics Integrated Review Group, Synthetic and Biological Chemistry A Study Section.

*Date:* February 3–4, 2009.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* The Westin St. Francis, 335 Powell Street, San Francisco, CA 94102.

*Contact Person:* Mike Radtke, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4176, MSC 7806, Bethesda, MD 20892, 301–435–1728, *radtkem@csr.nih.gov*.

*Name of Committee:* Cardiovascular Sciences Integrated Review Group, Respiratory Integrative Biology and Translational Research Study Section.

*Date:* February 3–4, 2009.

*Time:* 8:30 a.m. to 1 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Bethesda Marriott Suites, 6711 Democracy Boulevard, Bethesda, MD 20817.

*Contact Person:* Everett E. Sinnett, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2178, MSC 7818, Bethesda, MD 20892, (301) 435–1016, *sinnett@nih.gov*.

*Name of Committee:* Infectious Diseases and Microbiology, Integrated Review Group, Host Interactions with Bacterial Pathogens Study Section.

*Date:* February 4–5, 2009.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Hotel Palomar, 2121 P Street, NW., Washington, DC 20037.

*Contact Person:* Marian Wachtel, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3208, MSC 7858, Bethesda, MD 20892, 301–435–1148, *wachtelm@csr.nih.gov*.

*Name of Committee:* Genes, Genomes, and Genetics Integrated Review Group, Molecular Genetics B Study Section.

*Date:* February 4–5, 2009.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Pier 5 Hotel, 711 Eastern Avenue, Baltimore, MD 21202.

*Contact Person:* Richard A. Currie, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5128, MSC 7840, Bethesda, MD 20892, (301) 435–1219, *currieri@csr.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 11, 2008.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy*.

[FR Doc. E8–30118 Filed 12–18–08; 8:45 am]

**BILLING CODE 4140–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute on Alcohol Abuse and Alcoholism; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections publication(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute on Alcohol Abuse and Alcoholism Special Emphasis Panel, Review of New Investigators' Grant Applications.

*Date:* March 17, 2009.

*Time:* 8 a.m. to 6 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Embassy Suites Hotel, at the Chevy Chase Pavilion, 4300 Military Road, Washington, DC 20015.

*Contact Person:* Katrina L Foster, PhD, Scientific Review Officer, National Inst on Alcohol Abuse & Alcoholism, National Institutes of Health, 5635 Fishers Lane, Rm. 2019, Rockville, MD 20852, 301–443–4032, *katrina@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants, National Institutes of Health, HHS)

Dated: December 12, 2008.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. E8–30119 Filed 12–18–08; 8:45 am]

**BILLING CODE 4140–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute on Alcohol Abuse and Alcoholism; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute on Alcohol Abuse and Alcoholism Special Emphasis Panel, Review of Conflicted Applications.

*Date:* March 17, 2009.

*Time:* 8 a.m. to 6 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Embassy Suites Hotel, At the Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015.

*Contact Person:* Beata Buzas, Ph.D., Scientific Review Officer, National Institute on Alcohol Abuse and Alcoholism, National Institutes of Health, 5635 Fishers Lane, Rm 2081, Rockville, MD 20852, 301–443–0800, *bbuzas@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants, National Institutes of Health, HHS)

Dated: December 12, 2008.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. E8–30120 Filed 12–18–08; 8:45 am]

**BILLING CODE 4140–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute on Alcohol Abuse and Alcoholism; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute on Alcohol Abuse and Alcoholism Initial Review Group; Neuroscience Review Subcommittee.

*Date:* March 16–17, 2009.

*Time:* 8 a.m. to 6 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Embassy Suites Hotel, At the Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015.

*Contact Person:* Beata Buzas, PhD, Scientific Review Administrator, National Institute on Alcohol Abuse and Alcoholism, National Institutes of Health, 5635 Fishers Lane, Rm 2081, Rockville, MD 20852, 301–443–0800, *bbuzas@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.89 1 Alcohol Research Center Grants, National Institutes of Health, HHS)

Dated: December 12, 2008.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. E8–30121 Filed 12–18–08; 8:45 am]

**BILLING CODE 4140–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Biomedical Imaging and Bioengineering; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the National Advisory Council for Biomedical Imaging and Bioengineering.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Advisory Council for Biomedical Imaging and Bioengineering NACBIB January 2009.

*Date:* January 23, 2009.

*Open:* 9 a.m. to 12:30 p.m.

*Agenda:* Report from the Institute Director, other Institute Staff and presentations of working group reports.

*Place:* Bethesda Marriott Suites, Independence Room (2nd level), 6711 Democracy Boulevard, Bethesda, MD 20817.

*Closed:* 1:30 p.m. to 4 p.m.

*Agenda:* To review and evaluate grant applications and/or proposals.

*Place:* Bethesda Marriott Suites, Independence Room (2nd level), 6711 Democracy Boulevard, Bethesda, MD 20817.

*Contact Person:* Anthony Demsey, Ph.D., Director, National Institute of Biomedical Imaging and Bioengineering, 6701 Democracy Blvd., Room 241, Bethesda, MD 20892.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *http://www.nibib1.nih.gov/about/NACBIB/NACBIB.htm*, where an agenda and any additional information for the meeting will be posted when available.

Dated: December 12, 2008.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. E8–30122 Filed 12–18–08; 8:45 am]

**BILLING CODE 4140–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute on Aging; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the National Advisory Council on Aging.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Advisory Council on Aging.

*Date:* January 27–28, 2009.

*Closed:* January 27, 2009, 3 p.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Building 31, 31 Center Drive, C Wing, Conference Room 10, Bethesda, MD 20892.

*Open:* January 28, 2009, 8 a.m. to 1:45 p.m.

*Agenda:* Call to order and reports from the Task Force Minority Aging Research Report; Consideration of the Report on Inclusion of Women and Minorities in Clinical Research: 2008 Data; Working Group on Program Report; Council of Councils Report; Division of Behavioral and Social Research Review; and Program Highlights.

*Place:* National Institutes of Health, Building 31, 31 Center Drive, C Wing, Conference Room 10, Bethesda, MD 20892.

*Closed:* January 28, 2009, 1:45 p.m. to 2:15 p.m.

*Agenda:* To review and evaluate the Intramural Research Program.

*Place:* National Institutes of Health, Building 31, 31 Center Drive, C Wing, Conference Room 10, Bethesda, MD 20892.

*Contact Person:* Robin Barr, Ph.D., Director National Institute on Aging, Office of Extramural Activities, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20814, (301) 496–9322, *barrr@nia.nih.gov*.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://www.nih.gov/nia/naca/*, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 11, 2008.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. E8–30123 Filed 12–18–08; 8:45 am]

**BILLING CODE 4140–01–M**

## DEPARTMENT OF HOMELAND SECURITY

### Identification of Foreign Countries Whose Nationals Are Eligible to Participate in the H–2B Visa Program

**AGENCY:** Office of the Secretary, DHS.

**ACTION:** Notice.

**SUMMARY:** On December 19, 2008, DHS published in the **Federal Register** a final rule ''Changes to Requirements Affecting H–2B Nonimmigrants,'' which provides that the Secretary of Homeland Security will publish a list of designated countries whose nationals can be the beneficiaries of an approved H–2B petition and are eligible for H–2B visas. This initial list will be composed of countries that are important for the operation of the H–2B program and are cooperative in repatriation of its citizens, subjects, nationals or residents who are subject to a final order of removal from the United States. Publication of such notice is made by the Secretary of Homeland Security, with the concurrence of the Secretary of State. Under the final rule, the Department of Homeland Security (DHS) will only approve petitions for H–2B nonimmigrant status for nationals of countries designated by means of this list or by means of the special procedure allowing petitioners to request approval for particular beneficiaries if the Secretary of Homeland Security determines that it is in the U.S. interest. Pursuant to the final rule, this notice designates those countries the Secretary of Homeland Security, with the concurrence of the Secretary of State, has found to be eligible to participate in the H–2B program.

**DATES:** This notice is effective January 18, 2009, and shall be without effect at the end of one year after January 18, 2009.

**SUPPLEMENTARY INFORMATION:**

#### Designation of Countries Whose Nationals Are Eligible to Participate in the H–2B Visa Program

Pursuant to the authority provided to the Secretary of Homeland Security under sections 241, 214(a)(1), and 215(a)(1) of the Immigration and Nationality Act (INA) (8 U.S.C. 1231, 1184(a)(1), and 1185(a)(1)), I have designated, with the concurrence of the Secretary of State, that nationals from the following countries are eligible to participate in the H–2B visa program:

Argentina;
Australia;
Belize;
Brazil;
Bulgaria;
Canada;
Chile;
Costa Rica;
Dominican Republic;
El Salvador;
Guatemala;
Honduras;
Indonesia;
Israel;
Jamaica;
Japan;
Mexico;
Moldova;
New Zealand;
Peru;
Philippines;
Poland;
Romania;
South Africa;
South Korea;
Turkey;
Ukraine;
United Kingdom.

This notice does not affect the status of aliens who currently hold H–2B nonimmigrant status.

Nothing in this notice limits the authority of the Secretary of Homeland Security or his or her designee or any other federal agency to invoke against any foreign country or its nationals any other remedy, penalty or enforcement action available by law.

**Paul A. Schneider,**

*Deputy Secretary.*

[FR Doc. E8–30114 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

**[Docket No. DHS–2008–0163]**

### Privacy Act of 1974; United States Secret Service—001 Criminal Investigation Information System of Records Notice

**AGENCY:** Privacy Office; DHS.

**ACTION:** Notice of Privacy Act system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974 and as part of the Department of Homeland Security's ongoing effort to review and update legacy system of record notices, the Department of Homeland Security proposes to update and reissue USSS.003 Criminal Investigation Information System, August 28, 2001 as DHS/USSS—001 Criminal Investigation Information System of Records. Categories of individuals, categories of records, and the routine uses of this legacy system of records notice have been reviewed and updated to better reflect the Department of Homeland Security United States Secret Service criminal investigation information record system. Additionally, an updated Notice of Proposed Rulemaking will be published elsewhere in the **Federal Register**. Until such time, the exemptions for the legacy system of records notice transfer from the SORN's legacy agency to the Department of Homeland Security. This reissued system will be included in the Department's inventory of record systems.

**DATES:** Written comments must be submitted on or before January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0163 by one of the following methods:

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

• *Fax:* 1–866–466–5370.

• *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

• *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.

• *Docket:* For access to the docket, to read background documents, or comments received go to *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: Latita Huff (202–406–6370), Privacy Point of Contact, United States Secret Service, 950 H St., NW., Washington, DC 20223. For privacy issues please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

## I. Background

Pursuant to the savings clause in the Homeland Security Act of 2002, the Department of Homeland Security (DHS) and United States Secret Service (USSS) have relied on preexisting Privacy Act systems of records notices for the collection and maintenance of records that concern DHS/USSS criminal investigation information system records.

As part of its efforts to streamline and consolidate its Privacy Act record systems, DHS/USSS is updating and reissuing a DHS/USSS system of records under the Privacy Act (5 U.S.C. 552a) for DHS/USSS criminal investigation information system records. This will ensure that all organizational parts of USSS follow the same privacy rules for collecting and handling criminal investigation information system records.

In accordance with the Privacy Act of 1974 and as part of DHS's ongoing effort to review and update legacy system of record notices, DHS/USSS proposes to update USSS.003 Criminal Investigation Information System (66 FR 45362 August 28, 2001). Categories of individuals, categories of records, and the routine uses of this legacy system of records notice have been reviewed and updated to better reflect the DHS/USSS criminal investigation information record system. Additionally, an updated Notice of Proposed Rulemaking will be published elsewhere in the **Federal Register**. Until such time, the exemptions for the legacy system of records notice transfer from the SORN's legacy agency to the Department of Homeland Security. This reissued system will be included in the Department's inventory of record systems.

## II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires that each agency publish in the **Federal Register** a description denoting the type and character of each system of records in order to make agency recordkeeping practices transparent, to notify individuals about the use of their records, and to assist the individual to more easily find files within the agency. Below is a description of the Criminal Investigation Information System.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this revised system of records to the Office of Management and Budget and to the Congress.

**System of Records: DHS/USSS–001.**

**SYSTEM NAME:**

United States Secret Service—001 Criminal Investigation Information System of Records.

**SECURITY CLASSIFICATION:**

Unclassified and Classified.

**SYSTEM LOCATION:**

Records are maintained at the United States Secret Service Headquarters, 950 H St., NW., Washington, DC 20223 and field offices.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Individuals who have been or are currently the subject of a criminal investigation by DHS/USSS in connection with the performance by that agency of its authorized criminal investigative functions; individuals who are payees, registered owners, or endorsers of stolen or lost obligations and other securities of the United States; individuals who are witnesses, complainants, informants, suspects, defendants, fugitives, released prisoners, correspondents, organized crime figures, and victims of crimes who have been identified by DHS/USSS in the conduct of criminal investigations or by information supplied by other law enforcement agencies, government units, and the general public.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Categories of records in this system include:

• Records containing information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting of identifying data, including, but not limited to, name, date of birth, social security number, telephone number, home address, business address, spouse and family information, physical description, notations of arrest, the nature and position of criminal charges, sentencing, confinement, release, and parole or probations status concerning criminal offenders, defendants and suspects, witnesses, victims, and law enforcement personnel;

• Records containing information compiled for the purpose of a criminal investigation and associated with an identifiable individual, including reports of informants and investigators;

• Records containing reports identifiable with an individual compiled at various stages of the process of enforcement of criminal laws from arrest or indictment through release from supervision;

• Records containing investigatory material compiled for law enforcement purposes, including but not limited to, handwriting exemplars; laboratory analyses of inks and papers; handwriting analyses; petitions for the remission of forfeitures; notice of non-receipt of Treasury drafts; affidavits of forged endorsements; opinions of the examiner of questioned documents; reports or opinions from the

examination of computer evidence; reports or opinions from the examination of altered cellular telephones; certificates by owners of U.S. registered securities concerning forged requests for payments or assignments; applications for relief on account of loss, theft, or destruction of U.S. Savings Bonds or checks; photographic reproductions of obligations and other securities of the United States; contraband items; claims against the United States for the proceeds of government checks and bonds; and reports necessary for the settlement of check and bond claims; polygraph case files; forensic examination information; search warrants and search warrant returns; indictments; certified inventories of property held as evidence; sworn and unsworn witnesses statements; witness statements; state, local and foreign criminal investigative information and reports; names and telephone numbers of persons intercepted by electronic, mechanical, or other device under the provisions of Title 18 U.S.C., Section 2510 *et seq.* compiled during the lawful course of a criminal or civil investigation.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

The Homeland Security Act of 2002, Public Law 107–296; Federal Records Act, 44 U.S.C. 3101; 6 CFR part 5; 5 U.S.C.; 18 U.S.C. 3056; Executive Order 9397.

**PURPOSE(S):**

The purpose of this system is to collect and maintain criminal records of individuals being investigated by DHS/USSS.

**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, all or a portion of the records or information contained in this system may be disclosed outside the Department of Homeland Security (DHS) as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. Any employee of DHS in his/her official capacity;

3. Any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or

4. The United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security 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 harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) or harm to the individual who relies upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate Federal, State, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To employees and officials of financial and commercial business firms and to private individuals information pertaining to actual or suspected criminal offenders where such disclosure is considered reasonably necessary for the purpose of furthering Secret Service efforts to investigate the activities of and apprehend criminal offenders and suspected criminal offenders.

I. To a court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosure to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations or in connection with criminal law proceedings or in response to a subpoena from a court of competent jurisdiction.

J. To an appropriate Federal, State, local, tribal, territorial, foreign, or international agency, if the information is relevant and necessary to agency's decision concerning the hiring or retention of an individual, the issuance of a security clearance, license, contract, grant, or other benefit, or if the information is relevant and necessary to a DHS decision concerning the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant or other benefit and when disclosure is appropriate to the proper performance of the official duties of the person making the request.

K. To the Integrated Automated Fingerprint Identification System (IAFIS) managed by the Department of Justice, Federal Bureau of Investigations in connection with Secret Service's utilization.

L. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of DHS or is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an

unwarranted invasion of personal privacy.

M. To Federal, State, and local government agencies foreign or domestic, having prosecutorial and civil law enforcement functions for use by attorneys, magistrates, and judges, parole or probation authorities and other law enforcement authorities for the purpose of developing a criminal or civil investigation, prosecuting, sentencing, or determining the parole and probation status of criminal offenders or suspected criminal offenders.

N. To personnel of other Federal, State, and local law enforcement agencies, foreign or domestic, for the purpose of developing information on subjects involved in Secret Service criminal investigations and assisting other law enforcement agencies in the investigation and prosecution of violations of the criminal laws which those agencies are responsible for enforcing.

O. To personnel of Federal, State, and local governmental agencies, where such disclosure is considered reasonably necessary for the purpose of furthering Secret Service efforts to investigate the activities of and apprehend criminal offenders and suspected criminal offenders.

P. To personnel of Federal, State, and local governmental agencies, foreign and domestic, where there is a showing of reasonable necessity to obtain such information to accomplish a valid law enforcement purpose.

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

None.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Records in this system are stored electronically or on paper in secure facilities in a locked drawer and/or behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD–ROM.

**RETRIEVABILITY:**

This system is indexed by name, address, vehicle license number, and/or telephone number, and is retrieved through computer search of magnetic media indices both at Headquarters and in the field offices. Additionally, subjects are retrievable from the computerized files by physical description. Access to the physical files containing records is by case number.

**SAFEGUARDS:**

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

**RETENTION AND DISPOSAL:**

All Judicial cases, 30 years after case closure; non-judicial criminal investigative cases (except non-judicial check and bond cases), 10 years; non-judicial check claim and bond forgery cases, 5 years; administrative files of an investigatory nature, 5 years; all other files and records the disposition of which is not otherwise specified, 5 years; investigations for other districts, 2 years; receipts vary with the case file to which they pertain; investigation control forms, varies; arrest history forms, indefinite; headquarters criminal investigative case files, 30 years; indices and microfilm copies are retained for an indefinite period; consensual and non-consensual interception indices, 10 years or when investigative use no longer exists, whichever is longer; fingerprint and photograph files, at varying intervals in accordance with record retention schedules approved by the National Archives and Records Administration.

**SYSTEM MANAGER AND ADDRESS:**

Assistant Director, Office of Investigations, U.S. Secret Service, 950 H St., NW., Suite 8900, Washington, DC 20223.

**NOTIFICATION PROCEDURE:**

Pursuant to 5 U.S.C. 522a(j) and (k), this system of records generally may not be accessed by members of the public for purposes of determining if the system contains a record pertaining to a particular individual. Nonetheless individual requests will be reviewed on a case by case basis. Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to the USSS's FOIA Officer, Freedom of Information and Privacy Acts Branch 245 Murray Drive, Building 410, Washington, DC 20223.

When seeking records about yourself from this system of records or any other USSS system of records, your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full name, current address, and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you,
- Specify when you believe the records would have been created,
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information USSS may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

**RECORD ACCESS PROCEDURES:**

See ''Notification procedure'' above.

**CONTESTING RECORD PROCEDURES:**

See ''Notification procedure'' above.

**RECORD SOURCE CATEGORIES:**

The Secretary of Homeland Security has exempted this system from subsections (e)(4)(I) of the Privacy Act pursuant to 5 U.S.C. 552a(j)(2) and (k)(2).and (k)(3), therefore records sources shall not be disclosed.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

Pursuant to exemption 5 U.S.C. 552a(j)(2) of the Privacy Act, portions of this system are exempt from 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5), and (e)(8); (f), and (g). Pursuant to 5 U.S.C. 552a(k)(1), (k)(2), and (k)(3) this system is exempt from the following provisions of the Privacy Act, subject to the limitations set forth in those subsections: 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f). In addition, to the extent a record contains information from other exempt systems of records, USSS will rely on the exemptions claimed for those systems.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29780 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

**[Docket No. DHS–2008–0166]**

### Privacy Act of 1974; United States Secret Service—004 Protection Information System System of Records

**AGENCY:** Privacy Office; DHS.

**ACTION:** Notice of Privacy Act system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974 and as part of the Department of Homeland Security's ongoing effort to review and update legacy system of record notices, the Department of Homeland Security proposes to update and reissue USSS.007 Protection Information System. Categories of individuals, categories of records, and the routine uses of this legacy system of records notice have been reviewed updated to better reflect the Department of Homeland Security United States Secret Service Criminal Investigation Information Record system. Additionally, DHS is issuing a Notice of Proposed Rulemaking (NPRM) concurrent with this SORN elsewhere in the **Federal Register**. The exemptions for the legacy system of records notices will continue to be applicable until the final rule for this SORN has been completed.

**DATES:** Written comments must be submitted on or before January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0166 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.
- *Docket:* For access to the docket, to read background documents, or comments received go to *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: Latita Huff (202–406–6370), Privacy Point of Contact, United States Secret Service, 950 H St., NW., Washington, DC 20223. For privacy issues please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

Pursuant to the savings clause in the Homeland Security Act of 2002, the Department of Homeland Security (DHS) and United States Secret Service (USSS) have relied on preexisting Privacy Act systems of records notices for the collection and maintenance of records that concern DHS/USSS protection records.

As part of its efforts to streamline and consolidate its Privacy Act record systems, DHS/USSS is updating and reissuing a DHS/USSS system of records under the Privacy Act (5 U.S.C. 552a) for DHS/USSS Protection Information System records. This will ensure that all organizational parts of USSS follow the same privacy rules for collecting and handling records regarding the protections of USSS protectees pursuant to Title 18 Section 3056 and 3056a.

In accordance with the Privacy Act of 1974 and as part of DHS's ongoing effort to review and update legacy system of record notices, DHS/USSS proposes to update and reissue USSS.007 Protection Information System (66 FR 45362 August 28, 2001). Categories of individuals and categories of records have been reviewed, and the routine uses of this legacy system of records notice have been updated to better reflect the DHS/USSS—004 Protection Information System. Additionally, DHS is issuing a Notice of Proposed Rulemaking (NPRM) concurrent with this SORN elsewhere in the **Federal Register**. The exemptions for the legacy system of records notices will continue to be applicable until the final rule for this SORN has been completed. This reissued system will be included in the Department's inventory of record systems.

#### II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires that each agency publish in the **Federal Register** a description denoting the type and character of each system of records in order to make agency recordkeeping practices transparent, to notify individuals about the use of their records, and to assist the individual to more easily find files within the agency. Below is a description of the Protection Information System.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this revised system of records to the Office of Management and Budget and to the Congress.

**SYSTEM OF RECORDS:**

**DHS/USSS–004.**

**SYSTEM NAME:**

United States Secret Service—004 Protection Information System of Records.

**SECURITY CLASSIFICATION:**

Unclassified and Classified.

**SYSTEM LOCATION:**

Records are maintained at the United States Secret Service Headquarters, 950 H St., NW., Washington, DC 20223, other locations in Washington, DC, and field offices.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Categories of individuals covered by this system include:

- Individuals who have been or are currently the subject of a criminal investigation by the USSS or another law enforcement agency for the violation of certain criminal statutes relating to the protection of persons or the security of properties;
- Individuals who are the subjects of investigative records and reports

supplied to the USSS by Federal, State, and local law enforcement agencies, foreign or domestic, other non-law enforcement governmental agencies, or private institutions and individuals;

• Individuals who are the subjects of non-criminal protective and background investigations by the Secret Service and other law enforcement agencies where the evaluation of such individuals, in accordance with criteria established by the USSS, indicates a need for such investigations;

• Certain individuals who are granted or denied ingress and egress to areas secured by the USSS, or to areas in proximity to persons protected by the USSS, including but not limited to invitees; passholders; tradesmen; and law enforcement, maintenance, or service personnel;

• Individuals who have sought an audience or contact with persons protected by the USSS or who have been involved in incidents or events which relate to the protective functions of the USSS; individuals who are witnesses, protectees, suspects, complainants, informants, defendants, fugitives, released prisoners, and correspondents who have been identified by the USSS or from information supplied by other law enforcement agencies, governmental units, private institutions, and members of the general public in connection with the performance by the USSS of its authorized protective functions; and

• Individuals protected by the USSS.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Categories of records in this system include:

• Individual's name;

• Address;

• Date of Birth;

• Case number;

• Arrest record;

• Nature and disposition of criminal charges, sentencing, confinement, release, and parole or probation status;

• Records containing information compiled for the purpose of a criminal investigation, including reports of informants and investigators, which are associated with an identifiable individual;

• Informant's name;

• Informant information;

• Informant's contact information (e.g. address, phone number);

• Records containing reports relative to an individual compiled at various stages of the process of enforcement of certain criminal laws from arrest or indictment through release from supervision;

• Records containing information supplied by other Federal, State, and local law enforcement agencies, foreign or domestic, other non-law enforcement governmental agencies, private institutions and persons concerning individuals who, because of their activities, personality traits, criminal or mental history, or history of social deviancy, may be of interest to the USSS in connection with the performance by that agency of its protective functions;

• Records containing information compiled for the purpose of identifying and evaluating individuals who may constitute a threat to the safety of persons or security of areas protected by the USSS;

• Records containing information compiled for the purpose of background investigations of individuals, including but not limited to, passholders, tradesmen, maintenance or service personnel who have access and/or have been denied access to areas secured by or who may be in proximity to persons protected by the USSS; and

• Records concerning agency activities associated with protectee movements.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. 301; the Federal Records Act, 44 U.S.C. 3101; The protective authority is contained in 18 U.S.C. 3056 and 3056A and Section 1 of Public Law 90–331, (18 U.S.C. 871; 18 U.S.C. 1751).

**PURPOSE(S):**

The purpose of this system is to assist the USSS in protecting its protectees by recording individuals who may come into proximity to a protectee, including individuals who have been involved in incidents or events which relate to the protective functions of the USSS, and individuals who have sought to make contact with a protectee.

**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, all or a portion of the records or information contained in this system may be disclosed outside the Department of Homeland Security (DHS) as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. Any employee of DHS in his/her official capacity;

3. Any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or

4. The United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security 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 harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) or harm to the individual who relies upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate Federal, State, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or

prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To the Department of Justice and other Federal, State, and local governmental agencies having a prosecution function for the use of attorneys, magistrates, and judges; and the parole and probation authorities for the purpose of prosecuting, sentencing, and determining the parole and probation status of criminal offenders or suspected criminal offenders; and for civil and other proceedings involving the USSS protective functions.

I. To Federal, State, and local law enforcement agencies, foreign and domestic, for the purpose of developing information on subjects involved in USSS protective investigations and evaluation and for the purpose of protective functions.

J. To Federal, State, and local government agencies, foreign and domestic, where such disclosures are considered reasonably necessary for the purpose of furthering USSS efforts to investigate the activities of those persons considered to be of protective interest.

K. To Federal, State, and local law enforcement agencies and other governmental agencies, foreign and domestic, where there is a showing of a reasonable need to accomplish a valid enforcement purpose.

L. To private institutions and private individuals of identifying information pertaining to actual or suspected criminal offenders or other individuals considered to be of protective interest for the purpose of furthering USSS efforts to evaluate the danger such individuals pose to persons protected by that agency.

M. To a court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations or in connection with criminal law proceedings or in response to a subpoena from a court of competent jurisdiction.

N. To an appropriate Federal, State, local, tribal, foreign, or international agency, if the information is relevant and necessary to a requesting agency's decision concerning the hiring or retention of an individual, or the issuance of a security clearance, license, contract, grant, or other benefit, or if the information is relevant and necessary to a DHS decision concerning the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, the issuance of a license, grant or other benefit and when disclosure is appropriate to the proper performance of the official duties of the person making the request.

O. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of DHS or is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

None.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Paper and electronic records in this system are stored in secure facilities behind locked doors. Electronic records media, such as magnetic tape, magnetic disk, digital media, and CD ROM are stored in proper environmental controls.

**RETRIEVABILITY:**

This system is indexed by case number, name, and other identifying data and other case related data, in master and magnetic media indices. Access to the physical files is located at field offices, Headquarters, and other Washington, DC locations.

**SAFEGUARDS:**

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

**RETENTION AND DISPOSAL:**

All judicial records are retained for a period of 20 years from the date of last action. All other protective intelligence case records including protective surveys and non-judicial protective intelligence cases are routinely retained for a period of up to 10 years from the date of last action or otherwise required to be held permanently for transfer to the National Archives and Records Administration. Case files relating to the issuance of White House Complex passes for employees of the White House, Secret Service Employees, press representatives accredited at the White House, and other authorized individuals are retained for a period of 8 years from the date the file is closed. Records pertaining to the administration and operations of Secret Service protective program, shift reports, survey files, and special event files are retained for a period of 3 to 5 years from the end of the event. Records pertaining to trip files for domestic travel are retained for 5 years, and trip files for foreign travel are retained for 10 years from the end of the event. Campaign related files are retained for a period of 30 years after the end of the campaign and subsequently transferred to the National Archives and Records Administration.

**SYSTEM MANAGER AND ADDRESS:**

Assistant Director, Office of Protective Research and Assistant Director, Office of Protective Operations, U.S. Secret Service, 950 H St., NW., Washington, DC 20223.

**NOTIFICATION PROCEDURE:**

Pursuant to 5 U.S.C. 522a(j) and (k), this system of records generally may not be accessed by members of the public for purposes of determining if the system contains a record pertaining to a particular individual. Nonetheless individual requests will be reviewed on a case by case basis. Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to the USSS's FOIA Officer, Freedom of Information and Privacy Acts Branch, 245 Murray Drive, Building 410, Washington, DC 20223.

When seeking records about yourself from this system of records or any other USSS system of records your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28

U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

• An explanation of why you believe the Department would have information on you,

• Specify when you believe the records would have been created,

• If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information USSS may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

**RECORD ACCESS PROCEDURES:**

See ''Notification procedure'' above.

**CONTESTING RECORD PROCEDURES:**

See ''Notification procedure'' above.

**RECORD SOURCE CATEGORIES:**

In accordance with the provisions of 5 U.S.C. 552a (j) and (k) the Secretary of Homeland Security has exempted this System from compliance with the provisions of 5 U.S.C. 552a(e)(4)(I).

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

Pursuant to exemption 5 U.S.C. 552a(j)(2) of the Privacy Act, portions of this system are exempt from 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5) and (e)(8); (f), and (g). Pursuant to 5 U.S.C. 552a(k)(1), (k)(2), and (k)(3) this system is exempt from the following provisions of the Privacy Act, subject to the limitations set forth in those subsections: 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f). In addition, to the extent a record contains information from other exempt systems of records, USSS will rely on the exemptions claimed for those systems.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29782 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

**[Docket No. DHS–2008–0142]**

### Privacy Act of 1974; United States Coast Guard—018 Exchange System and Morale Well-Being and Recreation System Files System of Records

**AGENCY:** Privacy Office; DHS.

**ACTION:** Notice of Privacy Act system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974 and as part of the Department of Homeland Security's ongoing effort to review and update legacy system of records notices, the Department of Homeland Security is giving notice that it proposes to update and reissue the following legacy record system DOT/CG 535 Coast Guard Exchange System (CGES) and Morale, Welfare and Recreation (MWR) System (April 11, 2000) as a Department of Homeland Security/United States Coast Guard system of records notice titled, Coast Guard Exchange System (CGES) and Morale, Well-being and Recreation (MWR) Program. Categories of individuals, categories of records, and the routine uses of this legacy system of records notice have been reviewed and updated to better reflect the Department of Homeland Security and the United States Coast Guard's Coast Guard Exchange System (CGES) and Morale, Well-being and Recreation (MWR) Program record system. This new system will be included in the Department of Homeland Security's inventory of record systems.

**DATES:** Written comments must be submitted on or before January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0142 by one of the following methods:

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

• *Fax:* 1–866–466–5370.

• *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

• *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change and may be read at *http://www.regulations.gov,* including any personal information provided.

• *Docket:* For access to the docket, to read background documents, or comments received, go to *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: David Roberts (202–475–3521), United States Coast Guard Privacy Officer, United States Coast Guard. For privacy issues please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS) and its components and offices have relied on preexisting Privacy Act systems of records notices for the collection and maintenance of records that concern the Coast Guard Exchange System (CGES), and Morale, Well-being and Recreation (MWR) Program.

As part of its efforts to streamline and consolidate its record systems, DHS is updating and reissuing a USCG system of records under the Privacy Act (5 U.S.C. 552a) that deals with the CGES and MWR Program. CGES and MWR programs are nonpay compensation programs that provide for the mission readiness and retention of military personnel, their families, and other eligible patron groups. CGES provides high quality goods and services at price savings to its patrons with a return to support MWR programs. MWR offers a wide range of programs, facilities, and services such as fitness centers, picnic areas, child development centers, food and beverage operations, and golf courses to name a few. A complete list of MWR activities may be found in the Coast Guard Morale, Well-Being, and Recreation Manual, COMDTINST M1710.13 (series). This record system will allow DHS/USCG to collect and preserve the records regarding the CGES and MWR Program. The collection and maintenance of this information will assist DHS/USCG in meeting its obligation to administer the CGES and MWR Program.

In accordance with the Privacy Act of 1974 and as part of DHS's ongoing effort to review and update legacy system of records notices, DHS is giving notice that it proposes to update and reissue the following legacy record system DOT/CG 535 Coast Guard Exchange System (CGES) and Morale, Welfare and Recreation (MWR) System (65 FR 19475 April 11, 2000) as a DHS/USCG system of records notice titled, Coast Guard Exchange System (CGES) and Morale, Well-being and Recreation (MWR) Program. Categories of individuals and categories of records have been

reviewed, and the routine uses of this legacy system of records notice have been updated to better reflect the Department of Homeland Security and the United States Coast Guard's CGES and MWR Program record system. This new system will be included in the Department of Homeland Security's inventory of record systems.

## II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency record keeping practices transparent, to notify individuals regarding the uses to which their records are put, and to assist individuals to more easily find such files within the agency. Below is the description of the CGES and MWR Program System of Records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this new system of records to the Office of Management and Budget and to Congress.

**SYSTEM OF RECORDS:**

DHS/USCG–018.

**SYSTEM NAME:**

United States Coast Guard Coast Guard—018 Exchange System (CGES) and Morale, Well-being and Recreation (MWR) Program.

**SECURITY CLASSIFICATION:**

Unclassified.

**SYSTEM LOCATION:**

Records are maintained at the United States Coast Guard Headquarters in Washington, DC and field offices.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Categories of individuals covered by this system Include eligible patrons of CGES and MWR including active duty members and their dependents, members of the reserves and their dependents, military cadets of Services academies and their families, commissioned officers of the Public Health Service, and their dependents, commissioned officers of the National Oceanic and Atmospheric Administration on active duty, armed forces retirees from active duty and their dependents, armed forces retires from the reserves with/without pay and their dependents, honorably discharged veterans with 100 percent service-connected disability and their dependents, Medal of Honor recipients and their dependents, former spouses who have not remarried, but were married to a military member for at least 20 years while the military member was on active duty of the armed forces and their dependents, orphans of a military member when not adopted by new parents under 21 years old or 23 years old if they are in full-time study, DHS and DoD civilian employees and their dependents, other U.S. Federal employees, medical personnel under contract to the Coast Guard or DoD, when residing on an installation, military personnel of foreign nations and their dependents when on orders from the U.S. Armed Forces, paid members of the American Red Cross, Young Men's Christian Association, United Services Organization and other private organizations when assigned to and serving with the U.S. Armed Forces, DHS/DoD contract personnel, Reserve Officers Training Corps cadets, former prisoners of war and spouses of current POWs or service members missing in action and their family members, nonappropriated and appropriated funded foreign nationals, and other civilian members as authorized.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Categories of records in this system include:

- Individual's name;
- Payroll and personnel records;
- Accounting records for MWR loans;
- Listing of bad checks;
- Job applications;
- Correspondence regarding use of CGES and MWR programs and facilities;
- Membership applications as applicable for the use of any facilities;
- Investigatory reports involving damage to facilities or abuse of privileges to utilize facilities; and
- Financial accounting documentation supporting sales, accounts payable, accounts receivable as examples for the CGES/MWR program.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. 301; 5 U.S.C. 2105; 10 U.S.C. 1146, 1587; 14 U.S.C. 632; the Federal Records Act, 44 U.S.C. 3101.

**PURPOSE(S):**

The purpose of this system to administer programs that provide for the mission readiness and retention of Coast Guard personnel and other authorized users; to document the approval and conduct of specifics contests, shows, entertainment programs, sports activities/competitions, and other MWR-type activities and events sponsored or sanctioned by the Coast Guard. Information is used for registration; reservations; track participation; pass management; report attendance; record sales transactions; maintain billing for individuals; collect payments; collect and report time and attendance of employees; process credit cards, personal checks, and debt cards; create and manage budgets; order and receive supplies and services; provide child care services reports; track inventory, and issue catered event contracts. Information will be used to market and promote similar MWR-type activities conducted by Services' MWR programs, to provide a means of paying, recording, accounting, reporting, and controlling expenditures and merchandise inventories associated with retail operations, rentals, and activities such as bingo games.

**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, all or a portion of the records of information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when:

1. DHS or any component thereof;

2. Any employee of DHS in his/her official capacity;

3. Any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or

4. The United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security 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 harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) or harm to the individual that rely upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate Federal, State, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

None.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD–ROM.

**RETRIEVABILITY:**

Records may be retrieved alphabetically by name.

**SAFEGUARDS:**

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

**RETENTION AND DISPOSAL:**

Letters of authorization for Coast Guard MWR/CGES activities are destroyed 3 years after disestablishment of the activity. Records and supporting documents for administration of Coast Guard MWR/CGES activities including bank statements, check registers, cash books, cancelled checks, property and stock records, expenditure vouchers, purchase orders, vendors' invoices, payroll and personnel records, daily activity records, guest registration cards, food and beverage cost control sheets, petty cash vouchers, reports and related papers are destroyed 6 years and 3 months after the period covered by the account. Credit cards receipts are destroyed in accordance with retention requirements issued by the card processing agency and ranges from 6 months to 2 years. GRS 2, item 1–31.

**SYSTEM MANAGER AND ADDRESS:**

Commandant, CG–1, Assistant Commandant for Human Resources, United States Coast Guard Headquarters, 2100 2nd Street, SW., Washington, DC 20593–0001.

**NOTIFICATION PROCEDURE:**

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to Commandant, CG–1, Assistant Commandant for Human Resources, United States Coast Guard Headquarters, 2100 2nd Street, SW., Washington, DC 20593–0001.

When seeking records about yourself from this system of records or any other USCG system of records your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you,
- Specify when you believe the records would have been created,
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the USCG will not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

**RECORD ACCESS PROCEDURES:**

See ''Notification procedure'' above.

**CONTESTING RECORD PROCEDURES:**

See ''Notification procedure'' above.

**RECORD SOURCE CATEGORIES:**

Individual record subject, previous employees, employment agencies, civilian and military investigative reports, and general correspondence.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29783 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

### Privacy Act of 1974; System of Records

**AGENCY:** Privacy Office, DHS.

**ACTION:** Notice of removal of one Privacy Act system of records notice.

**SUMMARY:** In accordance with the Privacy Act of 1974, the Department of Homeland Security is giving notice that it will remove one system of records notice from its inventory of record systems because the United States Secret Service no longer requires the system. The obsolete system is Treasury/IRS 46.016 Secret Service Details, Criminal Investigation Division (66 FR 63783 December 10, 2001).

**DATES:** *Effective Date:* January 20, 2009.

**FOR FURTHER INFORMATION CONTACT:** Hugo Teufel III, Chief Privacy Officer, Department of Homeland Security, Washington, DC 20528, by telephone (703) 235–0780 or facsimile 1–866–466–5370.

**SUPPLEMENTARY INFORMATION:** Pursuant to the provisions of the Privacy Act of 1974, 5 U.S.C. 552a, and as part of its ongoing integration and management efforts, the Department of Homeland Security (DHS) is removing one United States Secret Service (USSS) system of records notice from its inventory of record systems.

DHS inherited this record system upon its creation in January of 2003. Upon review of its inventory of records systems, DHS has determined it no longer needs or uses this system of records and is retiring Treasury/IRS 46.016 Secret Service Details, Criminal Investigation Division (66 FR 63783 December 10, 2001).

Treasury/IRS 46.016 Secret Service Details, Criminal Investigation Division was originally established to collect and maintain the USSS's Criminal Investigation Division records, which are now covered but a different system of records.

Eliminating this system of records notice will have no adverse impacts on individuals, but will promote the overall streamlining and management of DHS Privacy Act record systems.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29790 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

### Privacy Act of 1974; System of Records Notice

**AGENCY:** Privacy Office, DHS.

**ACTION:** Notice of removal of one Privacy Act system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974, the Department of Homeland Security is giving notice that it will remove one system of records from its inventory of record systems because the United States Secret Service is consolidating system of records notices. The obsolete system of records notice is USSS.004 Financial Management Information System (August 28, 2001).

**DATES:** *Effective Date:* January 20, 2009.

**FOR FURTHER INFORMATION CONTACT:** Hugo Teufel III, Chief Privacy Officer, Department of Homeland Security, Washington, DC 20528, by telephone (703) 235–0780 or facsimile 1–866–466–5370.

**SUPPLEMENTARY INFORMATION:** Pursuant to the provisions of the Privacy Act of 1974, 5 U.S.C. 552a, and as part of its ongoing integration and management efforts, the Department of Homeland Security (DHS) is removing one United States Secret Service (USSS) system of records from its inventory of record systems.

DHS inherited this record system upon its creation in January of 2003. Upon review of its inventory of records systems, DHS has determined that records within this legacy system are covered by Department system of records DHS/ALL–007 Accounts Payable Records (73 FR 61880 October 17, 2008) covering general accounts payable records, budget preparation and presentation materials, apportionment records, payroll records, pay administration records, expenditure accounting records, tax ID records, and records containing information on current and projected accounts payable; DHS/ALL–008 Accounts Receivable Records (73 FR 61885 October 17, 2008) covering general accounts receivable records, records on individuals involved in payments with DHS, and records containing information on current and projected accounts receivable; DHS/ALL–019 Payroll, Personnel, and Time and Attendance Records (73 FR 63172 October 23, 2008) covering employee and individual records, employer records, records containing information compiled for the purpose of pay, travel, expenses incurred other than travel, and retirement annuities and taxes, and time and attendance records; DHS/ALL–013 Claims Records (73 FR 63987 October 28, 2008) covering records containing information compiled for the purpose of property damage, records containing information on tort claims dealing with USSS property; DHS/ALL–021 Contractors and Consultants Records (73 FR 63179 October 23, 2008) covering contractor and vendor records; DHS/ALL–011 Biographies and Awards Records (73 FR 66654 November 10, 2008) covering individuals who are recipients of awards and are retiring USSS.004 Financial Management Information System (66 FR 45362 August 28, 2001).

USSS.004 Financial Management Information System (66 FR 45362 August 28, 2001) was originally established to record, track, and maintain USSS financial accounting information, which are now covered by different systems of records. Eliminating this system of records notice will have no adverse impacts on individuals, but will promote the overall streamlining and management of DHS Privacy Act system of record notices.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29791 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

**[Docket No. DHS–2008–0154]**

### Privacy Act of 1974; U.S. Customs and Border Protection—009 Nonimmigrant Information System

**AGENCY:** Privacy Office, DHS.

**ACTION:** Notice of Privacy Act system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974 and as part of the Department of Homeland Security's ongoing effort to review and update legacy system of record notices, the Department of Homeland Security proposes to update and reissue the following legacy record system, Justice/INS–036 Nonimmigrant Information System, January 31, 2003, as a Department of Homeland Security system of records notice titled, U.S. Customs and Border Protection Nonimmigrant Information System. Categories of individuals, categories of records, and the routine uses of this legacy system of records notice have

been reviewed updated to better reflect the Department of Homeland Security U.S. Customs and Border Protection Nonimmigrant Information System. Concurrent with this System of Records Notice, DHS is issuing a notice of proposed rulemaking to exempt this system for certain aspects of the Privacy Act. This reissued system will be included in the Department of Homeland Security's inventory of record systems.

**DATES:** Written comments must be submitted on or before January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0154 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.
- *Docket:* For access to the docket to read background documents or comments received go to *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: Laurence E. Castelli (202–325–0280), Chief, Privacy Act Policy and Procedures Branch, U.S. Customs and Border Protection, Office of International Trade, Regulations & Rulings, Mint Annex, 799 Ninth Street, NW., Washington, DC 20001–4501. For privacy issues contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

## I. Background

Pursuant to 6 U.S.C. 552(a)(1), the Department of Homeland Security (DHS) and Customs and Border Protection (CBP) have maintained the Nonimmigrant Information System (NIIS) in conformance with the terms of the previous NIIS SORN, 68 FR 5048.

As part of its efforts to streamline and consolidate its record systems, DHS is updating and reissuing a DHS/CBP system of records under the Privacy Act (5 U.S.C. 552a) to reflect CBP's current and future practices regarding the processing of foreign nationals entering the U.S. CBP inspects all persons applying for admission to the U.S. As part of this inspection process, CBP establishes the identity, nationality, and admissibility of persons crossing the border and may create a border crossing record, which would be covered by DHS/CBP–007 Border Crossing Information System of Records Notice (73 FR 43457 published on July 25, 2008), or additional CBP records, which would be covered by the TECS System of Records Notice (re-published concurrently with this notice) during this process. Similarly, CBP has authority to keep records of departures from the U.S.

In addition to information collected from the alien during the inspection process, CBP primarily uses two immigration forms to collect information from nonimmigrant aliens as they arrive in the U.S.: The I–94, Arrival/Departure Record and, for aliens applying for admission under the visa waiver program, the I–94W Nonimmigrant Visa Waiver Arrival/Departure Form. Separately, Canadian nationals, who travel to the U.S. as tourists or for business, and Mexican nationals, who possess a nonresident alien Mexican Border Crossing Card, are not required to complete an I–94 upon arrival, but their information will also be maintained in NIIS. Additionally, DHS/CBP has been implementing an Electronic System for Travel Authorization (ESTA) to permit nationals of VWP countries to submit their biographic and admissibility information online in advance of their travel to the U.S. Applicants under this program will have access to their accounts so that they may check the status of their ESTA and make limited amendments. ESTA is covered by privacy documentation including a SORN published on June 10, 2008, 73 FR 32720.

In accordance with the Privacy Act of 1974 and as part of DHS's ongoing effort to review and update legacy system of record notices, DHS/CBP proposes to update and reissue the following legacy record system, Justice/INS–036 Nonimmigrant Information System (68 FR 5048 January 31, 2003), as a DHS/CBP system of records notice titled, U.S. Customs and Border Protection Nonimmigrant Information System. Categories of individuals and categories of records have been reviewed, and the routine uses of this legacy system of records notice have been updated to better reflect the DHS/CBP Nonimmigrant Information System. Additionally, the exemptions for this legacy system of records notice transfer from the system's legacy agency to DHS. This reissued system will be included in the DHS's inventory of record systems.

## II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the U.S. Government collects, maintains, uses and disseminates individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass U.S. citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system to make agency recordkeeping practices transparent, to notify individuals regarding the uses of their records, and to assist the individual to more easily find such files within the agency. Below is a description of the NIIS System of Records.

In accordance with 5 U.S.C. 552a(r), a report concerning this record system has been sent to the Office of Management and Budget and to the Congress.

**SYSTEM OF RECORDS:**

DHS/CBP–009.

**SYSTEM NAME:**

U.S. Customs and Border Protection—009 Nonimmigrant Information System.

**SECURITY CLASSIFICATION:**

Unclassified.

**SYSTEM LOCATION:**

This computer database is located at the U.S. Customs and Border Protection (CBP) National Data Center. Computer terminals are located at customhouses, border ports of entry, airport inspection facilities under the jurisdiction of the Department of Homeland Security and other locations at which DHS authorized personnel may be posted to

facilitate DHS's mission. Terminals may also be located at appropriate facilities for other participating government agencies that have obtained system access pursuant to a Memorandum of Understanding.

**CATEGORIES OF INDIVIDUALS COVERED BY THIS SYSTEM:**

Categories of individuals covered by this system are nonimmigrant aliens entering and departing the U.S.

**CATEGORIES OF RECORDS IN THIS SYSTEM:**

NIIS is a dataset residing on the CBP Information Technology (IT) platform and in paper form. It contains arrival and departure information collected from foreign nationals entering and departing the U.S. on such forms as the I–94, I–94W, or through interviews with CBP officers. This information consists of the following data elements, where applicable:

- Full Name (first, middle, and last);
- Date of birth;
- E-mail address, as required;
- Travel document type (e.g., passport information, permanent resident card, etc.), number, issuance date, expiration date and issuing country;
- Country of citizenship;
- Date of crossing both into and out of the U.S.;
- Scanned images linked through the platform;
- Airline and flight number;
- City of embarkation;
- Address while visiting the U.S.;
- Admission number received during entry into the U.S.;
- Whether the individual has a communicable disease, physical or mental disorder, or is a drug abuser or addict;
- Whether the individual has been arrested or convicted for a moral turpitude crime, drugs, or has been sentenced for a period longer than five years;
- Whether the individual has engaged in espionage, sabotage, terrorism, or Nazi activity between 1933 and 1945;
- Whether the individual is seeking work in the U.S.;
- Whether the individual has been excluded or deported, or attempted to obtain a visa or enter the U.S. by fraud or misrepresentation;
- Whether the individual has ever detained, retained, or withheld custody of a child from a U.S. citizen granted custody of the child;
- Whether the individual has ever been denied a U.S. visa or entry into the U.S., or had a visa cancelled (if yes, when and where);
- Whether the individual has ever asserted immunity from prosecution; and
- Any change of address while in the U.S.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. 301; the Federal Records Act, 44 U.S.C. 3101; The legal authority for NIIS comes from 8 U.S.C. 1103, 8 U.S.C. 1184, Intelligence Reform and Terrorism Prevention Act of 2004, Public Law 108–458, The Immigration and Nationality Act, 8 U.S.C. 1354, and the Homeland Security Act of 2002, Public Law 107–296.

**PURPOSE(S):**

NIIS is a repository of records for persons arriving in or departing from the U.S. as nonimmigrant visitors and is used for entry screening, admissibility, and benefits purposes. The system provides a central repository of contact information for such aliens while in the U.S. and also captures arrival and departure information for determination of future admissibility.

**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, all or a portion of the records or information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. Any employee of DHS in his/her official capacity;

3. Any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or

4. The U.S. or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security 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 harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) or harm to the individual who relies upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To appropriate Federal, State, local, tribal, or foreign governmental agencies or multilateral governmental organizations responsible for investigating or prosecuting the violations of, or for enforcing or implementing, a statute, rule, regulation, order, license, or treaty where DHS determines that the information would assist in the enforcement of civil or criminal laws.

H. To a court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil or criminal discovery, litigation, or settlement negotiations, or in response to a subpoena from a court of competent jurisdiction.

I. To third parties during the course of a law enforcement investigation to the extent necessary to obtain information pertinent to the investigation, provided disclosure is appropriate to the proper performance

of the official duties of the officer making the disclosure.

J. To an organization or individual in either the public or private sector, either foreign or domestic, where there is a reason to believe that the recipient is or could become the target of a particular terrorist activity or conspiracy, to the extent the information is relevant to the protection of life or property and disclosure is appropriate to the proper performance of the official duties of the person making the disclosure.

K. To an appropriate Federal, State, local, tribal, foreign, or international agency, if the information is relevant and necessary to a requesting agency's decision concerning the hiring or retention of an individual, or issuance of a security clearance, license, contract, grant, or other benefit, or if the information is relevant and necessary to a DHS decision concerning the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant or other benefit and when disclosure is appropriate to the proper performance of the official duties of the person making the request.

L. To appropriate Federal, State, local, tribal, or foreign governmental agencies or multilateral governmental organizations, for purposes of assisting such agencies or organizations in preventing exposure to or transmission of a communicable or quarantinable disease or for combating other significant public health threats.

M. To Federal and foreign government intelligence or counterterrorism agencies or components where CBP becomes aware of an indication of a threat or potential threat to national or international security, or where such use is to assist in anti-terrorism efforts and disclosure is appropriate to the proper performance of the official duties of the person making the disclosure.

N. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of DHS or is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

O. To appropriate Federal, State, local, tribal, or foreign governmental agencies or multilateral governmental organizations where DHS is aware of a need to utilize relevant data for purposes of testing new technology and systems designed to enhance national security or identify other violations of law

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

None.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

The data is stored electronically at the CBP and DHS Data Center for current data and offsite at an alternative data storage facility for historical logs, system backups and in paper form.

**RETRIEVABILITY:**

These records may be searched on a variety of data elements including name, addresses, place and date of entry or departure, or country of citizenship as listed in the travel documents used at the time of entry to the U.S. An admission number, issued at each entry to the U.S. to track the particular admission, may also be used to identify a database record.

**SAFEGUARDS:**

All NIIS records are protected from unauthorized access through appropriate administrative, physical, and technical safeguards. These safeguards include all of the following: restricting access to those with a ''need to know''; using locks, alarm devices, and passwords; compartmentalizing databases; auditing software; and encrypting data communications.

NIIS information is secured in full compliance with the requirements of the DHS IT Security Program Handbook. This handbook establishes a comprehensive program, consistent with federal law and policy, to provide complete information security, including directives on roles and responsibilities, management policies, operational policies, and application rules, which will be applied to component systems, communications between component systems, and at interfaces between component systems and external systems.

One aspect of the DHS comprehensive program to provide information security involves the establishment of rules of behavior for each major application, including NIIS. These rules of behavior require users to be adequately trained regarding the security of their systems. These rules also require a periodic assessment of technical, administrative and managerial controls to enhance data integrity and accountability. System users must sign statements acknowledging that they have been trained and understand the security aspects of their systems. System users must also complete annual privacy awareness training to maintain current access.

NIIS transactions are tracked and can be monitored. This allows for oversight and audit capabilities to ensure that the data is being handled consistent with all applicable federal laws and regulations regarding privacy and data integrity.

**RETENTION AND DISPOSAL:**

NIIS data is subject to a retention requirement. The information collected and maintained in NIIS is used for entry screening, admissibility, and benefits purposes and is retained for seventy five (75) years from the date obtained. However, NIIS records that are linked to active law enforcement lookout records, CBP matches to enforcement activities, and/or investigations or cases will remain accessible for the life of the law enforcement activities to which they may become related. The current disposition for paper copy is 180 days from date of departure.

**SYSTEM MANAGER AND ADDRESS:**

Assistant Commissioner, Office of Information Technology, U.S. Customs and Border Protection Headquarters, 1300 Pennsylvania Avenue, NW., Washington, DC 20229.

**NOTIFICATION PROCEDURE:**

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to CBP's FOIA Officer, 1300 Pennsylvania Avenue, NW., Mint Annex, Washington, DC 20229.

When seeking records about yourself from this system of records or any other CBP system of records your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

• An explanation of why you believe the Department would have information on you,

• Specify when you believe the records would have been created,

• If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information CBP may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

**RECORD ACCESS PROCEDURES:**

See ''Notification procedure'' above.

**CONTESTING RECORD PROCEDURES:**

See ''Notification procedure'' above.

**RECORD SOURCE CATEGORIES:**

The system contains certain data received on individuals, passengers and crewmembers that arrive in, depart from, or transit through the U.S. This system also contains information collected from carriers that operate vessels, vehicles, aircraft and/or trains that enter or exit the U.S. and from the individuals upon crossing the U.S. border.

Basic information is obtained from individuals, the individual's attorney/representative, CBP officials, and other federal, state, local, and foreign agencies.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

No exemption shall be asserted with respect to information maintained in the system that is collected from a person or submitted on behalf of a person, if that person, or his or her agent, seeks access or amendment of such information.

This system, however, may contain information related to an ongoing law enforcement investigation because the information regarding a person's travel and border crossing was disclosed to appropriate law enforcement in conformance with the above routine uses. As such pursuant to 5 U.S.C. 552 a (j)(2) and (k)(2), DHS will claim exemption from (c)(3), (e)(8), and (g) of the Privacy Act of 1974, as amended, as is necessary and appropriate to protect this information.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29792 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

**[Docket No. DHS–2008–0108]**

### Privacy Act of 1974; United States Coast Guard—014 Military Pay and Personnel System of Records

**AGENCY:** Privacy Office; DHS.

**ACTION:** Notice of Privacy Act system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974, and as part of the Department of Homeland Security's ongoing effort to review and update legacy system of record notices, the Department of Homeland Security giving notice that it proposes to add a system of records to its inventory of record systems titled United States Coast Guard Military Pay and Personnel. This system is a compilation of nine legacy record systems: DOT/CG 534 Travel and Transportation of Household Effects (April 11, 2000); DOT/CG 537 FHA Mortgage Insurance for Servicemen in lieu of VHA Mortgage Insurance for Servicemen; DOT/CG 573 United States Public Health Services, Commissioned Officer Corps Staffing and Recruitment Files (April 11, 2000); DOT/CG 622 Military Training and Education Records (April 11, 2000); DOT/CG 623 Military Pay and Personnel System (April 11, 2000); DOT/CG 625 Officer Selection and Appointment System (April 11, 2000); DOT/CG 626 Official Officer Service Records (April 11, 2000); DOT/CG 629 Enlisted Personnel Record System (April 11, 2000); DOT/CG 630 Coast Guard Family Housing (April 11, 2000); and DOT/CG 640 Outside Employment of Active Duty Coast Guard Personnel (April 11, 2000). This record system will allow the Department of Homeland Security/United States Coast Guard to collect and maintain records regarding military pay and personnel. Categories of individuals, categories of records, and routine uses of these legacy system of records notices have been consolidated and updated to better reflect the United States Coast Guard's military service personnel record systems. This new system will be included in the Department of Homeland Security's inventory of record systems.

**DATES:** Written comments must be submitted on or before January 20, 2009. This new system will be effective January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0108 by one of the following methods:

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

• *Fax:* 1–866–466–5370.

• *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

• *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change and may be read at *http://www.regulations.gov*, including any personal information provided.

• *Docket:* For access to the docket, to read background documents, or comments received, go to *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: David Roberts (202–475–3521), Privacy Officer, United States Coast Guard. For privacy issues please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS)/United States Coast Guard (USCG) have relied on preexisting Privacy Act systems of records notices for the collection and maintenance of records that concern active duty, reserve, and retired active duty and retired reserve, as well as eligible dependent's military pay and personnel processing.

As part of its efforts to streamline and consolidate its record systems, DHS is updating and reissuing a USCG system of records under the Privacy Act (5 U.S.C. 552a) that deals with active duty, reserve, retired active duty, and retired reserve, as well as eligible dependent's military pay and personnel processing. This record system will allow DHS/USCG to collect and maintain records regarding military pay. The collection and maintenance of this information will assist DHS/USCG in meeting its obligation pay active duty, reserve, retired active duty, and retired reserve military personnel, as well as eligible dependents for their service.

In accordance with the Privacy Act of 1974, and as part of the DHS Privacy Office's ongoing effort to review and update legacy system of record notices DHS is giving notice that it proposes to add a system of records to its inventory

of record systems titled United States Coast Guard Military Pay and Personnel. This system is a compilation of nine legacy record systems: DOT/CG 534 Travel and Transportation of Household Effects (65 FR 19476 April 11, 2000); DOT/CG 537 FHA Mortgage Insurance for Servicemen in lieu of VHA Mortgage Insurance for Servicemen (65 FR 19476 April 11, 2000); DOT/CG 573 United States Public Health Services, Commissioned Officer Corps Staffing and Recruitment Files (65 FR 19476 April 11, 2000); DOT/CG 622 Military Training and Education Records (65 FR 19476 April 11, 2000); DOT/CG 623 Military Pay and Personnel System (65 FR 19475 April 11, 2000); DOT/CG 625 Officer Selection and Appointment System (65 FR 19476 April 11, 2000); DOT/CG 626 Official Officer Service Records (65 FR 19476 April 11, 2000); DOT/CG 629 Enlisted Personnel Record System (65 FR 19476 April 11, 2000); DOT/CG 630 Coast Guard Family Housing (65 FR 19476 April 11, 2000); and DOT/CG 640 Outside Employment of Active Duty Coast Guard Personnel (65 FR 19476 April 11, 2000). This record system will allow the DHS/USCG to collect and maintain records regarding military pay and personnel. Categories of individuals, categories of records, and routine uses of these legacy system of records notices have been consolidated and updated to better reflect the USCG's military service personnel record systems. This new system will be included in DHS's inventory of record systems.

## II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates individuals' information. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency record keeping practices transparent, to notify individuals regarding the use of their records, and to assist individuals to more easily find such files within the agency. Below is the description of the Military Pay and Personnel System of Records.

## III. Health Insurance Portability and Accountability Act

This system of records contains individually identifiable health information. The Health Insurance Portability and Accountability Act of 1996, applies to most of such health information. Department of Defense 6025.18–R may place additional procedural requirements on the uses and disclosures of such information beyond those found in the Privacy Act of 1974 or mentioned in this system of records notice.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this new system of records to the Office of Management and Budget and to Congress.

### System of Records

DHS/USCG–014.

**SYSTEM NAME:**

United States Coast Guard Military Pay and Personnel System.

**SECURITY CLASSIFICATION:**

Unclassified.

**SYSTEM LOCATION:**

Records are maintained at the United States Coast Guard Headquarters in Washington, DC and field offices.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Categories of individuals covered by this system include active duty, reserve, and retired active duty and retired reserve USCG military personnel and their annuitants and dependents. Also included are active duty and retired National Oceanic and Atmospheric Administration (NOAA) Officers and their annuitants and dependents, as well as Officers of the Commissioned Corps of the United States Public Heath Service (PHS) and their annuitants and dependents.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Categories of records in this system include:

- Individual's name;
- Social security number;
- Employee identification number;
- Date and place of birth;
- Gender;
- Minority designation and nationality;
- Marital status;
- Limited medical related information to include dates of physical examinations, color blindness, immunizations, weight and body mass index (and compliance to standards);
- Addresses;
- Total current monetary earnings, including overtime, computed to the nearest dollar;
- Number of hours worked;
- Leave accrual rate;
- Leave requests and balances;
- Health and life insurance requests;
- Payroll deduction requests;
- Information for the purpose of validating legal requirements for garnishment of wages;
- Salary rate;
- Cash awards;
- Retirement withholdings;
- Background information to include work experience;
- Education records, including: Highest level achieved; specialized education or training obtained in and outside of military service; non-traditional education support records; achievement and aptitude test results; academic performance records; correspondence course rate advancement records; military performance records; admissions processing records; grade reporting records; academic status records; transcript maintenance records;
- Military duty assignments;
- Ranks held;
- Allowances;
- Personnel actions such as promotions, demotions, or separations;
- Record of instances of Uniform Code of Military Justice infractions;
- Performance evaluations;
- Individual's desires for future assignments, training requested, and notations by assignment officers;
- Information for determinations of waivers and remissions of indebtedness to the United States Government;
- Travel claims, transportation claims, government bills of lading, and applications for shipment of household effects;
- USCG Housing System Records, including: Housing surveys, computer data summaries, correspondence from the individual seeking housing; and
- Names, dates of birth, addresses, social security numbers, and gender of annuitants and dependents of active duty, reserve, and retired active duty and reserve military members.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. 301; The Federal Records Act, 44 U.S.C. 3101; 5 U.S.C. 5501–5597; 10 U.S.C. 1043, 1147; 14 U.S.C. 92(I) 92(r), 93(g), 475, 512, 620, 632, 645, 681, 687; 37 U.S.C. 406; 42 U.S.C. 213, 253; 49 CFR 1.45, 1.46.

**PURPOSE(S):**

The purpose of this system is to administer the USCG active duty, reserve, and retired active duty and retired reserve military pay and personnel system. Additionally, the system is used to provide necessary information to Department of Commerce for NOAA Officers and to Health and Human Services Officers for the Commissioned Corps of the United States Public Heath Service (PHS) to administer their respective pay and personnel system.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

**Note:** This system of records contains individually identifiable health information. The Health Insurance Portability and Accountability Act of 1996, applies to most of such health information. Department of Defense 6025.18–R may place additional procedural requirements on the uses and disclosures of such information beyond those found in the Privacy Act of 1974 or mentioned in this system of records notice. Therefore, routine uses outlined below may not apply to such health information.

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records of information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice (including United States Attorney Offices) or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. Any employee of DHS in his/her official capacity;

3. Any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or

4. The United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security 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 harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) or harm to the individual who relies upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate Federal, State, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To the Department of Treasury for the purpose of disbursement of salary, United States Savings Bonds, allotments, or travel claim payments.

I. To Department of Commerce and Health and Human Services to administer their respective pay and personnel systems for NOAA Officers and the Commissioned Corps of the PHS, respectively.

J. To Federal, State, and local government agencies to disclose earnings and tax information, including the Internal Revenue Service and the Social Security Administration.

K. To the Department of Defense and Veterans Administration for determinations of benefit eligibility for military members and their dependents.

L. To the Department of Defense for manpower and readiness planning.

M. To the Comptroller General for the purpose of processing waivers and remissions.

N. To an individual's spouse, or person responsible for the care of the individual concerned when the individual to whom the record pertains is mentally incompetent, critically ill, or under other legal disability for the purpose of assuring the individuals is receiving benefits or compensation they are entitled to receive.

O. To a requesting government agency, organization, or individual the home address and other relevant information on those individuals who, it is reasonably believed, might have contracted an illness, been exposed to, or suffered from a health hazard while a member of government service.

P. To other government agencies for the purpose of earnings garnishment.

Q. To the Department of Defense for the purpose of preparing the Officer Register and Reserve Office Register, which is provided to all Coast Guard officers.

R. To education institutions or training facilities for purposes of enrollment and verification of employee attendance and performance.

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

None.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, CD–ROM, and DVD.

**RETRIEVABILITY:**

Records may be retrieved by name, social security number, or employee identification number.

**SAFEGUARDS:**

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. A defense in depth strategy has been employed. Overlapping and complimentary management, operational and technical security controls have been implemented and followed to minimize the risk of compromising the confidentiality or adversely impacting the integrity of the information that is being stored, processed, and/or transmitted. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

**RETENTION AND DISPOSAL:**

Travel and Transportation of Household Effects records are temporary and are destroyed six years after the period of the account. (AUTH GRS 9, Item 1).

U.S. Public Health Services (USPHS) Commissioned Officer Corps Staffing and Recruiting records are temporary and are transferred to Commission Personnel Operation Division upon completion of Coast Guard assignment. (AUTH NC1–26–76–2), item 359, and (NC1–26–80–4), item 151.

Military Training and Education, records are temporary, including training courses and related material, school and training files containing correspondence, reports and related paper on Coast Guard and Navy schools and trainee index cards. These records are destroyed when five years old. (AUTH NC1–26–76–2), items 559 and 561 and (NC1–26–80–4), item 338b.

Class folders containing personal and service history, muster card files, and recruit training record cards are destroyed when one year old (AUTH NC1–26–80–4), items 338b, 338c, 338d and 338e.

Military Pay and Personnel System records are temporary, and transferred to FRC 6 months after period of account, and destroyed 56 years after period covered by account (AUTH NC1–26–76–2), items 227a and 99d.

Officer Selection and Appointment System, records are temporary. Officer Candidates and Direct Commission Program application for selected applicants and filed in Official Personnel Folder (AUTH NC1–26–76–2), items 583a and 584a.

Non-selected Officer Candidate applicants are destroyed six months after deadline dates for class which application is made (NC1–26–76–2), item 583b.

For Non-selected Direct Commission Program applicants records are destroyed one year from date of board by which considered (NC1–26–79–2), item 584b.

For OCS and Direct Commission applicant files containing copies of applications for appointment in the Coast Guard Reserve, interviews, reports, and medical examination are destroyed when one year old (AUTH NC1–26–80–4 item 337b).

Official Officer Service Records are permanent and transferred records to the National Personnel Records Center (NPRC), St. Louis, MO, six months after separation or retirement. Transfer to NARA 62 years after date (AUTH: N1–330–04–1, Item 1).

Enlisted Personnel Records System records are permanent and transferred records to the National Personnel Records Center (NPRC), St. Louis, MO, six months after separation or retirement. Transfer to NARA 62 years after date (AUTH: N1–330–04–1, Item 1).

Records concerning housing are kept until the applicant is placed in housing. Coast Guard Family Housing records are temporary and destroyed when two years old (AUTH: GRS 15, items 1, 3, and 5a).

Outside Employment of Active Duty Coast Guard Personnel records are temporary and destroyed when three years old or when superseded ore obsolete, whichever is later (AUTH GRS 25), items, 1 and 9.

Leave and earnings statements and pay records are microfilmed and retained onsite for four years, then archived at the Federal Record Center, and destroyed when 50 years old.

Duplicate magnetic copies of the pay and personnel record are retained at an off site facility for a useful life of seven years.

Education records are kept for five years. Paper records for waivers and remissions are retained on site six years three months after the determination and then destroyed.

Paper records to determine legal sufficiency for garnishment are retained on site six years three months after the member separates from the service or the garnishment is terminated, and then destroyed.

Travel and transportation of household effects records are kept for three years, and then transferred to a Federal Records Center.

Records concerning congressional correspondence are maintained indefinitely because they were determined to be of historical value.

**SYSTEM MANAGER AND ADDRESS:**

For active duty military personnel of the USCG: Chief, Office of Personnel, USCG Headquarters, 2100 2nd Street, SW., Washington, DC 20593–0001. For USCG reserve military personnel and retired USCG reserve military personnel waiting pay at age 60: Chief, Office of Reserve Affairs, USCG Headquarters, 2100 2nd Street, SW., Washington, DC 20593–0001. For USCG waivers and remissions: Chief, Personnel Services Division, Office of Military Personnel, USCG Headquarters, 2100 2nd Street, SW., Washington, DC 20593–0001. For records used to determine legal sufficiency for garnishment of wages and pay records: Commanding Officer, USCG, Personnel Services Center, 444 SE Quincy Street, Topeka, KS 66683–3591. For data added to the decentralized data segment the commanding officer, officer-in-charge of the unit handling the military personnel's pay and personnel record, or Chief, Administrative Services Division for individuals whose records are handled by USCG Headquarters 2100 2nd Street, SW., Washington, DC 20593–0001.

For NOAA members: National Oceanic and Atmospheric Administration, Commissioned Personnel Division, 11400 Rockville Pike, Rockville, MD 20852.

For Officers of the Commissioned Corps, United States Public Health Service Office of Commissioned Corps Operations, 1100 Wootton Parkway, Suite 100, Rockville MD 20852.

**NOTIFICATION PROCEDURE:**

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to: For active duty military personnel of the USCG: Chief, Office of Personnel, USCG Headquarters, 2100 2nd Street, SW., Washington, DC 20593–0001. For USCG reserve military personnel and retired USCG reserve military personnel waiting pay at age 60: Chief, Office of Reserve Affairs, USCG Headquarters, 2100 2nd Street, SW., Washington, DC 20593–0001. For USCG waivers and remissions: Chief, Personnel Services Division, Office of Military Personnel, USCG Headquarters, 2100 2nd Street, SW., Washington, DC 20593–0001. For records used to determine legal

sufficiency for garnishment of wages and pay records: Commanding Officer, USCG, Personnel Services Center, 444 SE Quincy Street, Topeka, KS 66683–3591. For data added to the decentralized data segment the commanding officer, officer-in-charge of the unit handling the individual's pay and personnel record, or Chief, Administrative Services Division for individuals whose records are handled by USCG Headquarters 2100 2nd Street, SW., Washington, DC 20593–0001.

For NOAA members: National Oceanic and Atmospheric Administration, Commissioned Personnel Division, 11400 Rockville Pike, Rockville, MD 20852.

For Officers of the Commissioned Corps, United States Public Health Service Office of Commissioned Corps Operations, 1100 Wootton Parkway, Suite 100, Rockville, MD 20852.

When seeking records about yourself from this system of records or any other USCG system of records your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

• An explanation of why you believe the Department would have information on you,

• Specify when you believe the records would have been created,

• If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the USCG may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

**RECORD ACCESS PROCEDURES:**

See ''Notification procedure'' above.

**CONTESTING RECORD PROCEDURES:**

See ''Notification procedure'' above.

**RECORD SOURCE CATEGORIES:**

Individuals, USCG personnel officials, National Oceanic and Atmospheric Administration personnel officials, the Department of Defense, Commissioned Corp of Public Health Service personnel officials, previous employers, educational institutions, court records, and test results.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29793 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

**[Docket No. DHS–2008–0088]**

### Privacy Act of 1974; Federal Emergency Management Agency—003 National Flood Insurance Program Files System of Records

**AGENCY:** Privacy Office; DHS.

**ACTION:** Notice of Privacy Act system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974, the Department of Homeland Security is giving notice that it proposes to consolidate five legacy record systems and a new program into a Department of Homeland Security system of records notice titled, Department of Homeland Security Federal Emergency Management Agency—003 National Flood Insurance Program Files: FEMA/FIMA–2 National Flood Insurance Direct Servicing Agent Application and Related Documents Files (January 23, 2002); FEMA/FIMA–3 National Flood Insurance Bureau and Statistical Agent (BSA) Data Elements and Related Files (January 23, 2002); FEMA/FIMA–6 National Flood Insurance Special Direct Facility Repetitive Loss Target Group Records and Related Files (January 23, 2002); FEMA/FIMA–7 National Flood Insurance Community Rating System and Related Documents Files (January 23, 2002); and FEMA/FIA–2 National Flood Insurance Application and Related Documents Files (January 23, 2002), and the newly created National Flood Insurance Program Modernization, Business Process Improvement, and Systems Engineering Management Systems. This system will enable the Department of Homeland Security to administer the Federal Emergency Management Agency National Flood Insurance Program. Categories of individuals, categories of records, and the routine uses of these legacy system of records notices have been consolidated and updated to better reflect the Department of Homeland Security's Federal Emergency Management Agency National Flood Insurance Program record systems. This system will be included in the Department's inventory of record systems.

**DATES:** Written comments must be submitted on or before January 20, 2009. This new system will be effective January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0088 by one of the following methods:

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

• *Fax:* 1–866–466–5370.

• *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

• *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change and may be read at *http://www.regulations.gov*, including any personal information provided.

• *Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: Federal Emergency Management Agency Acting Privacy Officer, Federal Emergency Management Agency. For privacy issues please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS)/Federal Emergency Management Agency (FEMA) has relied on preexisting Privacy Act systems of records notices for the collection and maintenance of records pertaining to the National Flood Insurance Program, which is administered by DHS/FEMA.

In 1968, Congress created the National Flood Insurance Program (NFIP) in response to the rising cost of taxpayer funded disaster relief for flood victims and the increasing amount of damage caused by floods. The Mitigation

Directorate, a component of FEMA, manages the NFIP and oversees the floodplain management and mapping components of the Program.

Nearly 20,000 communities across the United States and its territories participate in the NFIP by adopting and enforcing floodplain management ordinances to reduce future flood damage. In exchange, the NFIP makes Federally-backed flood insurance available to homeowners, renters, and business owners in these communities.

Typically, a home or business owner will seek flood insurance from an insurance company that provides other lines of business such as car insurance or property and casualty homeowners insurance. In other cases, a mortgage lender will require flood insurance in addition to regular homeowner's insurance. If a homeowner's insurance company participates in the NFIP's Write-Your-Own (WYO) Program, and the home or business owner's building is located in a participating NFIP community, the home or business owner can purchase flood insurance.

This record system will allow DHS/FEMA to collect and maintain records regarding applicants, policyholders, and others, including insurance agents, associated with the National Flood Insurance Program. The system will be used by DHS to collect and maintain records on applicants and beneficiaries of the FEMA National Flood Insurance Program, as well as others who are involved in the National Flood Insurance Program, including WYO business transactions. The collection and maintenance of this information will assist DHS in meeting its obligation to administer the FEMA National Flood Insurance Program.

In accordance with the Privacy Act of 1974, DHS is giving notice that it proposes to consolidate five legacy record systems: FEMA/FIMA–2 National Flood Insurance Direct Servicing Agent Application and Related Documents Files (67 FR 3193 January 23, 2002), FEMA/FIMA–3 National Flood Insurance Bureau and Statistical Agent (BSA) Data Elements and Related Files (67 FR 3193 January 23, 2002), FEMA/FIMA–6 National Flood Insurance Special Direct Facility (SDF) Repetitive Loss Target Group Records and Related Files (67 FR 3193 January 23, 2002), FEMA/FIMA–7 National Flood Insurance Community Rating System and Related Documents Files (67 FR 3193 January 23, 2002), and FEMA/FIA–2 National Flood Insurance Application and Related Documents Files (67 FR 3193 January 23, 2002) into a DHS/FEMA system of records notice titled, Federal Emergency Management Agency National Flood Insurance Program Files. This system will enable DHS/FEMA to administer the National Flood Insurance Program. Categories of individuals, categories of records, and the routine uses of these legacy system of records notices have been consolidated and updated to better reflect DHS/FEMA's National Flood Insurance Program record systems. This system will be included in DHS's inventory of record systems.

## II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency record keeping practices transparent, to notify individuals regarding the uses of their records, and to assist individuals to more easily find such files within the agency. Below is the description of the Federal Emergency Management Agency National Flood Insurance Program Files System of Records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this newly revised system of records to the Office of Management and Budget (OMB) and to Congress.

**System of Records: DHS/FEMA–003**

**SYSTEM NAME:**

Federal Emergency Management Agency—003 National Flood Insurance Program Files.

**SECURITY CLASSIFICATION:**

Unclassified.

**SYSTEM LOCATION:**

Records are maintained at the Federal Emergency Management Agency Headquarters in Washington, DC and in field offices.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Categories of individuals covered by this system include applicants and policyholders of flood insurance; Severe Repetitive Loss (SRL) property owners (previously known as ''Repetitive Loss Target Group'' (RLTG)); insurance companies and agents; WYO Companies and lenders; communities that submit Community Rating Survey (CRS) applications; and certified flood adjusters.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Categories of records in this system include:

- Individual's name;
- Social security number;
- Addresses;
- Telephone numbers;
- E-mail address;
- Tax ID numbers;
- Insurance policy numbers and information;
- Group Flood Insurance Program (GFIP) Certificate Holders
- Property information:
  - Bank/lender
  - Date of mortgage
  - Address of bank/lender
  - Loan information, such as: loan number, names and addresses of first and possible second mortgagees, and file or identification number of loan;
  - Taxpayer's identification number
- Administration records, such as: transaction errors and rejects per WYO Company, documents and photographs necessary to substantiate a claim for losses due to burglary or robbery, reports of adjusters, and adjusters' bills paid by the program;
- Names and contact information of insurance agents;
- Write Your Own Companies (WYO's);
- Severe Repetitive Loss (SRL) property owners;
- Community Rating System (CRS) applications to adjust NFIP insurance premiums based on the mitigation of activities implemented by a community;
- Names and contact information of individuals seeking NFIP data; and

• Data elements required for reporting purposes under the FEMA Mitigation Directorate Bureau and Statistical Agent contract for private insurance companies. Data elements include, but are not limited to:

○ Data elements regarding policy reinstatement with/without policy changes,

○ Data elements regarding insurance claims, and

○ Data elements regarding payment of claims.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

The Federal Records Act, 44 U.S.C. 3101; National Flood Insurance Act of 1968, as amended and Flood Disaster Protection Act of 1973, 42 U.S.C. 4001, *et seq.*

**PURPOSE(S):**

The purpose of this system is to manage the National Flood Insurance Program, to assess National Flood Insurance Program user satisfaction, and to provide information on the National Flood Insurance Program to those who inquire.

**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, all or a portion of the records of information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice (DOJ) (including United States Attorney Offices) or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. Any employee of DHS in his/her official capacity;

3. Any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or

4. The United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal Government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security 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 harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) or harm to the individual who relies upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate Federal, State, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To insurance agents, brokers, adjusters, lending institutions, WYO Companies as authorized under 44 CFR 62.23, the Army Corps of Engineers, Small Business Association, the American Red Cross, the United States Department of Agriculture Farm Service Agency, State and local governments, including State and local individual and family grant and assistance agencies, National Flood Insurance Program policy and claims records for carrying out the purposes of the National Flood Insurance Program, to determine eligibility for benefits, and to verify non-duplication of benefits following a flooding event.

I. To States to provide Group Flood Insurance Program (GFIP) certificates for carrying out the purposes of the National Flood Insurance Program.

J. To property loss reporting bureaus, State insurance departments, and insurance companies to investigate fraud or potential fraud in connection with claims, subject to the approval of the Office of Inspector General, DHS.

K. To State and local government individual and family grant agencies to ascertain the degree of financial burden that State and local governments expect to assume in the event of a flooding disaster.

L. To State and local government agencies to further the National Flood Insurance Program marketing activities.

M. To State and local government agencies that provide the names and addresses of policyholders and a brief general description of their plan for acquiring and relocating their flood prone properties to ensure that they are engaged in flood plain management, improved real property acquisitions, relocation projects that are consistent with the National Flood Insurance Program and, upon the approval of the Administrator, Federal Insurance Mitigation Administration, that the use furthers the flood plain management and hazard mitigation goals of the agency.

N. To the Army Corps of Engineers, State and local government agencies and municipalities to review National Flood Insurance Program policy and claims files to assist in hazard mitigation and flood plain management activities and in monitoring compliance with the flood plain management measures duly adopted by the community.

O. To lending institutions, mortgage servicing companies, and others servicing mortgage loan portfolios, as well as private companies engaged in or planning to engage in activities to market or assist lenders and mortgage servicing companies to comply with the requirements of the Flood Disaster Protection Act of 1973, including lender compliance, and to market the sale of flood insurance policies under the National Flood Insurance Program.

P. To current owners of properties designated under the National Flood

Insurance Program as SRL Target Group properties, the dates and dollar amounts of loss payments made to prior owners so current owners may evaluate whether that designation is appropriate and may, if they believe the designation is not appropriate, use the information to appeal that designation.

Q. To the Special Direct Facility National Flood Insurance Program Repetitive Loss records for the processing of SRL Target Group policyholder underwriting and claims records.

R. To Preferred Risk Property (PRP) owners who are contesting the denial of the PRP applications, the properties' prior loss history.

S. To Federal, State, and local government agencies to conduct research, analysis, and feasibility studies.

T. To communities to provide repetitive loss records that pertain to that community.

U. To OMB in connection with the review of private relief legislation in accordance with OMB Circular No. A–19.

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

Disclosure under 5 U.S.C. 552a(b)(12). DHS/FEMA may make disclosures from this system to ''consumer reporting agencies'' as defined in the Fair Credit Reporting Act 15 U.S.C. 1681a(f), as amended; or the Federal Claims Collection Act of 1966 31 U.S.C. 3701(a)(3), as amended.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD–ROM.

**RETRIEVABILITY:**

Records will be retrieved by individual's name; insurance policy number; Repetitive Loss Target Group number; property address; zip code; telephone number; insurance agents; company name, including lenders and WYO Companies; community name; and Community Rating System application number.

**SAFEGUARDS:**

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated system security access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

**RETENTION AND DISPOSAL:**

Policy records are kept as long as the property owner is enrolled in the insurance program and pays the policy premiums, and cutoff when the file becomes inactive. Policy records are destroyed 5 years after the cutoff with FEMA Records Schedule N1–311–86–1, Item 1A13a(2). Claim records are maintained for 6 years and 3 months after final action, unless litigation exists. Records are disposed of FEMA Records Schedule N1–311–86–1, Item 2A12(2)(b). Claim records with pending litigation are destroyed after review by General Counsel with FEMA Records Schedule N1–311–86–1, Item 2A13a(1). Consumer records, including Community Rating System records, are retired to the Federal Record Center 2 years after cutoff, and destroyed 10 years after cutoff, IAW FEMA Records Schedule N1–311–02–01, Item 4.

**SYSTEM MANAGER AND ADDRESS:**

Administrator, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency Headquarters, 500 C Street, SW., Washington, DC 20472.

**NOTIFICATION PROCEDURE:**

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to FEMA's FOIA Officer, 500 C Street, SW., Attn: FOIA Coordinator, Washington, DC 20472.

When seeking records about yourself from this system of records or any other FEMA system of records your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you,
- Specify when you believe the records would have been created,
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the FEMA may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

**RECORD ACCESS PROCEDURES:**

See ''Notification procedure'' above.

**CONTESTING RECORD PROCEDURES:**

See ''Notification procedure'' above.

**RECORD SOURCE CATEGORIES:**

Individual's who apply for and individuals who are insured under the National Flood Insurance Program, WYO Companies, flood insurance agents and lenders, individuals who request information on the National Flood Insurance Program, appraisal records, title reports, and homeowner reports.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29794 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

**[Docket No. DHS–2008–0126]**

### Privacy Act of 1974; Federal Emergency Management Agency–005 Temporary and Permanent Relocation and Personal and Real Property Acquisitions and Relocation Files System of Records

**AGENCY:** Privacy Office; DHS.

**ACTION:** Notice of Privacy Act system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974 and as part of the Department of Homeland Security's ongoing effort to review and update legacy system of records notices, the Department of Homeland Security is giving notice that it proposes to update and reissue the following legacy record

system: FEMA/State and Local Programs and Support (SLPS)–6 Temporary and Permanent Relocation and Personal and Real Property Acquisitions and Relocation Files (September 7, 1990) as a Department of Homeland Security system of records notice titled, Department of Homeland Security Federal Emergency Management Agency—005 Temporary and Permanent Relocation and Personal and Real Property Acquisitions and Relocation Files. Categories of individuals, categories of records, and the routine uses of this legacy system of records notice have been reviewed updated to better reflect the Department of Homeland Security's Federal Emergency Management Agency—005 Temporary and Permanent Relocation and Personal and Real Property Acquisitions and Relocation Files. This new system will be included in the Department of Homeland Security's inventory of record systems.

**DATES:** Written comments must be submitted on or before January 20, 2009. This new system will be effective January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0126 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change and may be read at *http://www.regulations.gov*, including any personal information provided.
- *Docket:* For access to the docket, to read background documents, or comments received, go to *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: Federal Emergency Management Agency Privacy Officer, Federal Emergency Management Agency. For privacy issues please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

## I. Background

Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS)/Federal Emergency Management Agency (FEMA) have relied on preexisting Privacy Act systems of records notices for the collection and maintenance of records that concern DHS/FEMA—005 Temporary and Permanent Relocation and Personal and Real Property Acquisitions and Relocation Files.

As part of its efforts to streamline and consolidate its record systems, DHS is updating and reissuing a system of records under the Privacy Act (5 U.S.C. 552a) that deals with the DHS/FEMA—005 Temporary and Permanent Relocation and Personal and Real Property Acquisitions and Relocation Files. This record system will allow DHS/FEMA to collect and maintain records regarding individual properties that qualify for acquisition and/or relocation under the Comprehensive Environmental Response Compensation Liability Act of 1980, as amended, and National Flood Insurance Act as amended, 42 U.S.C. 4001. The collection and maintenance of this information will assist DHS/FEMA in tracking individual properties that qualify for acquisition and/or relocation under these Acts.

In accordance with the Privacy Act of 1974 and as part of DHS's ongoing effort to review and update legacy system of records notices, DHS is giving notice that it proposes to update and reissue the following legacy record system FEMA/SLPS–6 Temporary and Permanent Relocation and Personal and Real Property Acquisitions and Relocation Files (55 FR 37182 September 7, 1990) as a DHS system of records notice titled DHS/FEMA—005 Temporary and Permanent Relocation and Personal and Real Property Acquisitions and Relocation Files. DHS has reviewed the categories of individuals and categories of records, and has updated the routine uses of this legacy system of records notice to better reflect DHS/FEMA—005 Temporary and Permanent Relocation and Personal and Real Property Acquisitions and Relocation Files. This new system will be included in DHS's inventory of record systems.

## II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency record keeping practices transparent, to notify individuals regarding the uses of their records, and to assist individuals to more easily find such files within the agency. Below is the description of the DHS/FEMA—005 Temporary and Permanent Relocation and Personal and Real Property Acquisitions and Relocation Files System of Records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this new system of records to the Office of Management and Budget and to Congress.

### System of Records: DHS/FEMA–005

#### SYSTEM NAME:

Federal Emergency Management Agency—005 Temporary and Permanent Relocation and Personal and Real Property Acquisitions and Relocation Files.

#### SECURITY CLASSIFICATION:

Unclassified.

#### SYSTEM LOCATION:

Records are maintained at the Federal Emergency Management Agency Headquarters in Washington, DC and field offices.

#### CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Categories of individuals covered by this system include individuals whose real property has been, or is being, acquired by DHS/FEMA. Also included are individuals who have been, or are being, relocated by DHS/FEMA.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Categories of records in this system include:

- Individual's name;
- Taxpayer identification number/social security number;
- Amounts paid for purchase of property including records of negotiations and offers;
- Title search documentation including property titles, title company correspondence, closing papers, tax records, and contracts;
- Loan interest payment information including mortgage payment papers, loan documentation claims, and DHS/FEMA approvals;
- Information for determining benefit amounts for real property acquisition including tax records, mortgage information, and divorce decrees;
- Information concerning replacement housing determinations including tax information, affidavits, and determinations;
- Relocation claims payment information including documents which verify that funds have been spent, deeds, contracts, building estimates, construction bills, loan papers, leases, cancelled checks, claim forms, and Decent, Safe and Sanitary Inspection Forms;
- Deeds, contractual sale documents, notations of follow-up actions, appraiser qualifications, rent supplement information, insurance verifications, moving cost information, permanent relocation questionnaires including background information on displaced persons, and information supplied by displaced persons to support claims for real property acquisition and relocation assistance. The temporary relocation file may contain the following:
  - Applicant contact sheets;
  - Application for assistance;
  - Leases and/or reimbursement agreements and corresponding housing inspection reports;
  - Requests for payment with supporting bills, receipts, etc., for relocation expenses and payment records to individuals and businesses; and
  - Move-out records.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

Federal Records Act, 44 U.S.C. 3101; Comprehensive Environmental Response Compensation Liability Act (CERCLA) of 1980, 42 U.S.C. 9601 *et seq.*; Executive Order 12580; Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. 4601 *et seq.*; National Flood Insurance Act of 1968 and Flood Disaster Protection Act of 1973, 42 U.S.C. 4001, *et seq.* and Executive Order 9397.

**PURPOSE(S):**

The purpose of this system is to track individual properties that qualify for acquisition and/or relocation under the Comprehensive Environmental Response Compensation Liability Act of 1980, as amended, and the National Flood Insurance Act, 42 U.S.C. 4001, as amended.

**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, all or a portion of the records of information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. Any employee of DHS in his/her official capacity;

3. Any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or

4. The United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security 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 harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) or harm to the individual who relies upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate Federal, State, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To the affected State or political subdivision thereof for the purpose of determining the State's or subdivision's eligibility for tracking title to the acquired property for recreational and open space resources.

I. To the Environmental Protection Agency for the purpose of verifying the proper eligibility and use of Superfund monies to acquire properties found to be uninhabitable for the population and in connection with legal cases brought under the Superfund.

J. To the Small Business Administration for the purpose of determining the individual/business eligibility for loans and no duplication of funds.

K. To the Department of Justice, or a United States Attorney for legal representation in duplication of benefits provided to the individual or legal cases brought by or against FEMA, or in the case of Superfund monies, those brought by or against the Environmental Protection Agency.

L. To the Department of Justice for the purpose of obtaining official title opinions prior to acquisition as outlined under Section 1362 acquisitions.

M. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of DHS or is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

Disclosure pursuant to 5 U.S.C. 552a(b)(12): Disclosures may be made from this system to ''consumer reporting agencies'' as defined in the Fair Credit Reporting Act (15 U.S.C. 1681a(f) or the Federal Claims Collection Act of 1966 (31 U.S.C. 3701(a)(3)).

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD–ROM.

**RETRIEVABILITY:**

Records may be retrieved by individual's name, property addresses, mobile home sales documents, leases, and contracts.

**SAFEGUARDS:**

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

**RETENTION AND DISPOSAL:**

Permanent Personal and Real Property Acquisition and Relocation records are covered by General Record Schedules 3 and 4. Original files regarding occupant-related documents (e.g., site requests, mobile home sales documents, leases, and contracts) will be consolidated at regional offices at the end of Phase II (e.g., when shelterees are moved to permanent housing) and destroyed 6 years and 3 months after files are consolidated in accordance with FEMA Record Schedule N1–311–86–1, Item 4C8b(1). Files relating to permanent relocations under Superfund and purchases of properties under Section 1362 are permanent and will be maintained in accordance with FEMA Records Schedule N1–311–86–1, Item 4C10d.

**SYSTEM MANAGER AND ADDRESS:**

For Superfund acquisitions—Associate Director, State and Local Programs and Support Directorate, Federal Emergency Management Agency, Washington, DC 20472.

**NOTIFICATION PROCEDURE:**

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to FEMA's FOIA Officer, 500 C Street, SW., Attn: FOIA Coordinator, Washington, DC 20472.

When seeking records about yourself from this system of records or any other FEMA system of records your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you,
- Specify when you believe the records would have been created,
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the FEMA may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

**RECORD ACCESS PROCEDURES:**

See ''Notification procedure'' above.

**CONTESTING RECORD PROCEDURES:**

See ''Notification procedure'' above.

**RECORD SOURCE CATEGORIES:**

Individuals, appraisal records, title reports, or homeowner reports.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29796 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

**[Docket No. DHS–2008–0155]**

### Privacy Act of 1974; U.S. Customs and Border Protection—010 Persons Engaged in International Trade in Customs and Border Protection Licensed/Regulated Activities System of Records

**AGENCY:** Privacy Office; DHS.

**ACTION:** Notice of Privacy Act system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974, the Department of Homeland Security is giving notice that it proposes to consolidate eight legacy record systems into a U.S. Customs and Border Protection system of records notice titled, U.S. Customs and Border Protection Persons Engaged in International Trade in Customs and Border Protection Licensed/Regulated Activities: Treasury/CS.040 Carrier File, October 18, 2001; Treasury/CS.041 Cartmen or Lightermen, October 18, 2001; Treasury/CS.057 Container Station Operator Files, October 18, 2001; Treasury/CS.069 Customs Brokers File, October 18, 2001; Treasury/CS.137 List of Vessel Agents Employees, October 18, 2001; Treasury/CS.260 Warehouse Proprietor Files, October 18, 2001; Treasury/CS.271 Cargo Security Record System, October 18, 2001; and Treasury/CS.274 Importers, Brokers, Carriers, Individuals and Sureties Master Files, October 18, 2001. Categories of individuals, categories of records, and the routine uses have been consolidated and updated to better reflect the U.S. Customs and Border Protection record systems that collect and maintain information on persons engaged in international trade in Customs and Border Protection licensed/regulated activities. The Department of Homeland Security is

issuing a Notice of Proposed Rulemaking concurrent with this SORN in the **Federal Register**. The exemptions for the legacy system of records notices will continue to be applicable until the final rule for this system of records notice is completed. This system will be included in the Department's inventory of record systems.

**DATES:** Written comments must be submitted on or before January 20, 2009. This new system will be effective January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0155 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change and may be read at *http://www.regulations.gov*, including any personal information provided.
- *Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: Laurence E. Castelli (202–325–0280), Chief, Privacy Act Policy and Procedures Branch, U.S. Customs and Border Protection, Office of International Trade, Regulations & Rulings, Mint Annex, 1300 Pennsylvania Ave., NW., Washington, DC 20229. For privacy issues contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

## I. Background

Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS)/U.S. Customs and Border Protection (CBP) have relied on preexisting Privacy Act systems of records notices for the collection and maintenance of records pertaining to persons engaged in international trade in CBP licensed/regulated activities.

As part of its efforts to streamline and consolidate its record systems, DHS is establishing a component system of records under the Privacy Act (5 U.S.C. 552a) for DHS/CBP that deals with persons engaged in international trade in CBP licensed/regulated activities. This record system is titled, U.S. Customs and Border Protection Persons Engaged in International Trade in CBP Licensed/Regulated Activities. This system will be used by DHS/CBP to collect and maintain records on persons engaged in international trade in CBP licensed/regulated activities.

In accordance with the Privacy Act of 1974, DHS is giving notice that it proposes to consolidate eight legacy record systems into a DHS/CBP system of records notice titled, U.S. Customs and Border Protection Persons Engaged in International Trade in Customs and Border Protection Licensed/Regulated Activities: Treasury/CS.040 Carrier File (66 FR 52984 October 18, 2001); Treasury/CS.041 Cartmen or Lightermen (66 FR 52984 October 18, 2001); Treasury/CS.057 Container Station Operator Files (66 FR 52984 October 18, 2001); Treasury/CS.069 Customs Brokers File (66 FR 52984 October 18, 2001); Treasury/CS.137 List of Vessel Agents Employees (66 FR 52984 October 18, 2001); Treasury/CS.260 Warehouse Proprietor Files (66 FR 52984 October 18, 2001); Treasury/CS.271 Cargo Security Record System (66 FR 52984 October 18, 2001); and Treasury/CS.274 Importers, Brokers, Carriers, Individuals and Sureties Master Files (66 FR 52984 October 18, 2001). Categories of individuals, categories of records, and the routine uses have been consolidated and updated to better reflect DHS/CBP record systems that collect and maintain information on persons engaged in international trade in CBP licensed/regulated activities. Additionally, DHS is issuing a Notice of Proposed Rulemaking (NPRM) concurrent with this system of records notice (SORN) in the **Federal Register**. The exemptions for the legacy system of records notices will continue to be applicable until the final rule for this SORN is completed. This system will be included in the Department's inventory of record systems.

## II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the U.S. Government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass U.S. citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency record keeping practices transparent, to notify individuals regarding the uses of their records, and to assist individuals to more easily find such files within the agency. Below is the description of the DHS/CBP Persons Engaged in International Trade in CBP Licensed/Regulated Activities System of Records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this system of records to the Office of Management and Budget (OMB) and to Congress.

### System of Records: DHS/CBP–010

**SYSTEM NAME:**

U.S. Customs and Border Protection Persons Engaged in International Trade in Customs and Border Protection Licensed/Regulated Activities.

**SECURITY CLASSIFICATION:**

Unclassified.

**SYSTEM LOCATION:**

Records are maintained at the U.S. Customs and Border Protection Headquarters in Washington, DC and in field offices.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Categories of individuals covered by this system include importers, brokers, carriers, sureties; officers/owners, employees, associates of customs bonded carriers, drivers of motor vehicles, licensed cartmen, licensed lightermen, individuals and firms who have applied for or hold a license as a bonded cartman or lighterman, individuals employed by cartmen or lightermen, present and past container station operators and warehouse proprietors and their employees, including those who require an

investigation, licensed customs brokers, employees of customs brokers, individuals or firms who have applied for a broker's license, airport and airline employees with access to the CBP controlled area of a terminal, and employees of vessel agents.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Categories of records in this system may include:

- Individual's name;
- Social security number;
- Date and place of birth;
- Addresses and notification of change of address;
- Personal characteristics;
- Photograph or other biometrics;
- History of past employment;
- Previous five years residences,
- Alias;
- Citizenship;
- Military records;
- Criminal record other than traffic violations;
- Use of narcotic drugs;
- Organization's name;
- Copies of bonds, entries, bills, and data center listings;
- Location of business records;
- Status reports of individuals' application including issuance, denial or renewal;
- Copies of incoming and outgoing correspondence relating to persons engaged in international trade in CBP licensed/regulated activities;
- Requests for written approval to employ persons who have been convicted of a felony;
- Applications for cartmen/lightermen licenses and identification cards;
- Applications and approvals/denials of bonds to act as container station operator or warehouse proprietor;
- Reports of investigations;
- Fingerprint cards;
- Information regarding proposed administrative disciplinary action against customs brokers for violation of the regulations governing the conduct of their business; and
- Determinations as to whether CBP issued or did not issue a particular license or permit and the type of license or permit.

*Authority for maintenance of the system:*

5 U.S.C. 301; the Federal Records Act, 44 U.S.C. 3101; Executive Order 9373; 19 U.S.C. 1484, 1485, 1498, 1499, 1509, 1551, 1551a, 1555, 1556, 1565, 1624, and 1641; 19 CFR parts 19, 111, 112, 113, 141, 142, 148, and 163..

**PURPOSE(S):**

The purpose of this system is to collect and maintain records on persons engaged in international trade in CBP licensed/regulated activities. These records include identifying information as well as the results of background checks or official vetting performed to ensure that CBP's approval of the individuals' right to perform the licensed or regulated activity is appropriate.

**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, all or a portion of the records of information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. Any employee of DHS or any component in his/her official capacity;

3. Any employee of DHS or any component in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or

4. The U.S. or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS or CBP determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS or CBP collected the records.

B. To a congressional office in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS or CBP suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised;

2. DHS or CBP has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS, CBP, or another agency or entity) or harm to the individual who relies upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS or CBP's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS or CBP, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS/CBP officers and employees.

G. To appropriate Federal, State, local, tribal, or foreign governmental agencies or multilateral governmental organizations responsible for investigating or prosecuting the violations of, or for enforcing or implementing, a statute, rule, regulation, order, license, or treaty where DHS determines that the information would assist in the enforcement of civil or criminal laws.

H. To an appropriate Federal, State, local, tribal, foreign, or international agency, if the information is relevant and necessary to a requesting agency's decision concerning the hiring or retention of an individual, or issuance of a security clearance, license, contract, grant, or other benefit, or if the information is relevant and necessary to a DHS decision concerning the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant or other benefit and disclosure is appropriate to the proper performance of the official duties of the person making the request.

I. To a court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations or in connection with criminal law proceedings or in response to a subpoena form a court of competent jurisdiction.

J. To third parties during the course of a law enforcement investigation or

background check to the extent necessary to obtain information pertinent to the investigation, provided disclosure is appropriate to the proper performance of the official duties of the officer making the disclosure.

K. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of DHS or is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

None.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD–ROM.

**RETRIEVABILITY:**

Records are retrieved by individual's name or organization's name.

**SAFEGUARDS:**

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated system security access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

**RETENTION AND DISPOSAL:**

• Carrier records are retained by CBP for six years after the death of the licensee or revocation in accordance with the CBP, Records Control Manual, Schedule 6, Custody of Merchandise, Item 2.

• Broker files and records of broker's employees are retained by CBP for six years after the death of the licensee or revocation in accordance with the CBP, Records Control Manual, Schedule 6, Custody of Merchandise, Item 2. These files are periodically updated and removed to an inactive file, as necessary.

• Cartmen and lightermen files are reviewed annually at which time cancelled identification cards are removed. Closed CBP Form 3078s (Application for Identification Card) may also be removed, but normally are held for approximately three years incase a new application is received from the same company or transferred to another company after investigation.

• Container station operator files are disposed of in accordance with the CBP Records Control Manual, Schedule 6, Custody of Merchandise Records, Item 10.

• Records on warehouse proprietor and vessel agent employees are maintained by the organization for the duration of the individual's employment and retained by CBP for six years after the death of the licensee or revocation in accordance with the CBP, Records Control Manual, Schedule 6, Custody of Merchandise, Item 2.

• Records on drivers are maintained in an active file until revoked or cancelled. After revocation or cancellation, the information folder is placed in an inactive file for five years, and then disposed of in accordance with the General Services Administration Disposal Manual.

• Information on proprietor bonded warehouse operators and employees is retained on file until Customs bonded operations cease and are discontinued, and then maintained in an inactive file for three years. Final disposition is in accordance with the General Services Administration Disposal Manual.

• Files on brokers, carriers, and sureties are maintained for six years after death of licensee or revocation in accordance with the CBP Records Control Manual. In accordance with the Records Control Manual, Schedule 9 Entry Processing, files on importers are maintained in connection with the respective entry of merchandise for eight years after liquidation of the entry, which is the final determination of classification and duty relating to the imported merchandise by CBP.

**SYSTEM MANAGER AND ADDRESS:**

Executive Director, Commercial Targeting and Enforcement, Office of International Trade, U.S. Customs and Border Protection, Customs and Border Protection Headquarters, 1300 Pennsylvania Avenue, NW., Mint Annex, Washington, DC 20229.

**NOTIFICATION PROCEDURE:**

The Secretary of Homeland Security has exempted this system from certain aspects of the notification, access, and amendment requirements of the Privacy Act. CBP will review each request to determine whether or not notification, access, or amendment should be provided. Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to CBP's FOIA Officer, 1300 Pennsylvania Avenue, NW., Mint Annex, Washington, DC 20229.

When seeking records about yourself from this system of records or any other CBP system of records your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

• An explanation of why you believe the Department would have information on you,

• Specify when you believe the records would have been created,

• If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information CBP may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

**RECORD ACCESS PROCEDURES:**

See ''Notification procedure'' above.

**CONTESTING RECORD PROCEDURES:**

See ''Notification procedure'' above.

**RECORD SOURCE CATEGORIES:**

Records are obtained by authorized Customs forms or electronic formats from individuals and/or companies incidental to the conduct of foreign trade and required by the Customs Service in administering the tariff laws and regulations of the United States. Individuals; organizations; DHS/CBP; correspondence; investigation reports

and supporting materials; applications for bonds and licenses, and other DHS/CBP memoranda.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

The Secretary of Homeland Security has exempted this system pursuant to exemption 5 U.S.C. 552a(j)(2) of the Privacy Act, portions of this system are exempt from 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5) and (e)(8); (f), and (g). Additionally, the Secretary has exempted this system pursuant to 5 U.S.C. 552a(k)(2) of the Privacy Act from subsections (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f).

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29799 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

**[Docket No. DHS–2008–0109]**

### Privacy Act of 1974; United States Coast Guard—017 Federal Medical Care Recovery Act System of Records

**AGENCY:** Privacy Office; DHS.

**ACTION:** Notice of Privacy Act system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974 and as part of the Department of Homeland Security's ongoing effort to review and update legacy system of records notices, the Department of Homeland Security is giving notice that it proposes to update and reissue the following legacy record system DOT/CG 577 Federal Medical Care Recovery Act Record System (April 11, 2000) as a Department of Homeland Security system of records notice titled United States Coast Guard Federal Medical Care Recovery Act. This system will allow the Department of Homeland Security/United States Coast Guard to collect and maintain Federal Medical Care Recovery Act claims. Categories of individuals, categories of records, and the routine uses of this legacy system of records notice have been reviewed and updated to better reflect the Department of Homeland Security/United States Coast Guard's Federal Medical Care Recovery Act record system. This new system will be included in the Department of Homeland Security's inventory of record systems.

**DATES:** Written comments must be submitted on or before January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0109 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change and may be read at *http://www.regulations.gov*, including any personal information provided.
- *Docket:* For access to the docket, to read background documents, or comments received, go to *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: David Roberts (202–475–3521), Privacy Officer, United States Coast Guard. For privacy issues please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS)/United States Coast Guard (USCG) have relied on pre-existing Privacy Act systems of records notices for the collection and maintenance of records that concern the USCG Federal Medical Care Recovery Act (FMCRA).

As part of its efforts to streamline and consolidate its record systems, DHS/USCG is updating and reissuing a DHS/USCG system of records under the Privacy Act (5 U.S.C. 552a) that deals with the FMCRA. This record system will allow DHS/USCG to collect and maintain records regarding the FMCRA. The collection and maintenance of this information will assist DHS/USCG in meeting its obligation to address FMCRA claims. FMCRA is a statute that requires DHS/USCG to pursue collection actions for medical care provided to its beneficiaries. The FMCRA statute allows DHS/USCG to join and start their own action to collect for the medical care and lost wages provided to the beneficiary.

In accordance with the Privacy Act of 1974 and as part of DHS's ongoing effort to review and update legacy system of records notices, DHS is giving notice that it proposes to update and reissue the following legacy record system DOT/CG 577 Federal Medical Care Recovery Act Record System (65 FR 19475 April 11, 2000) as a DHS/USCG system of records notice titled Federal Medical Care Recovery Act. This system will allow DHS/USCG to collect and maintain FMCRA claims. Categories of individuals and categories of records have been reviewed, and the routine uses of this legacy system of records notice have been updated to better reflect the DHS/USCG's FMCRA record system. This new system will be included in the DHS's inventory of record systems.

#### II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency record keeping practices transparent, to notify individuals regarding the uses of their records, and to assist individuals to more easily find such files within the agency. Below is the description of the FMCRA Files System of Records.

#### III. Health Insurance Portability and Accountability Act

This system of records contains individually identifiable health information. The Health Insurance Portability and Accountability Act of

1996, applies to most of such health information. Department of Defense 6025.18–R may place additional procedural requirements on the uses and disclosures of such information beyond those found in the Privacy Act of 1974 or mentioned in this system of records notice.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this new system of records to the Office of Management and Budget and to Congress.

**System of Records**
**DHS/USCG–017**

**SYSTEM NAME:**

United States Coast Guard—017 Federal Medical Care Recovery Act.

**SECURITY CLASSIFICATION:**

Unclassified.

**SYSTEM LOCATION:**

Records are maintained at USCG Headquarters in Washington, DC, in field locations, and at USCG health care facilities at which the USCG military personnel or eligible dependent receives treatment.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Categories of individuals covered by this system include active duty, reserve, and retired active duty, retired reserve, and their eligible dependents. Also included are insurance company employees, related legal staff, the alleged tortfeasor. Finally, individuals such as Search and Rescue victims, employees, volunteers, or others who are provided emergency care by the USCG.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Categories of records in this system include:

- Military personnel's name;
- Eligible dependent's name;
- Social Security number;
- Gender;
- Date of birth;
- Case number;
- Insurance company's name and representative's name;
- Legal firm's name and legal representative's name;
- Addresses;
- Telephone numbers;
- Correspondence, memoranda, and related documents concerning potential and actual FMCRA claims;
- Police reports;
- Witness statements;
- Court documentation;
- Basic contact information for insurance companies, legal staff, and tortfeasor;
- Copies of medical and dental treatment provided to the individual subject of the claim;
- Copies of medical bills associated with civilian care provided at government expense; and
- Automated data processing (ADP) records containing identifying data on individuals, unit of assignment and address, home address, the amount of the claim, the amount paid to the government on the claim, dates of correspondence sent, due dates of reply, claim number, date claim opened, and date claim closed.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. 301; The Federal Records Act, 44 U.S.C. 3101; 14 U.S.C. 632.; 10 U.S.C. 1095, Uniformed Services Medical and Dental Care; 42 U.S.C. 2651 *et seq.*, Federal Medical Care Recovery Act. 3 CFR 25.131, 133.

**PURPOSE(S):**

The purpose of this system is to collect and maintain FMCRA claims for the government.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

**Note:** For records of identity, diagnosis, prognosis, or treatment of any client/patient, irrespective of whether or when he/she ceases to be a client/patient, maintained in connection with the performance of any alcohol or drug abuse prevention and treatment function conducted, requested, or directly or indirectly assisted by any department or agency of the United States, shall, except as provided therein, be confidential and be disclosed only for the purposes and under circumstances expressly authorized in 42 U.S.C. 290dd–2. The results of a drug test of civilian employees may be disclosed only as expressly authorized under 5 U.S.C. 7301. These statutes take precedence over the Privacy Act of 1974 to the extent that disclosure is more limited. The Routine Uses set forth below do not apply to this information. However, access to the record by the individual to whom the record pertains is governed by the Privacy Act.

A. To medical personnel to the extent necessary to meet a bona fide medical emergency;

B. To qualified personnel for the purpose of conducting scientific research, management audits, financial audits, or program evaluation provided that employees are individually identified;

C. To the employee's medical review official;

D. To the administrator of any Employee Assistance Program in which the employee is receiving counseling or treatment or is otherwise participating;

E. To any supervisory or management official within the employee's agency having authority to take adverse personnel action against such employee; or

F. Pursuant to the order of a court of competent jurisdiction where required by the United States Government to defend against any challenge against any adverse personnel action. See 42 U.S.C. 290dd, 290ee, and Public Law 100–71, Section 503(e).

**Note:** For all other records besides those noted above, this system of records contains individually identifiable health information. The Health Insurance Portability and Accountability Act of 1996 applies to most of such health information. Department of Defense 6025.18–R may place additional procedural requirements on the uses and disclosures of such information beyond those found in the Privacy Act of 1974 or mentioned in this system of records notice. Therefore, routine uses outlined below may not apply to such health information.

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records of information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice (including United States Attorney Offices) or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. Any employee of DHS in his/her official capacity;

3. Any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or

4. The United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such

information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security 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 harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) or harm to the individual who relies upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate Federal, State, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To attorneys and insurance companies involved in settling and litigating claims pursuant to Health Information Portability and Accountability Act.

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

None.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD–ROM.

**RETRIEVABILITY:**

Name, social security number, case number, or address of military personnel or eligible dependent. Records can also be retrieved by attorney's or other parties' names.

**SAFEGUARDS:**

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

**RETENTION AND DISPOSAL:**

Records are retained at USCG Headquarters for 2 years; transferred to a Federal Records Center and retained for an additional 4 years, for a total of 6 years, and destroyed thereafter. (AUTH: GRS 1, Item 19.)

**SYSTEM MANAGER AND ADDRESS:**

Human Resources Management, United States Coast Guard, Headquarters, 2100 2nd Street, SW., Washington, DC 20593–0001.

**NOTIFICATION PROCEDURE:**

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to Human Resources Management, United States Coast Guard, Headquarters, 2100 2nd Street, SW., Washington, DC 20593–0001.

When seeking records about yourself from this system of records or any other USCG system of records your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you,
- Specify when you believe the records would have been created,
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the USCG may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

**RECORD ACCESS PROCEDURES:**

See ''Notification procedure'' above.

**CONTESTING RECORD PROCEDURES:**

See ''Notification procedure'' above.

**RECORD SOURCE CATEGORIES:**

From the individual, or if a minor, the parent or guardian, and witnesses. Medical facilities (USCG, Department of Defense, Uniformed Services Treatment Facility, or Civilian Facility) where beneficiaries are treated. Injury investigations. Attorneys and insurance companies involved in the claim.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29800 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

**[Docket No. DHS–2008–0150]**

### Privacy Act of 1974; U.S. Customs and Border Protection—015 Automated Commercial System, System of Records

**AGENCY:** Privacy Office; DHS.

**ACTION:** Notice of Privacy Act system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974 and as part of the Department of Homeland Security's ongoing effort to review and update legacy system of record notices, the Department of Homeland Security proposes to update and reissue the following legacy record system, Treasury/CS.278 Automated

Commercial System (October 18, 2001) as a Department of Homeland Security system of records notice titled, U.S. Customs and Border Protection Automated Commercial System. The Customs and Border Protection Automated Commercial System is a comprehensive system used by Department of Homeland Security, U.S. Customs and Border Protection to track, control, and process all commercial goods imported into the United States. This legacy system will now also collect additional data via its Automated Broker Interface and Vessel Automated Manifest System. Categories of individuals, categories of records, and the routine uses of this legacy system of records notice have been reviewed and updated to better reflect the U.S. Customs and Border Protection—015 Automated Commercial System record system. This reissued system will be included in the Department of Homeland Security's inventory of record systems.

**DATES:** The established system of records will be effective January 20, 2009. Written comments must be submitted on or before January 20, 2009.

**ADDRESSES:** You may submit comments, identified by DHS–2008–0150 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.
- *Docket:* For access to the docket to read background documents or comments received go to *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: Laurence E. Castelli (202–325–0280), Chief, Privacy Act Policy and Procedures Branch, U.S. Customs and Border Protection, Office of International Trade, Regulations & Rulings, Mint Annex, 799 Ninth Street, NW., Washington, DC 20001–4501. For privacy issues please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The priority mission of U.S. Customs and Border Protection (CBP) is to prevent terrorists and terrorist weapons from entering the country while facilitating legitimate travel and trade. The Automated Commercial System (ACS) is the comprehensive system used by U.S. Customs and Border Protection to track, control, and process all commercial goods imported into the United States. ACS is a sophisticated and integrated large-scale business-oriented system which employs multiple modules to perform discrete aspects of its functionality, including receiving data transmissions from a variety of parties involved in international commercial transactions and providing CBP with the capability to track both the transport transactions and the financial transactions associated with the movement of merchandise through international commerce. Through the use of Electronic Data Interchange (EDI), ACS facilitates merchandise processing, significantly cuts costs, and reduces paperwork requirements for both Customs and the importing community.

ACS also provides the following:

*A. Cargo Selectivity*

CBP uses the ACS Cargo Selectivity System to sort high risk cargo from low risk cargo and to determine the type of examination required. Cargo selectivity accepts data transmitted through ABI and compares it against established criteria. CBP uses the Cargo Selectivity System, a module of ACS, to process manifests and National In-bond entries in order to identify the CBP inspection and examination status of specific bills of lading for imported merchandise. Cargo Selectivity facilitates more efficient and effective cargo processing by ensuring cargo that requires additional screening receives it and that which is lower risk does not.

*B. Entry Summary Selectivity*

The Entry Summary Selectivity system of ACS screens the review of entry summary data. Using line item data transmitted through ABI, the system matches national and local selectivity criteria against entry summary data to assess risk by importer, tariff number, country of origin, manufacturer, and value. The system captures paperless summary activity, discrepant summary findings, and line item team assignment data.

*C. Border Cargo*

The Border Cargo Selectivity system of ACS determines risk assessment and examination requirements for high volume borders (*i.e.*, ports of entry). The system uses the same screening process as the Cargo Selectivity system. The Border Cargo Selectivity system will soon be enhanced to allow ABI filers to transmit manifest information.

*D. Quota*

The ACS Quota system tracks quantity controls on imported merchandise. It also tracks visas from other countries. (Visas determine the amount of exports allowed for certain countries.) The Quota system checks the quantities against the visas and transmits this information to the country of origin. The ACS quota and visa controls simplify reconciliation of imports and exports.

*E. Paperless Entry*

Paperless entry processing eliminates the need for ABI participants to file a Customs Form 3461, Entry/Immediate Delivery, if certain criteria are met and the merchandise does not require examination. Carriers who participate in AMS will receive electronic notifications when merchandise is available for release.

*F. Automated Invoice Interface (AII)*

AII allows filers to send electronic invoice information to Customs. This information is transmitted to Customs using either ABI record formats or the EDIFACT CUSDEC (Customs declaration). When EDIFACT is used, the filer also transmits data that is normally on the CF–3461 for cargo release, as well as the entry summary CF–7501, invoice data, and other government agency data.

*G. Drawback*

Filers can submit a drawback claim to Customs on a diskette or through ABI. This ensures that the data is quickly and accurately recorded in ACS and results in faster claim processing and issuance of the drawback payment. Immediate acceptance or rejection of data is available.

*H. Protest*

The ABI electronic protest system allows ABI participants to file, amend, and query the following types of actions:

- Protests against decisions of the Customs Service under 19 U.S. C. 1514.
- Petitions for refunds of Customs duties or corrections of errors requiring reliquidation pursuant to 19 U.S.C. 1520(c) and (d).
- Interventions in an importer's protest by an exporter or producer of merchandise from a country that is a party to the North American Free Trade

Agreement under Section 181.115 of the Customs Regulations.

Once filed, protests can be amended and additional arguments submitted to:

- Apply for further review (when not requested at time of filing).
- Assert additional claims or challenge an additional decision.
- Submit alternative claims and additional grounds or arguments.
- Request review of denial of further review.
- Request denial of the protest be voided.

The protest, petition, or intervention can be transmitted remotely from any location. Customs views and processes the protest on-line. An automatic notification routine keeps the filer informed of any change in status, including final disposition.

*I. Remote Location Filing*

Remote Location Filing (RLF) is a pilot program which allows an approved participant to electronically file a formal or informal entry of merchandise with Customs from a location within the United States other than the port of arrival (POA) or the designated examination site (DES). Such merchandise, upon clearance by CBP, may enter the commerce of the United States.

*J. National In-bond*

The National In-bond system tracks cargo en route in the United States. Using departure, arrival, and closure data, the In-bond system tracks cargo from the point of unlading to the port of entry or exportation. The In-bond system is incorporated within AMS. AMS retains control over all sea in-bond movements (both conventional and paperless) that are associated with automated bills of lading.

*K. Paperless Master In-bond*

The Paperless Master In-bond program controls the movement and disposition of master in-bond (MIB) shipments from the carrier's custody at the port of unlading to the same carrier's custody at the port of destination. This program utilizes the data already available in AMS, eliminating the need for paper documentation.

To help prevent terrorist weapons from being transported to the United States, vessel carriers bringing cargo to the United States are required to transmit certain information to Customs and Border Protection (CBP) about the cargo they are transporting prior to lading that cargo at foreign ports of entry. CBP is issuing an interim final rule that requires both importers and carriers to submit additional information pertaining to cargo to CBP before the cargo is brought into the United States by vessel. This information must be submitted to CBP by way of a CBP-approved electronic data interchange system. The required information is necessary to improve CBP's ability to identify high-risk shipments so as to prevent smuggling and ensure cargo safety and security, as required by section 203 of the Security and Accountability for Every (SAFE) Port Act of 2006 and section 343(a) of the Trade Act of 2002, as amended by the Maritime Transportation Security Act of 2002.

The proposed rule was known to the trade as both the ''Importer Security Filing proposal'' and the ''10 + 2 proposal.'' The name ''10 + 2'' is shorthand for the number of advance data elements CBP was proposing to collect. Carriers would be generally required to submit two additional data elements—a vessel stow plan and container status messages regarding certain events relating to containers loaded on vessels destined to the United States—to the elements they are already required to electronically transmit in advance (the ''2'' of ''10+2''); and importers, as defined in the proposed regulations, would be required to submit ten data elements—an Importer Security Filing containing ten data elements (the ''10'' of ''10+2'').

ACS has two principal methods for electronic data interchange: The Automated Broker Interface (ABI) and the Automated Manifest System (AMS). Under the ''10+2'' program, importers, who submit the Importer Security Filing (ISF), will use either ABI or Vessel AMS to provide their information to CBP. ACS, upon receipt of the ISF, will transfer the data to the Automated Targeting System (ATS) for screening and targeting purposes. Once screened the ISF data will be returned with embedded targeting links to ACS to be maintained in accordance with the ACS stated retention policy.

Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS) and its components and offices have relied on preexisting Privacy Act systems of records notices for the maintenance of records that concern the tracking, controlling, and processing of all commercial goods imported into the United States.

This collection satisfies the requirements of Section 203 of the Security and Accountability for Every Port Act of 2006 (Pub. L. 109–347, 120 Stat. 1884 (SAFE Port Act)).

Consistent with DHS's information sharing mission, information stored in the Automated Commercial System may be shared with other DHS components, as well as appropriate Federal, State, local, tribal, foreign, or international government agencies. This sharing will only take place after DHS/CBP determines that the receiving component or agency has a need to know the information to carry out national security, law enforcement, immigration, intelligence, or other functions consistent with the routine uses set forth in this system of records notice.

To provide notice and transparency to the public, the Department of Homeland Security, U.S. Customs and Border Protection announces an amendment to an existing legacy Privacy Act system of records, the Automated Commercial System, a comprehensive system used by U.S. Customs and Border Protection to track, control, and process all commercial goods imported into the United States. This legacy system will now also collect additional data via the Automated Broker Interface and Vessel Automated Manifest System.

In accordance with the Privacy Act of 1974 and as part of DHS's ongoing effort to review and update legacy system of record notices, DHS proposes to update and reissue the following legacy record system, Treasury/CS.278 Automated Commercial System (66 FR 52984 October 18, 2001), as a DHS/CBP system of records notice titled, U.S. Customs and Border Protection Automated Commercial System. Categories of individuals and categories of records have been reviewed, and the routine uses of this legacy system of records notice have been updated to better reflect the DHS/CBP Automated Commercial System record system. This reissued system will be included in DHS's inventory of record systems.

**II. Privacy Act**

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates personally identifiable information. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and lawful permanent residents. As a matter

of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency recordkeeping practices transparent, to notify individuals regarding the uses to which personally identifiable information is put, and to assist individuals to more easily find such files within the agency. Below is the description of the Automated Commercial System system of records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this updated system of records to the Office of Management and Budget and to Congress.

**System of Records**
**DHS/CBP—015**

**SYSTEM NAME:**

U.S. Customs and Border Protection—015 Automated Commercial System

**SECURITY CLASSIFICATION:**

Unclassified.

**SYSTEM LOCATION:**

Records are maintained at the CBP Headquarters in Washington, DC and field offices.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Categories of individuals covered by this system include: CBP employees and individuals involved in the import trade.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Categories of records in this system include:

- Individual's name;
- Social Security Number (SSN), if collected;
- Address;
- CBP employee names;
- CBP employee SSN;
- Importer of record number, which can be the IRS Employer Identification Number (EIN), SSN, or a Customs-assigned number;
- Importer name and address;
- Type of importation bond;
- Importation bond expiration date;
- Surety code;
- Violation statistics;
- Protest information;
- Customhouse broker number;
- Customhouse name;
- Customhouse address;
- Bond agent name;
- Bond agent SSN;
- Surety code (non-SSN);
- Surety name;
- Customs bond information;
- Liquidator identification (non-SSN);
- Foreign Manufacturer/Shipper identification code;
- Foreign Manufacturer/Shipper name;
- Foreign Manufacturer/Shipper address;
- Carrier names;
- Carrier codes (non SSN) (Standard Carrier Agent Code (SCA) for vessel carriers, International Air Transport Association (IATA) for air carriers);
- Manufacturer (or supplier) name;
- Seller name;
- Buyer name;
- Ship to party name;
- Container stuffing location;
- Consolidator (stuffer);
- Foreign trade zone applicant identification number;
- Consignee number(s);
- Country of origin;
- Commodity HTSUS number;
- Booking party;
- Foreign port of unlading;
- Place of delivery; and
- Ship to party.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

19 U.S.C. 66, 1431, 1448, 1481, 1484, 1505, 1514 and 1624, section 203 of the Security and Accountability for Every (SAFE) Port Act of 2006 and section 343(a) of the Trade Act of 2002, as amended by the Maritime Transportation Security Act of 2002.

**PURPOSE(S):**

The purpose of this system is to track, control, and process all commercial goods imported into the United States, and to improve CBP's ability to identify high-risk shipments so as to prevent smuggling and ensure cargo safety and security. As part of CBP identifying high risk shipments for border security and counterterrorism purposes, the system includes information relating to individuals and their relationship to the merchandise as documented in the Importer Security Filing (ISF).

**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, all or a portion of the records or information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when:

1. DHS or any component thereof;

2. any employee of DHS in his/her official capacity;

3. any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or

4. the United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS/CBP determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS/CBP collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security 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 harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) that rely upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS,

when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To a Federal, State, or local agency, or other appropriate entity or individual, or through established liaison channels to selected foreign governments, in order to provide intelligence, counterintelligence, or other information for the purposes of intelligence, counterintelligence, or antiterrorism activities authorized by U.S. law, Executive Order, or other applicable national security directive.

H. To an appropriate Federal, State, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

I. To the Bureau of the Census to provide information on foreign trade data.

J. To a Federal agency, pursuant to the International Trade Data System Memorandum of Understanding, consistent with the receiving agency's legal authority to collect information pertaining to and/or regulate transactions in international trade.

K. To appropriate Federal, State, local, tribal, or foreign governmental agencies or multilateral governmental organizations responsible for investigating or prosecuting the violations of, or for enforcing or implementing, a statute, rule, regulation, order, license, or treaty where DHS determines that the information would assist in the enforcement of civil or criminal laws.

L. To a Federal, State, local, tribal, territorial, foreign, or international agency, maintaining civil, criminal or other relevant enforcement information or other pertinent information, which has requested information relevant to or necessary to the requesting agency's or the bureau's hiring or retention of an individual, or issuance of a security clearance, license, contract, grant, or other benefit;

M. To a court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations, in response to a subpoena, or in connection with criminal law proceedings;

N. To third parties during the course of an investigation to the extent necessary to obtain information pertinent to the investigation;

O. To the Department of Justice, the United States Attorney's Office, or a consumer reporting agency for further collection action on any delinquent debt when circumstances warrant;

P. To appropriate Federal, State, local, tribal, or foreign governmental agencies or multilateral governmental organizations where DHS is aware of a need to utilize relevant data for purposes of testing new technology and systems designed to enhance national security or identify other violations of law;

Q. To a former employee of DHS, in accordance with applicable regulations, for purposes of responding to an official inquiry by a Federal, State, or local government entity or professional licensing authority; or facilitating communications with a former employee that may be necessary for personnel-related or other official purposes where the Department requires information or consultation assistance from the former employee regarding a matter within that person's former area of responsibility;

R. To an organization or individual in either the public or private sector, either foreign or domestic, where there is a reason to believe that the recipient is or could become the target of a particular terrorist activity or conspiracy, to the extent the of life or property; and

S. To a consumer reporting agency related to owing the U.S. Government money in accordance with 15 U.S.C 1681 *et seq.*

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

Yes, in accordance with the provision of 15 U.S.C. 1681 *et seq.*

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records that are stored electronically are stored on magnetic disc, tape, digital media, and CD–ROM.

**RETRIEVABILITY:**

Records may be retrieved by identification codes and/or name.

**SAFEGUARDS:**

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions. The system maintains a real-time auditing function of individuals who access the system. Additional safeguards may vary by component and program.

**RETENTION AND DISPOSAL:**

The Importer Security Filing is retained for fifteen years from date of submission unless it becomes linked to active law enforcement lookout records, CBP matches to enforcement activities, and/or investigations or cases (*i.e.*, specific and credible threats; individuals, and routes of concern; or other defined sets of circumstances) for which it will remain accessible for the life of the law enforcement matter to support that activity and other enforcement activities that may become related. All other records are maintained for a period of six years from the date of entry.

**SYSTEM MANAGER AND ADDRESS:**

Director, Office of Automated Systems, CBP Headquarters, 1300 Pennsylvania Avenue, NW., Washington, DC 20229 is responsible for all data maintained in the files.

**NOTIFICATION PROCEDURE:**

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to CBP's FOIA Officer, 1300 Pennsylvania Avenue, NW., Washington, DC 20229. If an individual believes more than one component maintains Privacy Act records concerning him or her the individual may submit the request to the Chief Privacy Officer, Department of Homeland Security, 245 Murray Drive, SW., Building 410, STOP–0550, Washington, DC 20528.

When seeking records about yourself from this system of records or any other Departmental system of records your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full

name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty or perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you,
- Identify which component(s) of the Department you believe may have the information about you,
- Specify when you believe the records would have been created,
- Provide any other information that will help the FOIA staff determine which DHS component agency may have responsive records,
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the component(s) will not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

**RECORD ACCESS PROCEDURES:**

*See* ''Notification procedure'' above.

**CONTESTING RECORD PROCEDURES:**

*See* ''Notification procedure'' above.

**RECORD SOURCE CATEGORIES:**

Records are obtained by authorized Customs forms or electronic formats from individuals and/or companies incidental to the conduct of foreign trade and required by CBP in administering the tariff laws and regulations of the United States.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

Information in the system may be shared with law enforcement and/or intelligence agencies pursuant to the above routine uses. The Privacy Act requires DHS to maintain an accounting of the disclosures made pursuant to all routines uses. Disclosing the fact that a law enforcement or intelligence agencies has sought particular records may affect ongoing law enforcement or intelligence activity. As such pursuant to 5 U.S.C. 552a(j)(2) and (k)(2), DHS will claim exemption from (c)(3), (e)(8), and (g) of the Privacy Act of 1974, as amended, as is necessary and appropriate to protect this information.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29801 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

**[Docket No. DHS–2008–0153]**

### Privacy Act of 1974; U.S. Customs and Border Protection—013 Seized Assets and Case Tracking System

**AGENCY:** Privacy Office; DHS.

**ACTION:** Notice of Privacy Act system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974, the Department of Homeland Security is giving notice that it proposes to consolidate twelve legacy record systems into a U.S. Customs and Border Protection system of records notice titled, U.S. Customs and Border Protection Seizures and Violators (SEACATS): Treasury/CS.021 Arrest/Seizure/Search Report and Notice of Penalty File, October 18, 2001, Treasury/CS.096 Fines, Penalties, and Forfeiture Control and Information Retrieval System, October 18, 2001, Treasury/CS.098 Fines, Penalties, and Forfeitures Records, October 18, 2001, Treasury/CS.099 Fines, Penalties, and Forfeiture Files (Supplementary Petitions), October 18, 2001, Treasury/CS.100 Fines, Penalties, and Forfeiture Records, October 18, 2001, Treasury/CS.125 Intelligence Log, October 18, 2001, Treasury/CS.136 All Liquidated Damage, Penalty, and Seizure Cases; Prior Violators, October 18, 2001, Treasury/CS.156 Narcotic Violator File, October 18, 2001, Treasury/CS.209 Resumes of Professional Artists, October 18, 2001, Treasury/CS.213 Seized Asset and Case Tracking System, October 18, 2001, Treasury/CS.215 Seizure Report File, October 18, 2001, Treasury/CS.227 Temporary Importation Under Bond (TIB) Defaulter Control System, October 18, 2001, and Treasury/CS.258 Violator's Case Files, October 18, 2001. Categories of individuals, categories of records, and the routine uses of these legacy system of records notices have been consolidated and updated to better reflect the U.S. Customs and Border Protection seizures and violators record systems. DHS is issuing a Notice of Proposed Rulemaking concurrent with this SORN elsewhere in the **Federal Register**. The exemptions for the legacy system of records notices will continue to be applicable until the final rule for this SORN has been completed. This system will be included in the Department's inventory of record systems.

**DATES:** Written comments must be submitted on or before January 20, 2009. This new system will be effective January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0153 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change and may be read at *http://www.regulations.gov*, including any personal information provided.
- *Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: Laurence E. Castelli (202–325–0280), Chief, Privacy Act Policy and Procedures Branch, U.S. Customs and Border Protection, Office of International Trade, Regulations & Rulings, Mint Annex, 1300 Pennsylvania Ave., NW., Washington, DC 20229. For privacy issues contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS)/U.S. Customs and Border Protection (CBP) have relied on preexisting Privacy Act systems of records notices for the collection and maintenance of records pertaining to seizures and violators.

As part of its efforts to streamline and consolidate its record systems, DHS is establishing a component system of records under the Privacy Act (5 U.S.C. 552a) for DHS/CBP that pertains to seizures made, and persons found violating laws and regulations enforced,

by DHS/CBP. This record system will allow DHS/CBP to collect and maintain records regarding seizures and violators.

In accordance with the Privacy Act of 1974, DHS is giving notice that it proposes to consolidate twelve legacy record systems into a DHS/CBP system of records notice titled, U.S. Customs and Border Protection Seizures and Violators (SEACATS): Treasury/CS.021 Arrest/Seizure/Search Report and Notice of Penalty File (66 FR 52984 October 18, 2001), Treasury/CS.096 Fines, Penalties, and Forfeiture Control and Information Retrieval System (66 FR 52984 October 18, 2001), Treasury/CS.098 Fines, Penalties, and Forfeitures Records (66 FR 52984 October 18, 2001), Treasury/CS.099 Fines, Penalties, and Forfeiture Files (Supplementary Petitions) (66 FR 52984 October 18, 2001), Treasury/CS.100 Fines, Penalties, and Forfeiture Records (66 FR 52984 October 18, 2001), Treasury/CS.125 Intelligence Log (66 FR 52984 October 18, 2001), Treasury/CS.136 All Liquidated Damage, Penalty, and Seizure Cases; Prior Violators (66 FR 52984 October 18, 2001), Treasury/CS.156 Narcotic Violator File (66 FR 52984 October 18, 2001), Treasury/CS.209 Resumes of Professional Artists (66 FR 52984 October 18, 2001), Treasury/CS.213 Seized Asset and Case Tracking System (66 FR 52984 October 18, 2001), Treasury/CS.215 Seizure Report File (66 FR 52984 October 18, 2001), Treasury/CS.227 Temporary Importation Under Bond (TIB) Defaulter Control System (66 FR 52984 October 18, 2001), and Treasury/CS.258 Violator's Case Files (66 FR 52984 October 18, 2001). Categories of individuals, categories of records, and the routine uses of these legacy systems of records notices have been consolidated and updated to better reflect DHS/CBP seizures and violators record systems. Additionally, DHS is issuing a Notice of Proposed Rulemaking (NPRM) concurrent with this SORN elsewhere in the **Federal Register**. The exemptions for the legacy system of records notices will continue to be applicable until the final rule for this SORN has been completed. This system will cover all seizure, civil and criminal cases relating to violators of the customs, immigration, agriculture and other laws and regulations administered or enforced by DHS/CBP.

## II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the U.S. Government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass U.S. citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system, in order to make agency record keeping practices transparent, to notify individuals regarding the uses of their records, and to assist individuals to more easily find such files within the agency. Below is the description of the DHS/CBP Seizures and Violators System of Records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this system of records to the Office of Management and Budget (OMB) and to Congress.

### System of Records DHS/CBP–013

#### SYSTEM NAME:

U.S. Customs and Border Protection Seized Assets and Case Tracking System (SEACATS).

#### SECURITY CLASSIFICATION:

Unclassified.

#### SYSTEM LOCATION:

This computer database is located at the U.S. Customs and Border Protection National Data Center in the Washington, DC area. Computer terminals are located at CBP sites and ports throughout the United States and at CBP Headquarters, Washington, DC as well as appropriate facilities under the jurisdiction of the U.S. Department of Homeland Security (DHS) and other locations at which officers of DHS may be posted or operate to facilitate DHS's mission of homeland security. Terminals may also be located at appropriate facilities for other participating government agencies pursuant to agreement. Records are maintained at the U.S. Customs and Border Protection Headquarters in Washington, DC and in field offices.

#### CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Categories of individuals covered by this system include current and former violators and alleged or otherwise suspected violators of Custom, immigration, agriculture or other laws and regulations administered or enforced by DHS/CBP, and related parties involved in, or affected by, an inquiry concerning the violation of Customs, immigration, agriculture or other law enforced or administered by DHS/CBP. This system includes:

- Persons who are believed to be involved in activities which constitute, or may develop into, possible violation of Customs, immigration, agriculture or other laws administered or enforcement by DHS/CBP.
- Persons who smuggle, or are suspected of smuggling, merchandise or contraband, including narcotics and other illegal drugs, into the U.S.;
- Vessels, aircraft and other conveyances that have been used in connection or with or found in violation of Customs, immigration, agriculture or other laws and regulations enforced or administered by DHS/CBP;
- Individuals and businesses fined, penalized, or forced to forfeit merchandise because of violations of Customs, immigration, agriculture and/or other laws administered or enforced by DHS/CBP;
- Individuals and businesses who have filed false invoices, documents, or statements that result in a violation of Customs, immigration, agriculture or other laws and regulations administered or enforced by DHS/CBP;
- Individuals and businesses who have filed supplemental petitions for relief from fines, penalties, and forfeitures assessed for violations of the laws and regulations administered or enforced by DHS/CBP;
- Owners, claimants, and other interested parties to seized property;
- Purchasers of forfeited property;
- Individuals to whom prohibited merchandise is addressed; and
- Individuals who assist in the enforcement of customs, navigation, immigration, agriculture and other laws administered or enforced by DHS/CBP.

#### CATEGORIES OF RECORDS IN THE SYSTEM:

Categories of records in this system may include:

- Individual's name;
- Business name;
- Aliases;
- Social security number;

- Physical description of the individual;
- Addresses;
- Telephone numbers;
- Occupation;
- Violator's previous record;
- Driver's license;
- Passport number;
- Entry documentation;
- Personal identifying number, such as informant number;
- Case number or seizure number;
- Vessel name, including registration number;
- Aircraft name and tail number;
- License Plate Number;
- Type of violation/suspected violation;
- Description of violation/alleged violation, including circumstances surrounding the violation/alleged violation, including section of law violated or alleged to have been violated;
- Date and place of violation/alleged violation;
- On-site disposition actions, such as whether a seizure was made, an item was detained, or inspection occurred;
- Sender of the seized or detained goods;
- Intended recipient of the seized or detained goods;
- Parties entitled to legal notice or who are legally liable;
- Bond information;
- Notices;
- Investigative reports and disposition of fines, penalties, and forfeitures;
- Memoranda;
- Petitions and supplemental petitions;
- Recommendations pertaining to litigation;
- Referrals to Department of Justice;
- Notes from officers related to a DHS/CBP action;
- Case information pertaining to violation;
- Actions taken by DHS/CBP;
- Documents relating to the internal review and consideration of the request for relief and decision thereon;
- Property description;
- Estimated foreign value of merchandise;
- Duty;
- Domestic value of merchandise;
- CBP Port code;
- Delivery to seizure clerk; and
- Applicants for awards of compensation and determination of such applications.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. 301; the Federal Records Act, 44 U.S.C. 3101; the immigration laws, including 8 U.S.C. 1221, 1321–1328, 8 CFR parts 270, 274, 280; the Customs laws, including 18 U.S.C. 542, 545 and 19 U.S.C. 66, 1436, 1497, 1509, 1592, 1593a, 1594, 1595a, 1618, 1619, 1624, 1703 and, 19 CFR parts 1623, 171 and 172; the agriculture laws, including 7 U.S.C. 8303, 8304, 8307; Executive Order 9373.

**PURPOSE(S):**

The purpose of this system is to (1) document individuals and businesses who violated, or are alleged to have violated, Custom, immigration, agriculture and other laws and regulations enforced or administered by DHS/CBP; (2) collect and maintain records on fines, penalties, and forfeitures; and (3) collect and maintain records of individuals who have provided assistance with respect to identifying or locating individuals who have or are alleged to have violated Customs, immigration, agriculture and other laws and regulations enforced or administered by DHS/CBP.

**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, all or a portion of the records of information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. Any employee of DHS or any component in his/her official capacity;

3. Any employee of DHS or any component in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or

4. The U.S. or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS or CBP determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS or CBP collected the records.

B. To a congressional office in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS or CBP suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised;

2. DHS or CBP has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS, CBP, or another agency or entity) or harm to the individual who relies upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS or CBP's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS or CBP, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS/CBP officers and employees.

G. To appropriate Federal, State, local, tribal, or foreign governmental agencies or multilateral governmental organizations responsible for investigating or prosecuting the violations of, or for enforcing or implementing, a statute, rule, regulation, order, license, or treaty where DHS determines that the information would assist in the enforcement of civil or criminal laws.

H. To an appropriate Federal, State, local, tribal, foreign, or international agency, if the information is relevant and necessary to a requesting agency's decision concerning the hiring or retention of an individual, or issuance of a security clearance, license, contract, grant, or other benefit, or if the information is relevant and necessary to a DHS decision concerning the hiring or retention of an employee, the issuance of a security clearance, the reporting of

an investigation of an employee, the letting of a contract, or the issuance of a license, grant or other benefit and disclosure is appropriate to the proper performance of the official duties of the person making the request.

I. To a court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations or in connection with criminal law proceedings or in response to a subpoena from a court of competent jurisdiction.

J. To third parties during the course of a law enforcement investigation to the extent necessary to obtain information pertinent to the investigation, provided disclosure is appropriate to the proper performance of the official duties of the officer making the disclosure.

K. To a consumer reporting agency in accordance with section 3711(3) of Title 31.

L. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of DHS or any component is necessary to demonstrate the accountability of DHS or a component's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

M. To appropriate Federal, State, local, tribal, or foreign governmental agencies or multilateral governmental organizations where DHS is aware of a need to utilize relevant data for purposes of testing new technology and systems designed to enhance national security or identify other violations of law.

N. To a Federal, State, or local agency, or other appropriate entity or individual, or through established liaison channels to selected foreign governments, in order to provide intelligence, counterintelligence, or other information for the purposes of intelligence, counterintelligence, or antiterrorism activities authorized by U.S. law, Executive Order, or other applicable national security directive.

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

Yes, when appropriate and in accordance with section 3711(3) of Title 31.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD–ROM.

**RETRIEVABILITY:**

Records are retrieved by individual's name; business name; vessel name; aircraft name; case number; year and CBP port code; identification codes; identifying number; date of violation; type of violation; name of the person to which seized items are addressed; case or seizure number by fiscal year; and phone number.

**SAFEGUARDS:**

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated system security access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

**RETENTION AND DISPOSAL:**

Records related to a law enforcement action; or that are linked to an alleged violation of law or regulation, or are matches or suspected matches to enforcement activities, investigations or cases (i.e., administrative penalty actions or criminal prosecutions), will remain accessible until the conclusion of the law enforcement matter and any other enforcement matters or related investigative, administrative, or judicial action to which it becomes associated plus five years. Records associated with a law enforcement matter, where all applicable statutes of limitation have expired prior to the conclusion of the matter, will be retained for two years following the expiration of the applicable statute of limitations.

**SYSTEM MANAGER AND ADDRESS:**

Customs and Border Protection, Customs and Border Protection Headquarters, 1300 Pennsylvania Avenue, NW., Washington, DC 20229.

**NOTIFICATION PROCEDURE:**

The Secretary of Homeland Security has exempted this system from notification, access, and amendment because of the law enforcement nature of the information. However, CBP will review requests on a case by case and release information as appropriate. Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to CBP's FOIA Officer, 1300 Pennsylvania Avenue, NW., Mint Annex, Washington, DC 20229. Specific FOIA contact information can be found at *http://www.dhs.gov/foia* under ''contacts.''

When seeking records about yourself from this system of records or any other CBP system of records your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you,
- Specify when you believe the records would have been created,
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information CBP may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

**RECORD ACCESS PROCEDURES:**

*See* ''Notification procedure'' above.

**CONTESTING RECORD PROCEDURES:**

See ''Notification procedure'' above.

**RECORD SOURCE CATEGORIES:**

Individuals, including individuals petitioning for relief of fines, penalties, and forfeitures; DHS/CBP employees, including DHS/CBP employees who prepare Customs Form 5955a (Notice of Penalty or liquidated Damages Incurred and Demand for Payment) and Customs

Form 151 (Search/Arrest/Seizure Report) at the time and place where the violation occurred; Information and representations supplied by importers, brokers and other agents pursuant to the entry and processing of merchandise or in the clearing of individuals or baggage through Customs. Also included is information gathered pursuant to DHS/CBP investigations of suspected or actual violations of Customs, immigration, agriculture and other laws enforced or administered by DHS/CBP, regulations, recommendations, and information supplied by other agencies; Port Director of CBP who has jurisdiction over fines, penalties, and forfeitures; penalty notices; Search/Arrest/Seizure Reports transmitted to the Fines, Penalties, and Forfeitures Office by ports and stations within the area; and mail shipments.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

Pursuant to exemption 5 U.S.C. 552a(j)(2) of the Privacy Act, portions of this system are exempt from 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5) and (e)(8); (f), and (g). Pursuant to 5 U.S.C. 552a(k)(2), this system is exempt from the following provisions of the Privacy Act, subject to the limitations set forth in those subsections: 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f). In addition, to the extent a record contains information from other exempt systems of records, CBP will rely on the exemptions claimed for those systems.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29802 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

**[Docket No. DHS–2008–0139]**

### Privacy Act of 1974; United States Coast Guard—010 Physical Disability Evaluation System Files System of Records

**AGENCY:** Privacy Office; DHS.

**ACTION:** Notice of Privacy Act system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974 and as part of the Department of Homeland Security's ongoing effort to review and update legacy system of records notices, the Department of Homeland Security is giving notice that it proposes to update and reissue the following legacy record system, DOT/CG 571 Physical Disability Separation System as a Department of Homeland Security system of records notice titled, Department of Homeland Security United States Coast Guard—010 Physical Disability Evaluation System. Categories of individuals, categories of records, and the routine uses of this legacy system of records notice have been reviewed and updated to better reflect the Department of Homeland Security United States Coast Guard's physical disability evaluation record system. This new system will be included in the Department of Homeland Security's inventory of record systems.

**DATES:** Written comments must be submitted on or before January 20, 2009. This new system will be effective January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0139 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change and may be read at *http://www.regulations.gov*, including any personal information provided.
- *Docket:* For access to the docket, to read background documents, or comments received, go to *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: David Roberts (202–475–3521), United States Coast Guard Privacy Officer, United States Coast Guard. For privacy issues please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS)/United States Coast Guard (USCG) has relied on preexisting Privacy Act systems of records notices for the collection and maintenance of records that concern physical disability evaluation proceedings.

As part of its efforts to streamline and consolidate its record systems, DHS is updating and reissuing a DHS/USCG system of records under the Privacy Act (5 U.S.C. 552a) that deals with USCG's physical disability evaluation proceedings. This record system will allow DHS/USCG to collect and preserve the records regarding physical disability evaluation proceedings. The collection and maintenance of this information is used to ensure equitable application of the provisions of Title 10, United States Code, Chapter 61, which relates to the separation or retirement of military personnel by reason of physical disability. These laws were enacted primarily for the purpose of maintaining a vital and fit military organization with full consciousness of the necessity for maximum use of the available work force. These laws provide benefits for eligible members whose military service is terminated through no fault of their own due to a service-connected disability, and they prevent the arbitrary separation from the service of those members who incur a disabling injury or disease, yet remain fit for duty. The collection and maintenance of this information will assist DHS/USCG in meeting its obligation to manage the physical disability evaluation process proceedings.

In accordance with the Privacy Act of 1974 and as part of DHS's ongoing effort to review and update legacy system of records notices, DHS is giving notice that it proposes to update and reissue the following legacy record system, DOT/CG 571 Physical Disability Separation System (65 FR 19476 April 11, 2000), as a DHS/USCG system of records notice titled, DHS/USCG–010 Physical Disability Evaluation System. Categories of individuals, categories of records, and the routine uses of this legacy system of records notice have been reviewed and updated to better reflect the DHS/USCG physical disability evaluation record system. This new system will be included in DHS's inventory of record systems.

#### II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some

identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency record keeping practices transparent, to notify individuals regarding the uses to which their records are put, and to assist individuals to more easily find such files within the agency. Below is the description of the DHS/USCG–010 Physical Disability Evaluation Files System of Records.

## III. Health Insurance Portability and Accountability Act

This system of records contains individually identifiable health information. The Health Insurance Portability and Accountability Act of 1996, applies to most of such health information. Department of Defense 6025.18–R may place additional procedural requirements on the uses and disclosures of such information beyond those found in the Privacy Act of 1974 or mentioned in this system of records notice.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this new system of records to the Office of Management and Budget and to Congress.

**System of Records: DHS/USCG–010.**

**SYSTEM NAME:**

United States Coast Guard—010 Physical Disability Evaluation System.

**SECURITY CLASSIFICATION:**

Unclassified.

**SYSTEM LOCATION:**

Records are maintained at the USCG Headquarters in Washington, DC and field offices.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

All USCG active duty and reserve personnel who are referred for potential separation or retirement for physical disability.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Categories of records in this system include:

- Name;
- Social Security Number (SSN) and/or Employee ID (EmpID)
- Informal Physical Evaluation Board files;
- Formal Physical Evaluation Board files;
- International Classification of Diseases code (ICD);
- Physical Review Council files;
- Physical Disability Appeal Board files; and
- Physical Disability Board of Review files.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. 301; 14 U.S.C. 632; the Federal Records Act, 44 U.S.C. 3101; 10 U.S.C. Chapter 61.

**PURPOSE(S):**

The purpose of this system is to document physical disability evaluation proceedings and ensure equitable application of the provisions of Title 10, United States Code, Chapter 61, which relates to the separation or retirement of military personnel by reason of physical disability.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

**Note:** For records of identity, diagnosis, prognosis, or treatment of any client/patient, irrespective of whether or when he/she ceases to be a client/patient, maintained in connection with the performance of any alcohol or drug abuse prevention and treatment function conducted, requested, or directly or indirectly assisted by any department or agency of the United States, shall, except as provided therein, be confidential and be disclosed only for the purposes and under circumstances expressly authorized in 42 U.S.C. 290dd–2. This statute takes precedence over the Privacy Act of 1974 to the extent that disclosure is more limited. The Routine Uses set forth below do not apply to this information. However, access to the record by the individual to whom the record pertains is governed by the Privacy Act.

A. To medical personnel to the extent necessary to meet a bona fide medical emergency;

B. To qualified personnel for the purpose of conducting scientific research, management audits, financial audits, or program evaluation provided that employees are individually identified;

C. To the employee's medical review official;

D. To the administrator of any Employee Assistance Program in which the employee is receiving counseling or treatment or is otherwise participating;

E. To any supervisory or management official within the employee's agency having authority to take adverse personnel action against such employee; or

F. Pursuant to the order of a court of competent jurisdiction where required by the United States Government to defend against any challenge against any adverse personnel action. *See* 42 U.S.C. 290dd, 290ee, and Public Law 100–71, Section 503(e).

**Note:** For all other records besides those noted above, this system of records contains individually identifiable health information. The Health Insurance Portability and Accountability Act of 1996, applies to most of such health information. Department of Defense 6025.18–R may place additional procedural requirements on the uses and disclosures of such information beyond those found in the Privacy Act of 1974 or mentioned in this system of records notice. Therefore, routine uses outlined below may not apply to such health information.

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records of information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when:

1. DHS or any component thereof;

2. any employee of DHS in his/her official capacity;

3. any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or

4. the United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such

information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security 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 harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) or harm to the individuals that rely upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate Federal, State, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To Department of Veterans Affairs for assistance in determining the eligibility of individuals for benefits administered by that agency and available to U.S. Public Health Service or the Department of Defense medical personnel in connection with the performance of their official duties.

I. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of DHS or is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

None.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The electronic versions of records are stored on magnetic disc, tape, digital media, and CD–ROM.

**RETRIEVABILITY:**

Records may be retrieved by name, social security number, employee identification number, command, date, and the diagnosis or International Classification of Diseases (ICD) code.

**SAFEGUARDS:**

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

**RETENTION AND DISPOSAL:**

Records are transferred to National Personnel Records Center, Military Personnel Records NPRC (MPRC) three years after last activity. Records are destroyed 50 years from the date of the latest document in the record. (AUTH: NC1–26–82–5, Item 2a2).

**SYSTEM MANAGER AND ADDRESS:**

Commander, U.S. Coast Guard, Personnel Command CGPC—MS 7200, 4200 Wilson Boulevard, Suite 1100, Arlington, Virginia 20598–7200.

**NOTIFICATION PROCEDURE:**

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to Commander, U.S. Coast Guard, Personnel Command CGPC—MS 7200, 4200 Wilson Boulevard, Suite 1100, Arlington, Virginia 20598–7200.

When seeking records about yourself from this system of records or any other USCG system of records your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov/FOIA* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you,
- Specify when you believe the records would have been created,
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the USCG will not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

**RECORD ACCESS PROCEDURES:**

*See* ''Notification procedure'' above.

**CONTESTING RECORD PROCEDURES:**

*See* ''Notification procedure'' above.

**RECORD SOURCE CATEGORIES:**

Information in records developed through proceedings of administrative bodies listed in ''Categories of records'' above.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29803 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

**[Docket No. DHS–2008–0149]**

### Privacy Act of 1974; United States Coast Guard—012 Request for Remission of Indebtedness System of Records

**AGENCY:** Privacy Office; DHS.

**ACTION:** Notice of Privacy Act system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974 and as part of the Department of Homeland Security's ongoing effort to review and update legacy system of records notices, the Department of Homeland Security is giving notice that it proposes to update and reissue the following legacy record system DOT/CG 639 Request for Remission of Indebtedness as a Department of Homeland Security system of records notice titled, United States Coast Guard Request—012 for Remission of Indebtedness. Categories of individuals, categories of records, and the routine uses of this legacy system of records notice have been reviewed and updated to better reflect the Department of Homeland Security and the United States Coast Guard's Request for Remission of Indebtedness record system. This new system will be included in the Department of Homeland Security's inventory of record systems.

**DATES:** Written comments must be submitted on or before January 20, 2009. This new system will be effective January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0149 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change and may be read at *http://www.regulations.gov*, including any personal information provided.
- *Docket:* For access to the docket, to read background documents, or comments received, go to *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: David Roberts (202–475–3521), United States Coast Guard Privacy Officer, United States Coast Guard. For privacy issues please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS) and its components and offices have relied on preexisting Privacy Act systems of records notices for the collection and maintenance of records that concern active duty enlisted United States Coast Guard (USCG) personnel who request remission of indebtedness. Enlisted members serving on active duty who owe the government money may request to have the indebtedness, or a portion of the indebtedness remitted, which is to say cancelled. Enlisted members must submit an application which shows that they have just cause for remission in accordance with the standards for remission as outlined in the law.

As part of its efforts to streamline and consolidate its record systems, DHS is updating and reissuing a USCG system of records under the Privacy Act (5 U.S.C. 552a) that deals with the remission of indebtedness for entitled USCG personnel. This record system will allow DHS/USCG to collect and preserve the records regarding the remission of indebtedness. The collection and maintenance of this information will assist DHS/USCG in meeting its obligation to address requests of remission of indebtedness for active duty enlisted USCG personnel.

In accordance with the Privacy Act of 1974 and as part of the Department of Homeland Security's ongoing effort to review and update legacy system of records notices, the Department of Homeland Security is giving notice that it proposes to update and reissue the following legacy record system DOT/CG 639 Request for Remission of Indebtedness (65 FR 19476 April 11, 2000) as a Department of Homeland Security/United States Coast Guard system of records notice titled, Request for Remission of Indebtedness. Categories of individuals, categories of records, and the routine uses of this legacy system of records notice have been reviewed and updated to better reflect the Department of Homeland Security and the United States Coast Guard's—012 Request for Remission of Indebtedness record system. This new system will be included in the Department of Homeland Security's inventory of record systems.

#### II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates individuals' information. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency record keeping practices transparent, to notify individuals regarding the uses to which their records are put, and to assist individuals to more easily find such files within the agency. Below is the description of the Request for Remission of Indebtedness Files System of Records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this new system of records to the Office of Management and Budget and to Congress.

#### System of Records: DHS/USCG–012

**SYSTEM NAME:**

United States Coast Guard—012 Request for Remission of Indebtedness.

**SECURITY CLASSIFICATION:**

Unclassified.

**SYSTEM LOCATION:**

Records are maintained at the United States Coast Guard Headquarters in Washington, DC and field offices.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Active duty enlisted USCG personnel.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Categories of records in this system include:

- Individual's name; employee ID number (EMPLID), command name, and command address.
- Individual's Leave and Earning Statement (LES), including home address.
- Correspondence submitted to the USCG, such as leave and earning statements, letters or notices of indebtedness, financial worksheets, travel orders, or other documents related to the cause for indebtedness;
- Requests for endorsements;
- Correspondence submitted by the enlisted member, as appropriate;
- Research material on the individual's file;
- Paneling action;
- Commandant's decision.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. 301; the Federal Records Act, 44 U.S.C. 3101; 14 U.S.C. 461, 632.

**PURPOSE(S):**

The purpose of this system is to aid USCG in making determinations whether an active duty enlisted member is eligible to have the indebtedness to the U.S. Government forgiven, or a portion of the indebtedness pursuant to 14 U.S.C. 461, based on the best interests of the individual and the Government.

**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, all or a portion of the records of information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when:

1. DHS or any component thereof;

2. Any employee of DHS in his/her official capacity;

3. Any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or

4. The United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security 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 harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) or harm to the individual that rely upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate Federal, State, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of DHS or is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

None.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD–ROM.

**RETRIEVABILITY:**

Records may be retrieved alphabetically by name.

**SAFEGUARDS:**

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

**RETENTION AND DISPOSAL:**

Records are retained for five years past the date of the final adjudication.

**SYSTEM MANAGER AND ADDRESS:**

Director, Personnel Management Directorate, G–WP, United States Coast Guard Headquarters, 2100 2nd Street, SW., Washington, DC 20593–0001.

**NOTIFICATION PROCEDURE:**

Individuals seeking notification of and access to any record contained in

this system of records, or seeking to contest its content, may submit a request in writing to USCG, Commandant (CG–611), 2100 2nd St., SW., Attn: FOIA Coordinator, Washington, DC 20593–0001.

When seeking records about yourself from this system of records or any other USCG system of records your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

• An explanation of why you believe the Department would have information on you,

• Specify when you believe the records would have been created,

• If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the USCG will not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

**RECORD ACCESS PROCEDURES:**

*See* ''Notification procedure'' above.

**CONTESTING RECORD PROCEDURES:**

*See* ''Notification procedure'' above.

**RECORD SOURCE CATEGORIES:**

Individuals covered by this system of records and Coast Guard Officials.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29804 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

**[Docket No. DHS–2008–0111]**

## Privacy Act of 1974; United States Coast Guard—011 Military Personnel Health Records System of Records

**AGENCY:** Privacy Office; DHS.

**ACTION:** Notice of Privacy Act system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974 and as part of the Department of Homeland Security Privacy Office's ongoing effort to review and update legacy system of record notices, the Department of Homeland Security is giving notice that it proposes to update and reissue the following legacy record system DOT/CG 572 Military Personnel Health Record System (April 11, 2000) as a Department of Homeland Security system of records notice titled, United States Coast Guard Military—011 Personnel Health Record System Files. This system will be used by the United States Coast Guard to collect and maintain records of normal duty rotations, suitability of members for overseas assignments, develop automated information relating to medical readiness in wartime and contingence operations, determine eligibility for disability, and to maintain health care records. Categories of individuals, categories of records, and the routine uses of this legacy system of records notice have been reviewed and updated to better reflect the Department of Homeland Security/United States Coast Guard's military personnel health record system. This new system will be included in the Department of Homeland Security's inventory of record systems.

**DATES:** Written comments must be submitted on or before January 20, 2009. This new system will be effective January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0111 by one of the following methods:

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

• *Fax:* 1–866–466–5370.

• *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

• *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change and may be read at *http://www.regulations.gov*, including any personal information provided.

• *Docket:* For access to the docket, to read background documents, or comments received, go to *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: David Roberts (202–475–3521), Privacy Officer, United States Coast Guard. For privacy issues please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

### I. Background

Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (Nov. 25, 2002), the Department of Homeland Security (DHS)/United States Coast Guard (USCG) have relied on preexisting Privacy Act systems of records notices for the collection and maintenance of records that concern military personnel health records.

As part of its efforts to streamline and consolidate its record systems, DHS/USCG is updating and reissuing a DHS/USCG system of records under the Privacy Act (5 U.S.C. 552a) that deals with DHS/USCG's military personnel health records. This record system will allow DHS/USCG to collect and maintain records regarding military personnel health records. The collection and maintenance of this information will assist DHS/USCG in meeting its obligation to manage the military personnel health records.

In accordance with the Privacy Act of 1974 and as part of the DHS Privacy Office's ongoing effort to review and update legacy system of record notices, DHS is giving notice that it proposes to update and reissue the following legacy record system DOT/CG 572 Military Personnel Health Record System (65 FR 19475 4/11/2000) as a DHS/USCG system of records notice titled, DHS/USCG—011 Military Personnel Health Record System Files. This system will be used by the United States Coast Guard to collect and maintain records of normal duty rotations, suitability of members for overseas assignments, develop automated information relating to medical readiness in wartime and contingence operations, determine eligibility for disability, and to maintain health care records. Categories of individuals and categories of records have been reviewed, and the routine uses of this legacy system of records notice have been updated to better

reflect the DHS/USCG's military personnel health record system. This new system will be included in DHS's inventory of record systems.

## II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses and disseminates personally identifiable information. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency from which information is stored and retrieved by the name of the individual or by some identifying number such as property address, mailing address, or symbol assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and lawful permanent residents. DHS extends administrative Privacy Act protections to all individuals where information is maintained on both U.S. citizens, lawful permanent residents, and visitors. Individuals may request their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR 5.21.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency record keeping practices transparent, to notify individuals regarding the uses of their records, and to assist individuals to more easily find such files within the agency. Below is the description of the Military Personnel Health System of Records.

## III. Health Insurance Portability and Accountability Act

This system of records contains individually identifiable health information. The Health Insurance Portability and Accountability Act of 1996, applies to most of such health information. Department of Defense 6025.18–R may place additional procedural requirements on the uses and disclosures of such information beyond those found in the Privacy Act of 1974 or mentioned in this system of records notice.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this new system of records to the Office of Management and Budget and to Congress.

**System of Records: DHS/USCG–011**

**SYSTEM NAME:**

United States Coast Guard Military Personnel Health Records System.

**SECURITY CLASSIFICATION:**

Unclassified.

**SYSTEM LOCATION:**

Records are maintained at USCG Headquarters in Washington, DC, in field locations, and at USCG health care facilities at which USCG military personnel or eligible dependents receive treatment.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Active duty, reserve, retired active duty, reserve USCG military personnel or their eligible dependents, USCG Academy cadets, auxiliary while performing Coast Guard duties, members of foreign military services, federal employees assigned to USCG vessels, seamen, non-federally employed civilians aboard USCG vessels and civilians receiving physical exams prior to entry into the USCG.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Categories of records in this system include:

- Military personnel's name;
- Eligible dependant's name;
- Social security number;
- Employee ID;
- Date of Birth;
- Medical History;
- Records of medical and dental treatment, for example x-rays, physical examinations, psychological examinations;
- Records containing due date for physical/dental and eye examinations, inoculations, screening tests and results of actions required by USCG or other Federal, State or local government or agency; and
- Records concerning line of duty determination and eligibility for disability benefits.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. 301: The Federal Records Act, 44 U.S.C. 3101; Departmental Regulations; 10 U.S.C. 1071–1107; Medical and Dental Care; 14 U.S.C. 93(a)(17); 14 U.S.C. 632: Functions and powers vested in the Commandant.

**PURPOSE(S):**

To determine normal duty rotations, suitability of members for overseas assignments, develop automated information relating to medical readiness in wartime and contingence operations, determine eligibility for disability, and to maintain health care records as a function of general health maintenance.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

**Note:** For records of identity, diagnosis, prognosis, or treatment of any client/patient, irrespective of whether or when he/she ceases to be a client/patient, maintained in connection with the performance of any alcohol or drug abuse prevention and treatment function conducted, requested, or directly or indirectly assisted by any department or agency of the United States, shall, except as provided therein, be confidential and be disclosed only for the purposes and under circumstances expressly authorized in 42 U.S.C. 290dd–2. The results of a drug test of civilian employees may be disclosed only as expressly authorized under 5 U.S.C. 7301. Theses statutes take precedence over the Privacy Act of 1974 to the extent that disclosure is more limited. However, access to the record by the individual to whom the record pertains is governed by the Privacy Act. The Routine Uses set forth below do not apply to this information.

**Note:** For other records than those mentioned in the note above, this system of records contains individually identifiable health information. The Health Insurance Portability and Accountability Act of 1996, applies to most of such health information. Department of Defense 6025.18–R may place additional procedural requirements on the uses and disclosures of such information beyond those found in the Privacy Act of 1974 or mentioned in this system of records notice. Therefore, routine uses outlined below may not apply to such health information.

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records of information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when:

1. DHS or any component thereof;

2. Any employee of DHS in his/her official capacity;

3. Any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or

4. The United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to

an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security 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 harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) or harm to the individual who relies upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate Federal, State, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To Federal, State, or local governments and agencies to compile statistical data for research and auditing; to provide quality assurance; to report medical conditions and other data required by law; to aid in preventive health and communicable disease control programs.

I. To the Accreditation Association for Ambulatory Health Care, Inc. to evaluate health care provided, personnel, and facilities for professional certification and hospital accreditation; to provide quality services.

J. To the Department of Defense to analyze the results of communicable diseases, to ensure uniformity of record keeping, and to centralize production of reports for all uniformed services.

K. To the Department of Defense or other Federal, State, or local governments and agencies for casualty identification purposes.

L. To the Social Security Administration and Veterans Administration for use in determining an individual's entitlement to benefits administered by those agencies.

M. To the Public Health Service, Department of Defense, or Veterans Administration medical personnel or to personnel or facilities providing care to eligible beneficiaries under contract in connection with medical treatment of individuals.

N. To the Department of Health and Human Services for purposes of the Federal Medical Care Recovery Act. Records are available to the Public Health Service or Department of Defense medical personnel in connection with medical treatment of individuals at the Public Health Service or Department of Defense facilities.

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

None.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD–ROM.

**RETRIEVABILITY:**

Records may be retrieved by name and sponsor's social security number.

**SAFEGUARDS:**

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individual who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

**RETENTION AND DISPOSAL:**

A. Active Duty Personnel: Individual medical files are retained at the military personnel's unit or healthcare facility at which the military personnel receives care for so long as individual is assigned to the particular area. When the military personnel is reassigned, the individual medical file is transferred to the new duty station upon reassignment of military personnel. Upon separation or retirement, the medical file is incorporated into DHS/USCG–005 Military Services Personnel.

B. Retired Personnel: military personnel medical files are retained at the medical facility for a period of 6 years from date of last activity. Six years after the last report, the files are transferred to National Personnel Records Center (Military Personnel Records), 9700 Page Blvd, St. Louis, MO 63132.

C. Dependents: dependent's medical files are retained at the medical treatment facility for period of 6 years from date of last activity. Transferred to new duty station of sponsor upon written request of dependent. Records not transferred are forwarded to National Personnel Records Center, CPR, 111 Winnebago Street, St. Louis, MO 63118 six years after last activity.

D. Reserve Personnel: reservist medical files are retained in custody of the reserve group or unit, or healthcare facility at which the member receives care for so long as the reservist is assigned to the particular area. When the reservist is reassigned, the medical file is transferred to the new reserve group or unit or district commander as appropriate. Upon separation or retirement, the medical file is incorporated into Official USCG Reserve Service Record System, DHS/USCG–028.

**SYSTEM MANAGER AND ADDRESS:**

Commandant, CG–11, United States Coast Guard Headquarters, Director, Health and Safety Directorate, 2100 2nd Street, SW., Washington, DC 20593–0001.

**NOTIFICATION PROCEDURE:**

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to USCG,

Commandant (CG–611), 2100 2nd St., SW., Attn: FOIA Coordinator, Washington, DC 20593–0001.

When seeking records about yourself from this system of records or any other USCG system of records your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted to you under 28 U.S.C. 1746, a law that permits statements to be made under penalty or perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

• An explanation of why you believe the Department would have information on you,

• Specify when you believe the records would have been created,

• If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the USCG may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

**RECORD ACCESS PROCEDURES:**

See ''Notification procedure'' above.

**CONTESTING RECORD PROCEDURES:**

See ''Notification procedure'' above.

**RECORD SOURCE CATEGORIES:**

Medical facilities where beneficiaries treated or examined; investigations resulting from illness or injury; the individual.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29805 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

**[Docket No. DHS–2008–0144]**

## Privacy Act of 1974; United States Coast Guard—006 Great Lakes Registered Pilot and Applicant Pilot Eligibility System of Records

**AGENCY:** Privacy Office; DHS.

**ACTION:** Notice of Privacy Act system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974 and as part of the Department of Homeland Security's ongoing effort to review and update legacy system of records notices, the Department of Homeland Security is giving notice that it proposes to update and reissue the following legacy record system DOT/CG 592 Registered/Applicant Pilot Eligibility Folder (April 11, 2000), as Department of Homeland Security system of records notice titled, United States Coast Guard—006 Great Lakes Registered Pilot and Applicant Pilot Eligibility Records. Categories of individuals, categories of records, and the routine uses of this legacy system of records notice have been updated to better reflect the United States Coast Guard's Great Lakes Registered Pilot's and Applicant Pilot's files. This system will be included in the Department's inventory of record systems.

**DATES:** Written comments must be submitted on or before January 20, 2009. This new system will be effective January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0144 by one of the following methods:

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

• *Fax:* 1–866–466–5370.

• *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

• *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change and may be read at *http://www.regulations.gov*, including any personal information provided.

• *Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: David Roberts (202–475–3521), United States Coast Guard Privacy Officer, United States Coast Guard. For privacy issues please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

### I. Background

Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS) and its components and offices have relied on preexisting Privacy Act systems of records notices for the maintenance of records pertaining to Great Lakes registered and applicant pilots.

As part of its efforts to streamline and consolidate its record systems, DHS is updating and reissuing a system of records under the Privacy Act (5 U.S.C. 552a) that deals with pilot registration and qualification documentation. This records system will allow DHS/United States Coast Guard (USCG) to collect and preserve the records related to applicant and registered pilots that assists USCG in meeting its statutory obligation to establish, regulate, and oversee the operations of a pilotage system on the Great Lakes. Additionally this record system is used to maintain records of individuals who are registered as Great Lakes pilots to perform pilotage duties aboard foreign trade vessels on the Great Lakes and to maintain applications of mariners seeking registration as a Great Lakes registered pilot. In order to apply for this program, an individual must already maintain a USCG issued license. In accordance with the Privacy Act of 1974 and as part of DHS's ongoing effort to review and update legacy system of records notices, DHS is giving notice that it proposes to update and reissue the following legacy record system DOT/CG 592 Registered/Applicant Pilot Eligibility Folder (65 FR 19476 April 11, 2000), as DHS system of records notice titled, USCG Great Lakes Registered Pilot and Applicant Pilot Eligibility Records. Categories of individuals, categories of records, and the routine uses of this legacy system of records notice have been updated to better reflect the USCG's Great Lakes registered pilot's and applicant pilot's files. This system will be included in the Department's inventory of record systems.

### II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by

which the United States Government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency recordkeeping practices transparent, to notify individuals regarding the uses to which their records are put, and to assist individuals to more easily find such files within the agency. Below is the description of the Registered Pilot and Applicant Pilot Eligibility Records System of Records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this system of records to the Office of Management and Budget (OMB) and to Congress.

**System of Records: DHS/USCG–006**

**SYSTEM NAME:**

United States Coast Guard—006 Great Lakes Registered Pilot and Applicant Pilot Eligibility Records.

**SECURITY CLASSIFICATION:**

Unclassified.

**SYSTEM LOCATION:**

Records are maintained at USCG Headquarters in the Waterways Management Office, Great Lakes Pilotage Branch, (CG–54122) in Washington, DC.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

All United States Great Lakes registered pilots who are qualified to perform pilotage duties aboard foreign trade vessels on the Great Lakes; those individuals seeking selection as an applicant pilot on the Great Lakes records; and those individuals whose applications were rejected as a pilot on the Great Lakes.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Categories of records in the system include:

- Pilot's full name, home address, social security number, date and place of birth, height, weight, color of eyes and hair, citizenship, photograph.
- Application for registration;
- Renewal of registration;
- Annual report of physical examination and drug testing;
- Coast Guard license and merchant mariner document data;
- Examination and test results for registration; and
- Sea service record and other related documentation provided by the pilot or applicant.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. 301; 14 U.S.C. 632; the Federal Records Act, 44 U.S.C. 3101; 49 CFR 1.45, 1.46; 46 U.S.C. 9301–9308.

**PURPOSE(S):**

The purpose of this system is to assist USCG in meeting its statutory obligation to establish, regulate, and oversee the operations of a pilotage system on the Great Lakes and to maintain records of individuals who are registered as Great Lakes pilots to perform pilotage duties aboard foreign trade vessels on the Great Lakes and to maintain applications of mariners seeking registration as a Great Lakes pilot.

**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, all or a portion of the records of information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when:

1. DHS or any component thereof;

2. Any employee of DHS in his/her official capacity;

3. Any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or

4. The United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security 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 harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) or harm to the individual that rely upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate Federal, State, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper

and consistent with the official duties of the person making the disclosure.

H. To assist training program needs, retirements, statistical compilations, and negotiations with Canadian authorities to assure equitable participation by U.S. registered pilots with Canadian registered pilots.

I. To an appropriate Federal, state, local, tribal, territorial, foreign, or international agency, if the information is relevant and necessary to a requesting agency's decision concerning the hiring or retention of an individual, or issuance of a security clearance, license, contract, grant, or other benefit, or if the information is relevant and necessary to a DHS decision concerning the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant, or other benefit and when disclosure is appropriate to the proper performance of the official duties of the person making the request.

J. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of DHS or is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

None.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD–ROM.

**RETRIEVABILITY:**

Records may be retrieved by name and pilot registration number.

**SAFEGUARDS:**

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

**RETENTION AND DISPOSAL:**

Records are Destroyed 6 years after the individual's license expires, upon death of the individual or when the individual turns 70 years old, whichever is sooner. (AUTH: N1–26–05–2, Item 1)

**SYSTEM MANAGER AND ADDRESS:**

Commandant, CG–54122, Chief, Pilotage Branch, United States Coast Guard Headquarters, 2100 2nd Street, SW., Washington, DC 20593–0001.

**NOTIFICATION PROCEDURE:**

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to Commandant, CG–54122, Chief, Great Lakes Pilotage Branch, United States Coast Guard Headquarters, 2100 2nd Street, SW., Washington, DC 20593–0001.

When seeking records about yourself from this system of records or any other USCG system of records your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition, you should provide the following:

- An explanation of why you believe the Department would have information on you;
- Specify when you believe the records would have been created; and
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the USCG will not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

**RECORD ACCESS PROCEDURES:**

See ''Notification procedure'' above.

**CONTESTING RECORD PROCEDURES:**

See ''Notification procedure'' above.

**RECORD SOURCE CATEGORIES:**

Individual's original application for U.S. pilot's registration and individual's yearly report of medical examination.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29806 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

**[Docket No. DHS–2008–0191]**

### Privacy Act of 1974; U.S. Customs and Border Protection—011 TECS System of Records Notice

**AGENCY:** Privacy Office, DHS.

**ACTION:** Notice of Privacy Act system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974 and as part of the Department of Homeland Security's ongoing effort to review and update legacy system of record notices, the Department of Homeland Security is publishing a revised system of records notice for the system formerly known as the Treasury/CS.244, Treasury Enforcement Communication System, October 18, 2001, as a Department of Homeland Security system of records notice titled, DHS/CBP–011 TECS. Additionally, the Department is giving notice that it plans to consolidate into this newly revised system of records the following legacy system of records: Treasury/CS.272 Currency Declaration File, October 18, 2001; Treasury/CS.224 Suspect Persons Index, October 18, 2001; Justice/INS–032 National Automated Immigration Lookout System (NAILS), October 17, 2002; and Treasury/CS.262 Warnings to Importers in Lieu of Penalty, October 18, 2001. Categories of individuals, categories of records, and the routine uses of this legacy system of records notice have been reviewed and updated to better reflect the Department of Homeland Security DHS/CBP–011 TECS, which is no longer an acronym.

TECS is an updated and modified version of the former Treasury

Enforcement Communications System, which is principally owned and managed by U.S. Customs and Border Protection and is its principal law enforcement and anti-terrorism data base system. TECS is established as an overarching law enforcement information collection, analysis, and sharing environment that securely links telecommunications devices and personal computers to a central system and database. This environment is comprised of several modules designed to collect, maintain, and screen data as well as conduct analysis, screening, and information sharing. TECS databases contain temporary and permanent enforcement, inspection and intelligence records relevant to the anti-terrorism and law enforcement mission of U.S. Customs and Border Protection and numerous other federal agencies that it supports. TECS also maintains limited information on those individuals who have been granted access to the system. Access is granted to those agencies which share a common need for data maintained in the system. TECS also allows direct access to other major law enforcement systems, including the Department of Justice's National Crime Information Center (NCIC), the National Law Enforcement Telecommunications Systems (NLETS), and the Canadian Police Information Centre (CPIC).

In an effort to provide even more detailed information and transparency to the public, U.S. Customs and Border Protection has separately published System of Records Notices for the applicable subsets of data connected to TECS, including the DHS/CBP–006 Automated Targeting System (ATS) August 6, 2007, DHS/CBP–007 Border Crossing Information (BCI) July 25, 2008, DHS/CBP–005 Advanced Passenger Information System (APIS) last published November 18, 2008 and DHS/CBP–009 Non-Immigrant Information System (NIIS) being published concurrently with this SORN elsewhere in the **Federal Register** today.

Additionally, the Department is issuing a Notice of Proposed Rulemaking (NPRM) concurrent with this SORN elsewhere in the **Federal Register**. The exemptions for the legacy system of records notices will continue to be applicable until the final rule for this SORN has been issued.

This system will be included in the Department of Homeland Security's inventory of record systems.

**DATES:** Written comments must be submitted on or before January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0191 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.
- *Docket:* For access to the docket to read background documents or comments received go to *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: Laurence E. Castelli (202–325–0280), Chief, Privacy Act Policy and Procedures Branch, U.S. Customs and Border Protection, Office of International Trade, Regulations & Rulings, Mint Annex, 799 Ninth Street, NW., Washington, DC 20001–4501. For privacy issues contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

## I. Background

Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law, Section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS) and U.S. Customs and Border Protection (CBP) have relied on preexisting Privacy Act system of records notices for the collection and maintenance of records that concern the Treasury Enforcement Communications System (TECS).

As part of its efforts to streamline and consolidate its record systems, DHS is updating and reissuing a DHS/CBP system of records under the Privacy Act (5 U.S.C. 552a) that deals with CBP's priority mission of preventing terrorists and terrorist weapons from entering the country while facilitating legitimate travel and trade.

On March 1, 2003, the United States Customs Service (owner of the Treasury Enforcement Communications System) was transferred from the Department of the Treasury to the newly created Department of Homeland Security (''DHS'') and renamed ''Bureau of Customs and Border Protection.'' Subsequently, on April 23, 2007, a Notice was published in the **Federal Register** (72 FR 20131) to inform the public that the name of the Bureau of Customs and Border Protection had been changed by the Department of Homeland Security to ''U.S. Customs and Border Protection (CBP)''. Accordingly, inasmuch as the Treasury Enforcement Communications System is principally owned and managed by CBP and CBP is no longer part of the Department of the Treasury, the system formerly known as the Treasury Enforcement Communications System will now be known as DHS/CBP–011 TECS (no longer an acronym).

In accordance with the Privacy Act of 1974 and as part of the Department of Homeland Security's ongoing effort to review and update legacy system of record notices, the Department of Homeland Security is publishing a revised system of records notice for the system formerly known as the Treasury/CS.244, Treasury Enforcement Communication System, (66 FR 52984 October 18, 2001), as a Department of Homeland Security system of records notice titled, DHS/CBP–011 TECS. Additionally, the Department is giving notice that it is retiring Treasury/CS.272 Currency Declaration File, (October 18, 2001 66 FR 52984) Treasury/CS.224 Suspect Persons Index (66 FR 52984 October 18, 2001) Justice/INS–032 National Automated Immigration Lookout System (NAILS) (67 FR 64136 October 17, 2002) and Treasury/CS.262 Warnings to Importers in lieu of Penalty (66 FR 52984 October 18, 2001), as they have been into this consolidated SORN. Categories of individuals, categories of records, and the routine uses of this legacy system of records notice have been reviewed and updated to better reflect the Department of Homeland Security, U.S. Customs and Border Protection, and TECS.

DHS/CBP–011 TECS is an updated and modified version of the former Treasury Enforcement Communications System (TECS), which is principally owned and managed by U.S. Customs and Border Protection and is its principal law enforcement and anti-terrorism data base system. TECS is established as an overarching law enforcement information collection, analysis, and sharing environment that links telecommunications devices and personal computers securely to a central system and database. This environment is comprised of several modules designed to collect, maintain and screen data as well as conduct analysis, screening, and information sharing. TECS databases contain temporary and permanent enforcement, inspection, and intelligence records relevant to the anti-terrorism and law enforcement mission

of U.S. Customs and Border Protection and numerous other federal agencies that it supports. TECS also maintains limited information on those individuals who have been granted access to the system. Access is granted to those agencies which share a common need for data maintained in the system. TECS also allows direct access to other major law enforcement systems, including the Department of Justice's National Crime Information Center (NCIC), the National Law Enforcement Telecommunications Systems (NLETS) and the Canadian Police Information Centre (CPIC).

In an effort to provide even more detailed information and transparency to the public U.S. Customs and Border Protection has separately published System of Records Notices for the applicable subsets of data connected to TECS, including the DHS/CBP–006 Automated Targeting System (ATS) (August 6, 2007, 72 FR 43650), DHS/CBP–007 Border Crossing Information System (BCIS) (July 25, 2008, 73 FR 43457), DHS/CBP–005 Advanced Passenger Information System (APIS) (November 18, 2008, 73 FR 68435), and DHS/CBP–009 Non-Immigrant Information System (NIIS), which is being published concurrently with this SORN elsewhere in the **Federal Register** today.

Additionally, the Department is issuing a Notice of Proposed Rulemaking (NPRM) concurrent with this SORN elsewhere in the **Federal Register**. The exemptions for the legacy system of records notices will continue to be applicable until the final rule for this SORN has been published.

This system will be included in the Department of Homeland Security's inventory of record systems.

## II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses and disseminates personally identifiable information in individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system to make agency recordkeeping practices transparent, to notify individuals regarding the uses of their records, and to assist the individual to more easily find such files within the agency. Below is a description of the TECS System of Records.

In accordance with 5 U.S.C. 552a(r), a report concerning this record system has been sent to the Office of Management and Budget and to the Congress.

### System of Records: DHS/CBP–011

#### SYSTEM NAME:

DHS/CBP–011 TECS.

#### SECURITY CLASSIFICATION:

Unclassified; Law Enforcement Sensitive.

#### SYSTEM LOCATION:

This computer database is located at the U.S. Customs and Border Protection National Data Center in the Washington DC area. TECS will be migrated to other DHS Datacenters. Computer terminals are located at CBP sites and ports throughout the United States and at CBP Headquarters, Washington, DC, as well as appropriate facilities under the jurisdiction of the U.S. Department of Homeland Security (DHS) and other locations at which officers of DHS may be posted or operate to facilitate DHS's mission of homeland security. Terminals may also be located at appropriate facilities for other participating government agencies pursuant to agreement.

#### CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

- Violators or suspected violators of laws enforced or administered by DHS (some of whom have been apprehended by officers of DHS);
- Individuals who are suspected of, or who have been arrested for, thefts from international commerce;
- Convicted violators of laws enforced or administered by DHS and/or drug laws in the United States and foreign countries;
- Persons with outstanding warrants—Federal or state;
- Victims of any violation of the laws enforced or administered by DHS;
- Owners, operators and/or passengers of vehicles, vessels or aircraft traveling across U.S. borders or through other locations where CBP maintains an enforcement or operational presence;
- Persons traveling across U.S. borders or through other locations where CBP maintains an enforcement or operational presence and who are determined to be related to a law enforcement context;
- Persons identified by Center for Disease Control (CDC), U.S. Health and Human Services as ''No Boards'' because of a highly contagious communicable disease through the Advance Passenger Information System in connection with trying to board an aircraft to travel internationally;
- Individuals who have been issued a CBP detention or warning;
- Individuals who may pose a threat to the United States; and
- Individuals who have been given access to TECS for authorized purposes.

#### CATEGORIES OF RECORDS COVERED BY THE SYSTEM:

Various types of information from a variety of Federal, state, local, and foreign sources, which contribute to effective law enforcement and counterterrorism efforts, may be maintained in this system of records. Records include, but are not limited to, records pertaining to known or suspected violators, wanted persons, persons of interest for law enforcement and counterterrorism purposes, reference information, regulatory and compliance data. Information about individuals includes, but is not limited to full name, alias, date of birth, address, physical description, various identification numbers (e.g., social security number, alien number, I–94 number, seizure number), details and circumstances of a search, arrest, or seizure, case information such as merchandise and values, methods of theft.

#### AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Section 5 U.S.C. 301; Homeland Security Act of 2002, Pub. L. 107–296; the Tariff Act of 1930, as amended; Title 18, United States Code, Chapter 27; the Immigration and Nationality Act.

#### PURPOSE

The purpose of this system is to track individuals who have violated or are suspected of violating a law or regulation that is enforced or administered by CBP, to provide a record of any inspections conducted at

the border by CBP, to determine admissibility into the United States, and to record information regarding individuals, firms, and organizations to whom DHS/CBP has issued detentions and warnings. Additionally, this system of records covers individuals who have been given access to TECS for authorized 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, all or a portion of the records or information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. Any employee of DHS or any component in his/her official capacity;

3. Any employee of DHS or any component in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or

4. The U.S. or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS or CBP determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS or CBP collected the records.

B. To a congressional office in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS or CBP suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised;

2. DHS or CBP has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS, CBP, or another agency or entity) or harm to the individual who relies upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS or CBP's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS or CBP, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS/CBP officers and employees.

G. To appropriate Federal, State, local, tribal, or foreign governmental agencies or multilateral governmental organizations responsible for investigating or prosecuting the violations of, or for enforcing or implementing, a statute, rule, regulation, order, license, or treaty where DHS determines that the information would assist in the enforcement of civil or criminal laws.

H. To a court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil or criminal discovery, litigation, or settlement negotiations, or in response to a subpoena from a court of competent jurisdiction.

I. To third parties during the course of a law enforcement investigation to the extent necessary to obtain information pertinent to the investigation, provided disclosure is appropriate to the proper performance of the official duties of the officer making the disclosure.

J. To an organization or individual in either the public or private sector, either foreign or domestic, where there is a reason to believe that the recipient is or could become the target of a particular terrorist activity or conspiracy, to the extent the information is relevant to the protection of life or property and disclosure is appropriate to the proper performance of the official duties of the person making the disclosure.

K. To an appropriate Federal, State, local, tribal, foreign, or international agency, if the information is relevant and necessary to a requesting agency's decision concerning the hiring or retention of an individual, or issuance of a security clearance, license, contract, grant, or other benefit, or if the information is relevant and necessary to a DHS decision concerning the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant or other benefit and when disclosure is appropriate to the proper performance of the official duties of the person making the request.

L. To appropriate Federal, State, local, tribal, or foreign governmental agencies or multilateral governmental organizations, for purposes of assisting such agencies or organizations in preventing exposure to or transmission of a communicable or quarantinable disease or for combating other significant public health threats.

M. To Federal and foreign government intelligence or counterterrorism agencies or components where CBP becomes aware of an indication of a threat or potential threat to national or international security, or where such use is to assist in anti-terrorism efforts and disclosure is appropriate in the proper performance of the official duties of the person making the disclosure;

N. To the news media and the public, with the approval of the DHS Chief Privacy Officer in consultation with counsel, as appropriate, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of CBP or is necessary to demonstrate the accountability of CBP's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

O. To a Federal, State, or local agency, or other appropriate entity or individual, or through established liaison channels to selected foreign governments, in order to provide intelligence, counterintelligence, or other information for the purposes of intelligence, counterintelligence, or antiterrorism activities authorized by U.S. law, Executive Order, or other applicable national security directive.

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

None.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

The data is stored electronically at the National Data Center and other DHS Data Centers for current data and offsite at an alternative data storage facility for historical logs and system backups.

**RETRIEVABILITY:**

The data is retrievable by name, address, unique identifiers or in association with an enforcement report or other system document.

**SAFEGUARDS:**

All records are protected from unauthorized access through appropriate administrative, physical, and technical safeguards. These safeguards include all of the following: restricting access to those with a ''need to know''; using locks, alarm devices, and passwords; compartmentalizing databases; auditing software; and encrypting data communications.

TECS also monitors source systems for changes to the source data. The system manager, in addition, has the capability to maintain system back-ups for the purpose of supporting continuity of operations and the discrete need to isolate and copy specific data access transactions for the purpose of conducting security incident investigations. TECS information is secured in full compliance with the requirements of the DHS IT Security Program Handbook. This handbook establishes a comprehensive information security program.

Access to TECS is controlled through a security subsystem, which is used to grant access to TECS information on a ''need-to-know'' basis.

**RETENTION AND DISPOSAL:**

The majority of information collected in TECS is used for law enforcement and counterterrorism purposes. Records in the system will be retained and disposed of in accordance with a records schedule to be approved by the National Archives and Records Administration.

The retention period for information maintained in TECS is seventy-five (75) years from the date of the collection of the information or for the life of the law enforcement matter to support that activity and other enforcement activities that may become related. TECS collects information directly from authorized users.

**SYSTEM MANAGER AND ADDRESS:**

Assistant Commissioner, Office of Information Technology, Passenger Systems Program Office, U.S. Customs and Border Protection Headquarters, 1300 Pennsylvania Avenue, NW., Washington, DC 20229.

**NOTIFICATION PROCEDURE:**

The Secretary of Homeland Security has exempted this system from the notification, access, and amendment procedures of the Privacy Act because it is a law enforcement system. However, CBP will consider individual requests to determine whether or not information may be released. Thus, individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to CBP's FOIA Officer, 1300 Pennsylvania Avenue, NW., Washington, DC 20229.

When seeking records about yourself from this system of records or any other CBP system of records your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you,
- Specify when you believe the records would have been created,
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information CBP may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

**RECORD ACCESS PROCEDURES:**

See ''Notification procedure'' above.

**CONTESTING RECORD PROCEDURES:**

See ''Notification procedure'' above.

**RECORD SOURCE CATEGORIES:**

This system contains investigatory material compiled for law enforcement and counterterrorism purposes whose sources need not be reported.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

Pursuant to exemption 5 U.S.C. 552a(j)(2) of the Privacy Act, portions of this system are exempt from 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5) and (e)(8); (f), and (g). Pursuant to 5 U.S.C. 552a(k)(2), this system is exempt from the following provisions of the Privacy Act, subject to the limitations set forth in those subsections: 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f). In addition, to the extent a record contains information from other exempt systems of records, CBP will rely on the exemptions claimed for those systems.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29807 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

**[Docket No. DHS–2008–0140]**

### Privacy Act of 1974; United States Coast Guard–028 Family Advocacy Case Records System of Records

**AGENCY:** Privacy Office; DHS.

**ACTION:** Notice of Privacy Act system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974 and as part of the Department of Homeland Security's ongoing effort to review and update legacy system of records notices, the Department of Homeland Security is giving notice that it proposes to update and reissue the following United States Coast Guard legacy record system DOT/CG 631 Family Advocacy Case Records System (April 11, 2000) as a Department of Homeland Security system of records notice titled Family Advocacy United States Coast Guard Case Records. This system will allow the Department of Homeland Security to administer the United States Coast Guard Family Advocacy Program. Categories of individuals, categories of records, and the routine uses of this legacy system of records notice have been reviewed updated to better reflect the Department of Homeland Security/United States Coast Guard's—028 Family Advocacy Case Records system of records. Elsewhere in today's **Federal Register**, the Department is publishing a notice of proposed rulemaking to exempt this system of records from certain portions

of the Privacy Act. This new system will be included in the Department of Homeland Security's inventory of record systems.

**DATES:** Written comments must be submitted on or before January 20, 2009. This new system will be effective January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0140 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change and may be read at *http://www.regulations.gov*, including any personal information provided.
- *Docket:* For access to the docket, to read background documents, or comments received, go to *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: David Roberts (202–475–3521), Privacy Officer, United States Coast Guard. For privacy issues please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

## I. Background

Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS) and United States Coast Guard (USCG) have relied on previous Privacy Act systems of records notices for the collection and maintenance of records that concern the USCG–028 Family Advocacy Case Records system of records.

As part of its efforts to streamline and consolidate its record systems, DHS is updating and reissuing a DHS/USCG system of records under the Privacy Act (5 U.S.C. 552a) that deals with USCG Family Advocacy Program. The collection and maintenance of this information will assist DHS/USCG in meeting its obligation to administer the DHS/USCG Family Advocacy Program.

In accordance with the Privacy Act of 1974 and as part of DHS's ongoing effort to review and update legacy system of records notices, DHS is giving notice that it proposes to update and reissue the following legacy record system DOT/CG 631 Family Advocacy Case Record System (65 FR 19476 April 11, 2000) as a DHS/USCG system of records notice titled DHS/USCG–028 Family Advocacy Case Records. This system will allow DHS/USCG to administer the USCG Family Advocacy Program. Categories of individuals, categories of records, and the routine uses of this legacy system of records notice have been reviewed and updated to better reflect the DHS/USCG–028 Family Advocacy Case Records system of records. This new system will be included in DHS's inventory of record systems.

## II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5. When information about an adult dependent is contained in a Family Advocacy Case Record, that dependent may request access to the record maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5. Information about individuals, other than the individual requesting access, will be redacted.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency record keeping practices transparent, to notify individuals regarding the uses of their records, and to assist individuals to more easily find such files within the agency. Below is the description of the Family Advocacy Case Records system of records.

## III. Health Insurance Portability and Accountability Act

This system of records contains individually identifiable health information. The Health Insurance Portability and Accountability Act of 1996, applies to most of such health information. Department of Defense 6025.18–R may place additional procedural requirements on the uses and disclosures of such information beyond those found in the Privacy Act of 1974 or mentioned in this system of records notice.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this new system of records to the Office of Management and Budget and to Congress.

### System of Records: DHS/USCG–028

**SYSTEM NAME:**

United States Coast Guard Family Advocacy Case Records.

**SECURITY CLASSIFICATION:**

Unclassified.

**SYSTEM LOCATION:**

Records are maintained at the USCG Headquarters in Washington, DC, and servicing Work-Life Offices.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Categories of individuals covered by this system include active duty, reserve, and retired active duty and retired reserve military personnel and their dependents entitled to care at a USCG or other military or dental facility whose abuse or neglect is brought to the attention of appropriate authorities. Also included are persons suspected of abusing or neglecting such beneficiaries and persons presenting a need for preventive services.

**CATEGORIES OF RECORDS IN THIS SYSTEM INCLUDE:**

- Individual's name;
- Name of the suspected or confirmed abuser/neglecter or person in need of preventive services;
- Employee Identification Number and/or Social Security Number;
- Medical records of suspected and confirmed cases of family member abuse or neglect;
- Interviews and intake reports;
- Investigative reports;
- Correspondence;
- Family Advocacy Incident Determination Committee reports;

- Clinical assessment reports;
- State and/or local child protective services reports;
- Follow-up and evaluation reports; and
- Other supportive data assembled relevant to individual Family Advocacy Program files.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. 301; 14 U.S.C. 632; the Federal Records Act; 42 U.S.C. 5101, 5102; 44 U.S.C. 3101; COMDTINST 1750.7C.

**PURPOSE(S):**

The purpose of this system is to administer the USCG Family Advocacy program, including to maintain records that identify, monitor, track and provide treatment to alleged offenders, eligible victims and their families of substantiated spouse/child abuse and neglect; and to manage prevention programs to reduce the incidence of abuse throughout the USCG military communities.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

**Note:** Disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act limit access to those individuals within the Coast Guard who have a ''need to know'' in order to perform their official duties. Confidential information contained in Family Advocacy Case Records should generally be limited to the servicing Family Advocacy Specialist, with access permissible to the Family Advocacy Program Manager and direct supervisor of the Family Advocacy Specialist, on a ''need to know'' basis. When direct and complete access to the record is given to any other personnel within the agency who does not have a ''need to know'' in order to perform their official duties, written permission of the service member and any identified adult dependent is required.

**Note:** This system of records contains individually identifiable health information. The Health Insurance Portability and Accountability Act of 1996, applies to most of such health information. Department of Defense 6025.18–R may place additional procedural requirements on the uses and disclosures of such information beyond those found in the Privacy Act of 1974 or mentioned in this system of records notice. Therefore, routine uses outlined below may not apply to such health information.

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records of information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice (including United States Attorney Offices) or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. Any employee of DHS in his/her official capacity;

3. Any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or

4. The United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security 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 harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) or harm to the individual who relies upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate Federal, State, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To Federal, State, or local government or private agencies, or approved researchers for coordination of family advocacy programs, medical care, mental health treatment, and research into the causes and prevention of family domestic violence and trends within the USCG.

I. To Federal, State, or local governmental agencies when it is deemed appropriate to use civilian resources in counseling and treating individuals or families involved in child abuse or neglect or spouse abuse; or when appropriate or necessary to refer a case to civilian authorities for civil or criminal law enforcement; or when a state, county, or municipal child protective service agency inquires about a prior record of substantiated abuse for the purpose of investigating a suspected case of abuse.

J. To victims and witnesses of a crime for purposes of providing information consistent with the requirements of the Victim and Witness Assistance Program, regarding the investigation and disposition of an offense.

K. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of DHS or is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

None.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored electronically on magnetic disc, tape, digital media, and CD–ROM.

**RETRIEVABILITY:**

Individual's name, social security number, types of incidents, employee identification number.

**SAFEGUARDS:**

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system and/or paper files containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions. Those individuals routinely granted full access are Family Advocacy Program staff. When appropriate, those individuals may share information with persons outside the Family Advocacy Program, which is generally limited to a summary of the incident; names of individuals involved, when appropriate; and overview of assessment, disposition and treatment recommendations.

**RETENTION AND DISPOSAL:**

Records are maintained at the servicing Work-Life Office until the case is closed or the service member is separated from the Coast Guard. Upon closure of the case or separation of the sponsor, the paper record will be transferred to Commandant, CG–1112, or retained at the servicing Work-Life Office. The record is retained for five years from case closure or last date of action. At the end of five years the record is destroyed, except for information concerning certain minor USCG dependents who are victims of child abuse, neglect, or sexual abuse. These records are retained until the dependent turns 18 years-old. (AUTH: N1–26–05–8, Items, 1, 2, 3)

**SYSTEM MANAGER AND ADDRESS:**

Commandant, CG–111, Office of Work-Life-WP, Director, Personnel Management Directorate, United States Coast Guard Headquarters, 2100 2nd Street, SW., Washington, DC 20593–0001.

**NOTIFICATION PROCEDURE:**

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to Commandant, CG–111, Office of Work-Life G–WP, Director, Personnel Management Directorate, United States Coast Guard Headquarters, 2100 2nd Street, SW., Washington, DC 20593–0001.

When seeking records about yourself from this system of records or any other USCG system of records your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you,
- Specify when you believe the records would have been created,
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the USCG may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

**RECORD ACCESS PROCEDURES:**

See ''Notification procedure'' above.

**CONTESTING RECORD PROCEDURES:**

See ''Notification procedure'' above.

**RECORD SOURCE CATEGORIES:**

Reports from medical personnel, educational institutions, law enforcement agencies, public and private health and welfare agencies, USCG personnel and private individuals.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

The Secretary of Homeland Security has exempted this system from subsections (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2).

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29808 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

**[Docket No. DHS–2008–0128]**

### Privacy Act of 1974; Federal Emergency Management Agency—006 Citizen Corps Database System of Records

**AGENCY:** Privacy Office; DHS.

**ACTION:** Notice of Privacy Act system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974 and as part of the Department of Homeland Security's ongoing effort to review and update legacy system of records notices, the Department of Homeland Security is giving notice that it proposes to update and reissue the following legacy record system FEMA/VOL–1 Citizen Corps Database (April 29, 2002) as a Department of Homeland Security system of records notice titled, Federal Emergency Management Agency—006 Citizen Corps Database. Categories of individuals, categories of records, and the routine uses of this legacy system of records notice have been reviewed and updated to better reflect the Department of Homeland Security's Federal Emergency Management Agency Citizen Corps Database. The Citizen Corps, through its internet site at *http://www.citizencorps.gov*, allows individuals to indicate their interest in specific voluntary programs. Information concerning those desired activities is then disseminated by DHS/FEMA to the appropriate organization for further processing or response. The Citizen Corps coordinates efforts among several organizations, including the Community Emergency Response Teams (CERT), the Fire Corps, the Office of the Civilian Volunteer Medical Reserve Corps (MRC), the National Neighborhood Watch Program, the Volunteers in Police Service (VIPS), the Operation Terrorism Information and Prevention System (TIPS), the Corporation for National and Community Service (CNCS), and the Citizen Corps Council. In addition, these entities may express an interest in sharing their respective contact and similar information with other participants in these programs. This

new system will be included in the Department of Homeland Security's inventory of record systems.

**DATES:** Written comments must be submitted on or before January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0128 by one of the following methods:

- *Federal e-Rulemaking Portal*: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax*: 1–866–466–5370.
- *Mail*: Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions*: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change and may be read at *http://www.regulations.gov*, including any personal information provided.
- *Docket*: For access to the docket, to read background documents, or comments received, go to *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: Federal Emergency Management Agency Privacy Officer, Federal Emergency Management Agency. For privacy issues please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

## I. Background

Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS)/Federal Emergency Management Agency (FEMA) have relied on preexisting Privacy Act systems of records notices for the collection and maintenance of records that concern the DHS/FEMA Citizen Corps.

As part of its efforts to streamline and consolidate its record systems, DHS is updating and reissuing a system of records under the Privacy Act (5 U.S.C. 552a) that deals with the DHS/FEMA Citizen Corps. This record system will allow DHS/FEMA to collect and maintain records regarding individuals who express an interest in the Citizen Corps programs and activities, which include the Community Emergency Response Teams (CERT), the Fire Corps, the Office of the Civilian Volunteer Medical Reserve Corps (MRC), the National Neighborhood Watch Program, the Volunteers in Police Service (VIPS), the Operation Terrorism Information and Prevention System (TIPS), the Corporation for National and Community Service (CNCS), and the Citizen Corps Council. The collection and maintenance of this information will assist DHS/FEMA in recording individuals who express interest in Citizen Corps programs and activities.

In accordance with the Privacy Act of 1974 and as part of DHS's ongoing effort to review and update legacy system of records notices, DHS is giving notice that it proposes to update and reissue the following legacy record system FEMA/VOL–1 Citizen Corps Database (67 FR 30685, April 29, 2002) as a DHS system of records notice titled, DHS/FEMA—006 Citizen Corps Database. Categories of individuals and categories of records have been reviewed, and the routine uses of this legacy system of records notice have been updated to better reflect DHS/FEMA's Citizen Corps Database. The Citizen Corps, through its internet site at *http://www.citizencorps.gov*, allows individuals to indicate their interest in specific voluntary programs. Information concerning those desired activities is then disseminated by DHS/FEMA to the appropriate organization for further processing or response. The Citizen Corps coordinates efforts among several organizations, including the Community Emergency Response Teams (CERT), the Fire Corps, the Office of the Civilian Volunteer Medical Reserve Corps (MRC), the National Neighborhood Watch Program, the Volunteers in Police Service (VIPS), the Operation Terrorism Information and Prevention System (TIPS), the Corporation for National and Community Service (CNCS), and the Citizen Corps Council. In addition, these entities may express an interest in sharing their respective contact and similar information with other participants in these programs. This new system will be included in the DHS's inventory of record systems.

## II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency record keeping practices transparent, to notify individuals regarding the uses of their records, and to assist individuals to more easily find such files within the agency. Below is the description of the Citizen Corps Database System of Records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this updated system of records to the Office of Management and Budget and to Congress.

**System of Records**
**DHS/FEMA–006**

**SYSTEM NAME:**

Federal Emergency Management Agency—006 Citizen Corps Database.

**SECURITY CLASSIFICATION:**

Unclassified.

**SYSTEM LOCATION:**

Records are maintained at the Federal Emergency Management Agency Headquarters in Washington, DC and field offices.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Categories of individuals covered by this system include individuals who express an interest in Citizen Corps programs or activities supporting State and Local governments which include the Community Emergency Response Teams (CERT), the Fire Corps, the Office of the Civilian Volunteer Medical Reserve Corps (MRC), the National Neighborhood Watch Program, the Volunteers in Police Service (VIPS), the Operation Terrorism Information and Prevention System (TIPS), the Corporation for National and Community Service (CNCS), and the Citizen Corps Council. Additionally, various State and Local Government Officials are covered by this system.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Categories of records in this system include:

- Individual's name;
- Mailing address;
- E-mail address;
- Phone number;
- Volunteer program area and type of interest;
- Date of expression of interest; and
- Emergency preparedness training information, such as; courses taken and dates of courses.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

Federal Records Act, 44 U.S.C. 3101; Section 2, Executive Order 13254, January, 29, 2002; 1998 Appropriations Act (Pub, L, 105–119); and the Homeland Security Act of 2002 (Pub. L. 107–296, Section 224.). Fiscal Year 2008 Consolidated Appropriations Act (Pub. L. 110–161).

**PURPOSE(S):**

The Citizen Corps, through its internet site at *http://www.citizencorps.gov,* allows individuals to indicate their interest in specific voluntary programs. Information concerning those desired activities is then disseminated by DHS/FEMA to the appropriate organization for further processing or response. The Citizen Corps coordinates efforts among several organizations, including the Community Emergency Response Teams (CERT), the Fire Corps, the Office of the Civilian Volunteer Medical Reserve Corps (MRC), the National Neighborhood Watch Program, the Volunteers in Police Service (VIPS), the Operation Terrorism Information and Prevention System (TIPS), the Corporation for National and Community Service (CNCS), and the Citizen Corps Council. In addition, these entities may express an interest in sharing their respective contact and similar information with other participants in these programs.

**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, all or a portion of the records of information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. Any employee of DHS in his/her official capacity;

3. Any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or

4. The United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security 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 harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) or harm to the individual who relies upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate Federal, State, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To the USA Freedom Corps, Executive Office of the President.

I. To organizations or activities participating in the Citizen Corps Program if an individual has volunteered to assist this specific type of organization or activity.

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

None.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD–ROM.

**RETRIEVABILITY:**

Records may be retrieved by individual's name, mailing address, e-mail address, or volunteer program(s) in which the respondent indicates an interest.

**SAFEGUARDS:**

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

**RETENTION AND DISPOSAL:**

Routine correspondence with governors, mayors, and other State and local officials, as well as private citizens relating to FEMA programs will be destroyed when no longer needed in accordance with FEMA Records Schedule N1–311–86–1, Item 1B4.

Records relating to establishment, organization, membership, and policy of external committees that are sponsored by FEMA, but have a membership including representatives from other Federal agencies, States, local governments, and/or public citizens are permanent and will be maintained in accordance with FEMA Records Schedule N1–311–97–2, Item 1.

**SYSTEM MANAGER AND ADDRESS:**

Director, Office of Grants and Training, Federal Emergency Management Agency, 810 Seventh Street, NW., Washington, DC 20531.

**NOTIFICATION PROCEDURE:**

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to FEMA's FOIA Officer, 500 C Street, SW., Attn: FOIA Coordinator, Washington, DC 20472.

When seeking records about yourself from this system of records or any other FEMA system of records your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

• An explanation of why you believe the Department would have information on you,

• Specify when you believe the records would have been created,

• If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the FEMA may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

**RECORD ACCESS PROCEDURES:**

See ''Notification procedure'' above.

**CONTESTING RECORD PROCEDURES:**

See ''Notification procedure'' above.

**RECORD SOURCE CATEGORIES:**

Records are generated by the individual and by DHS/FEMA based on individual's responses submitted via the Citizen Corps Web site.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29809 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

**[Docket No. DHS–2008–0138]**

### Privacy Act of 1974; United States Coast Guard–016 Adjudication and Settlement of Claims System of Records

**AGENCY:** Privacy Office; DHS.

**ACTION:** Notice of Privacy Act system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974, the Department of Homeland Security is giving notice that it proposes to issue DHS/USCG–016 Adjudication and Settlement of Claims System system of records notice. This system of record was covered previously by the DOT/CG 526 Adjudication and Settlement of Claims System, but was inadvertently retired in the **Federal Register** on October 7, 2008. Categories of individuals, categories of records, and the routine uses of this legacy system of records notice have been reviewed and updated to better reflect the United States Coast Guard's adjudication and settlement of claims record system. This new system will be included in the Department of Homeland Security's inventory of record systems.

**DATES:** Written comments must be submitted on or before January 20, 2009. This new system will be effective January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0138 by one of the following methods:

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

• *Fax:* 1–866–466–5370.

• *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

• *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change and may be read at *http://www.regulations.gov*, including any personal information provided.

• *Docket:* For access to the docket, to read background documents, or comments received, go to *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: David Roberts (202–475–3521), United States Coast Guard Privacy Officer, United States Coast Guard. For privacy issues please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS) and its components and offices have relied on preexisting Privacy Act systems of records notices for the collection and maintenance of records that concern the adjudication and settlement of claims concerning the amounts of pay received by United States Cost Guard (USCG) military personnel.

As part of its efforts to streamline and consolidate its record systems, DHS is updating and reissuing a USCG system of records under the Privacy Act (5 U.S.C. 552a) that deals with the adjudication and settlement of claims concerning the amounts of pay received by USCG military personnel. This record system will allow DHS/USCG to collect and preserve the records regarding military personnel salary claims. The collection and maintenance of this information will assist DHS/USCG in meeting its obligation to adjudicate and settle salary claims received by USCG military personnel.

In accordance with the Privacy Act of 1974 and as part of DHS's ongoing effort to review and update legacy system of records notices, DHS is giving notice that it proposes to update and reissue the following legacy record system DOT/CG 526 Adjudication and Settlement of Claims System (65 FR 19476, 4/11/2000) as a DHS/USCG system of records notice titled, Adjudication and Settlement of Claims System. This system of records was covered previously by the DOT/CG, Adjudication and Settlement of Claims System, but was inadvertently retired in the **Federal Register** on October 7, 2008.

Categories of individuals and categories of records have been reviewed, and the routine uses of this legacy system of records notice have been updated to better reflect the DHS/USCG adjudication and settlement of claims record system. This new system will be included in DHS's inventory of record systems.

## II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses and disseminates individuals' information. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency from which information is stored and retrieved by the name of the individual or by some identifying number such as property address, mailing address, or symbol assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and lawful permanent residents. DHS extends administrative Privacy Act protections to all individuals where information is maintained on both U.S. citizens, lawful permanent residents, and visitors. Individuals may request their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR 5.21.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency record keeping practices transparent, to notify individuals regarding the uses of their records, and to assist individuals to more easily find such files within the agency. Below is the description of the Adjudication and Settlement of Claims System of Records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this new system of records to the Office of Management and Budget and to Congress.

**System of Records**
**DHS/USCG–016**

**SYSTEM NAME:**

United States Coast Guard Adjudication and Settlement of Claims System.

**SECURITY CLASSIFICATION:**

Unclassified.

**SYSTEM LOCATION:**

Records are maintained at the United States Coast Guard Headquarters in Washington, DC and field offices.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Categories of individuals covered by this system include active duty, reserve, retired active duty, and retired reserve military personnel who submit a claim against USCG relates to disputes concerning monetary matters.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Categories of records in this system include:

- Individual's name;
- Social security number or employee ID Number (EMPLID);
- Leave and earnings statements; and
- Other related information regarding claims arising out of disputes concerning amounts of pay received.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. 301, 5512–5514; 10 U.S.C. 939, 1442, 1453, 2774–2775; 14 U.S.C. 461; 31 U.S.C. 3716; 37 U.S.C. 1007; the Federal Records Act, 44 U.S.C. 3101; Debt Collection Act of 1982, Public Law 97–276, Section 124; Debt Collection Improvement Act of 1996, Public Law 104–132; Federal Claims Collection Standards, 31 CFR Chapter IX.

**PURPOSE(S):**

The purpose of this system is to adjudicate and settle claims related to such activities as salary claims, overpayments resulting from travel and transportation entitlement, claims from spouses, former spouses or widows of military personnel involving an annuity, and other similar activities when submitted by USCG active duty, reserve, and retired active duty and retired reserve military personnel.

**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, all or a portion of the records of information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice (including Unites States Attorney Offices) or other Federal agencies conducting litigation or in proceedings before any court, adjudicative or administrative body when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. Any employee of DHS in his/her official capacity;

3. Any employee of DHS in his/her individual capacity where the Department of Justice of DHS has agreed to represent the employee; or

4. The United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security 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 harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) or harm to the individual who relies upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate Federal, State, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To authorized officials of the Internal Revenue Service, General Accountability Office (GAO), and the Civil Service Commission, as required, to address salary claims submitted by USCG military and civilian personnel.

I. To a court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations or in connection with criminal law proceedings or in response to a subpoena.

J. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of DHS or is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

None.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD–ROM.

**RETRIEVABILITY:**

Records may be retrieved by claimant's name, employee ID (EMPLID), or social security number.

**SAFEGUARDS:**

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individual who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

**RETENTION AND DISPOSAL:**

Records are retained until adjudication and settlement. Most submissions are retained for present setting value, as required. Records are retained for 10 years, 3 months after the year in which the Government's right to collect first accrued. (AUTH: GRS 6, Item 10b(2)(a)) ( Records Officer).

**SYSTEM MANAGER AND ADDRESS:**

Commandant (CG–12), United States Coast Guard, 2100 2nd Street SW., Washington, DC 20593–0001.

**NOTIFICATION PROCEDURE:**

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to USCG, Commandant (CG–611), 2100 2nd St., SW., Attn: FOIA Coordinator, Washington, DC 20593–0001.

When seeking records about yourself from this system of records or any other USCG system of records your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted to you under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you,
- Specify when you believe the records would have been created,
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the USCG will not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

**RECORD ACCESS PROCEDURES:**

See ''Notification procedure'' above.

**CONTESTING RECORD PROCEDURES:**

See ''Notification procedure'' above.

**RECORD SOURCE CATEGORIES:**

Individual, USCG payroll offices, legal staff, investigators, Director of Personnel and Management, Comptroller General, GAO, and congressional correspondence.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

Dated: December 10, 2008.

**Hugo Teufel III**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29810 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

**[Docket No. DHS–2008–0143]**

### Privacy Act of 1974; United States Coast Guard–019 Non-Federal Invoice Processing System of Records

**AGENCY:** Privacy Office; DHS.

**ACTION:** Notice of Privacy Act system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974 and as part of the Department of Homeland Security's ongoing effort to review and update legacy system of records notices, the Department of Homeland Security is giving notice that it proposes to update and reissue the following legacy record system DOT/CG 576 Non-Federal Invoice Processing System (April 11, 2000) as a Department of Homeland Security system of records notice titled, United States Coast Guard–019 Non-Federal Invoice Processing System. Non-Federal Invoice Processing System is a program that facilitates processing of active duty member and dependent dental claims. Categories of individuals, categories of records, and the routine uses of this legacy system of records notice have been reviewed and updated to better reflect the Department of Homeland Security and the United States Coast Guard's–019 Non-Federal Invoice Processing System record system. This new system will be included in the Department of

Homeland Security's inventory of record systems.

**DATES:** Written comments must be submitted on or before January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0143 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax*: 1–866–466–5370.
- *Mail*: Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions*: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change and may be read at *http://www.regulations.gov*, including any personal information provided.
- *Docket*: For access to the docket, to read background documents, or comments received, go to *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: David Roberts (202–475–3521), Privacy Officer, United States Coast Guard. For privacy issues please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

## I. Background

Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS) and its components and offices have relied on preexisting Privacy Act systems of records notices for the maintenance of records that concern invoices processed by the United States Coast Guard (USCG) Non-Federal Invoice Processing System (NIPS).

As part of its efforts to streamline and consolidate its record systems, DHS is updating and reissuing a USCG system of records under the Privacy Act (5 U.S.C. 552a) that deals with invoices processed by NIPS. This record system will allow DHS/USCG to collect and preserve the records regarding invoices processed by NIPS. NIPS is an electronic database that provides for simple tracking and accounting of dental claims. The collection and maintenance of this information will assist DHS/USCG in meeting its obligation to record invoices processed by NIPS.

In accordance with the Privacy Act of 1974 and as part of the Department of Homeland Security's ongoing effort to review and update legacy system of records notices, the Department of Homeland Security is giving notice that it proposes to update and reissue the following legacy record system DOT/CG 576 Non-Federal Invoice Processing System (NIPS) (65 FR 19476, April 11, 2000) as a Department of Homeland Security/United States Coast Guard system of records notice titled, Non-Federal Invoice Processing System. Categories of individuals and categories of records have been reviewed, and the routine uses of this legacy system of records notice have been updated to better reflect the Department of Homeland Security and the United States Coast Guard's—019 Non-Federal Invoice Processing System record system. This new system will be included in the Department of Homeland Security's inventory of record systems.

## II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency record keeping practices transparent, to notify individuals regarding the uses to which their records are put, and to assist individuals to more easily find such files within the agency. Below is the description of the NIPS System of Records.

## III. Health Insurance Portability and Accountability Act

This system of records contains individually identifiable health information. The Health Insurance Portability and Accountability Act of 1996, applies to most of such health information. Department of Defense 6025.18–R may place additional procedural requirements on the uses and disclosures of such information beyond those found in the Privacy Act of 1974 or mentioned in this system of records notice.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this new system of records to the Office of Management and Budget and to Congress.

**System of Records**
**DHS/USCG–019**

**SYSTEM NAME:**

United States Coast Guard—019 Non-Federal Invoice Processing System.

**SECURITY CLASSIFICATION:**

Unclassified.

**SYSTEM LOCATION:**

Records are maintained at the United States Coast Guard Maintenance and Logistics Command Atlantic in Norfolk, VA.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Categories of individuals covered by this system include active duty, reserve, and retired members of the uniformed services and their eligible dependents, as well as non-Federal health care providers that have rendered services to eligible beneficiaries.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Categories of records in this system include:

- Individual's name;
- Social security number;
- Social security number of dependent's sponsor;
- Tax identification number of dental provider
- Correspondence, memoranda, and related documents concerning potential and actual health care invoices for processing by NIPS;
- Dental treatment and related medical records provided to the individual that are the subject of an invoice for non-Federal health care provided to an eligible beneficiary; and
- Automated data processing (ADP) records containing identifying data on individuals including: Units of

assignment and address, home address, and information necessary to process and monitor bills for payment.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. 301; 10 U.S.C. 1091; 14 U.S.C. 93.

**PURPOSE(S):**

The purpose of the USCG Non-Federal Invoice Processing System is to maintain an electronic record of dental invoices for Coast Guard active duty member, reserve, retired, and dependent, so that USCG can pay such invoices.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

**Note:** This system of records contains individually identifiable health information. The Health Insurance Portability and Accountability Act of 1996, applies to most of such health information. Department of Defense 6025.18–R may place additional procedural requirements on the uses and disclosures of such information beyond those found in the Privacy Act of 1974 or mentioned in this system of records notice. Therefore, routine uses outlined below may not apply to such health information.

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records of information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when:

1. DHS or any component thereof;

2. Any employee of DHS in his/her official capacity;

3. Any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or

4. The United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security 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 harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) or harm to the individual that rely upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate Federal, State, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To healthcare professionals: medical information, including records of healthcare and medical invoices to support a government claim.

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

None.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD–ROM.

**RETRIEVABILITY:**

Records may be retrieved by name, Social Security number of member or dependents sponsor, or name or tax identification number of non-Federal healthcare provider.

**SAFEGUARDS:**

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions. The system maintains a real-time auditing function of individuals who access the system. Additional safeguards may vary by component and program.

**RETENTION AND DISPOSAL:**

Records are retained for one year from date of service; transferred to a Federal Record Center and retained for an additional 5 years 3 months, and destroyed thereafter. (AUTH: GRS 6, Item 1a)

**SYSTEM MANAGER AND ADDRESS:**

United States Coast Guard Maintenance and Logistics Command Atlantic Health and Safety Division (MLC LANT (k)), 300 East Main Street, Suite 1000, Norfolk, VA 23510–9103.

**NOTIFICATION PROCEDURE:**

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to USCG, Commandant (CG–611), 2100 2nd St., SW., Attn: FOIA Coordinator, Washington, DC 20593–0001.

When seeking records about yourself from this system of records or any other USCG system of records your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity,

meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov or 1–866–431–0486.* In addition you should provide the following:

• An explanation of why you believe the Department would have information on you,

• Specify when you believe the records would have been created,

• If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the USCG will not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

**RECORD ACCESS PROCEDURES:**

See ''Notification procedure'' above.

**CONTESTING RECORD PROCEDURES:**

See ''Notification procedure'' above.

**RECORD SOURCE CATEGORIES:**

From the individual, individual's spouse, parent or guardian. Medical facilities (United States Coast Guard, Department of Defense, uniformed Services Treatment Facility, or non-Federal, provider) where beneficiaries are treated. From Active Duty and Enlisted Personnel; DHS/USCG–005 Military Services Personnel. From Reserve personnel—the Official Coast Guard Reserve Service Record System, DHS/USCG–028. Investigations resulting from illness or injury.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29811 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

**[Docket No. DHS–2008–0097]**

## Privacy Act of 1974; Federal Emergency Management Agency—007 National Flood Insurance Program Marketing Files System of Records

**AGENCY:** Privacy Office; DHS.

**ACTION:** Notice of Privacy Act system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974, the Department of Homeland Security is giving notice that it proposes to consolidate three legacy record systems into a Department of Homeland Security system of records notice titled, Federal Emergency Management Agency National Flood Insurance Program Marketing Files: FEMA/FIMA–4 National Flood Insurance Program Marketing Records and Related Files (January 23, 2002), FEMA/FIMA–5 National Flood Insurance Program Telephone Response Center (TRC) Consumer and Policyholder Records and Related Documents Files (January 23, 2002), and FEMA/MIT–7 Flood Map Customer Records (June 8, 2001). This system will allow the Department of Homeland Security to market the Department of Homeland Security Federal Emergency Management Agency—006 National Flood Insurance Program. Categories of individuals, categories of records, and the routine uses of these legacy system of records notices have been consolidated and updated to better reflect the National Flood Insurance Program marketing record systems. This system will be included in the Department's inventory of record systems.

**DATES:** Written comments must be submitted on or before January 20, 2009. This new system will be effective January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0097 by one of the following methods:

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

• *Fax:* 1–866–466–5370.

• *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

• *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change and may be read at *http://www.regulations.gov,* including any personal information provided.

• *Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: Federal Emergency Management Agency Privacy Officer, Federal Emergency Management Agency. For privacy issues please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

### I. Background

Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS)/Federal Emergency Management Agency (FEMA) have relied on preexisting Privacy Act systems of records notices for the collection and maintenance of records pertaining to the marketing of the National Flood Insurance Program, which is administered by DHS/FEMA.

In 1968, Congress created the National Flood Insurance Program (NFIP) in response to the rising cost of taxpayer funded disaster relief for flood victims and the increasing amount of damage caused by floods.

Nearly 20,000 communities across the United States and its territories participate in the NFIP by adopting and enforcing floodplain management ordinances to reduce future flood damage. In exchange, the NFIP makes federally-backed flood insurance available to homeowners, renters, and business owners in these communities.

Typically, a home or business owner will seek flood insurance from an insurance company that provides other lines of business such as traditional car insurance or property and casualty homeowners insurance. In other cases, a mortgage lender will require flood insurance in addition to regular homeowner's insurance. If a home owner's insurance company participates in the NFIP's Write-Your-Own (WYO) program, and the home or business owner's building is located in a participating NFIP community, the home or business owner can purchase flood insurance.

The NFIP Marketing Files SORN allows DHS/FEMA to market the NFIP program to home and business owners

whose homes/buildings are located in a participating NFIP community.

In accordance with the Privacy Act of 1974, the Department of Homeland Security is giving notice that it proposes to consolidate three legacy record systems into a Department of Homeland Security system of records notice titled, Federal Emergency Management Agency National Flood Insurance Program Marketing Files: FEMA/FIMA–4 National Flood Insurance Program Marketing Records and Related Files (67 FR 3193 January 23, 2002), FEMA/FIMA–5 National Flood Insurance Program Telephone Response Center (TRC) Consumer and Policyholder Records and Related Documents Files (67 FR 3193 January 23, 2002), and FEMA/MIT–7 Flood Map Customer Records (66 FR 30927 June 8, 2001). This system will allow the Department of Homeland Security to market the Department of Homeland Security Federal Emergency Management Agency—007 National Flood Insurance Program. Categories of individuals, categories of records, and the routine uses of these legacy systems of records notices have been consolidated and updated to better reflect the Department of Homeland Security's Federal Emergency Management Agency National Flood Insurance Program marketing record systems. This system will be included in the Department's inventory of record systems.

## II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency record keeping practices transparent, to notify individuals regarding the uses of their records, and to assist individuals to more easily find such files within the agency. Below is the description of the Federal Emergency Management Agency National Flood Insurance Program Marketing Files System of Records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this system of records to the Office of Management and Budget (OMB) and to Congress.

### System of Records DHS/FEMA–007

**SYSTEM NAME:**

Federal Emergency Management Agency—007 National Flood Insurance Program Marketing Files.

**SECURITY CLASSIFICATION:**

Unclassified.

**SYSTEM LOCATION:**

Records are maintained at the Federal Emergency Management Agency Headquarters in Washington, DC and in field offices.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Categories of individuals covered by this system include individuals who apply for and individuals who are insured under the National Flood Insurance Program, Write-Your-Own companies, flood insurance agents and lenders, and individuals who request information on the National Flood Insurance Program.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Categories of records in this system include:

- Individual's name;
- Business's name;
- Addresses;
- Phone numbers;
- Account numbers or order numbers;
- Market research data regarding the NFIP, including information regarding awareness, attitudes, and satisfaction as it relates to the NFIP, which is obtained through qualitative surveys approved by the Office of Management and Budget (OMB);
- Telephone Response Center (TRC) records regarding research conducted with customers, insurance agents, Write-Your-Own (WYO) companies and individual respondents.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

Federal Records Act, 44 U.S.C. 3101; National Flood Insurance Act of 1968, as amended, and Flood Disaster Protection Act of 1973, as amended, 42 U.S.C 4001 *et seq.*

**PURPOSE(S):**

The purpose of this system is to market the National Flood Insurance Program.

**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, all or a portion of the records of information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice (including United States Attorney Offices) or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. Any employee of DHS in his/her official capacity;

3. Any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or

4. The United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security 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 harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) or harm to the individual who relies upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate Federal, State, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of DHS or is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

None.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD-ROM.

**RETRIEVABILITY:**

Records are retrieved by individual's name, business' name, addresses, telephone number, account number, or order number.

**SAFEGUARDS:**

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated system security access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

**RETENTION AND DISPOSAL:**

Flood plain Management Files end at the close of each fiscal year, retired to the Federal Record Center, and destroyed ten years after cutoff, in accordance with FEMA Records Schedule N1–311–02–01, Item 4. Files generated in processing flood insurance policies under the continuing National Flood Insurance Program end when file becomes inactive and destroyed five years after cutoff, in accordance with FEMA Records Schedule N1–311–86–1, Item 1A13a(2).

**SYSTEM MANAGER AND ADDRESS:**

Administrator, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency Headquarters, 500 C Street, SW., Washington, DC 20472.

**NOTIFICATION PROCEDURE:**

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to FEMA's FOIA Officer, 500 C Street, SW., Attn: FOIA Coordinator, Washington, DC 20472.

When seeking records about yourself from this system of records or any other FEMA system of records your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you,
- Specify when you believe the records would have been created,
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the FEMA may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

**RECORD ACCESS PROCEDURES:**

See ''Notification procedure'' above.

**CONTESTING RECORD PROCEDURES:**

See ''Notification procedure'' above.

**RECORD SOURCE CATEGORIES:**

Individual's who apply for and individuals who are insured under the National Flood Insurance Program, Write-Your-Own companies, flood insurance agents and lenders, and individuals who request information on the National Flood Insurance Program.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29812 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

**[Docket No. DHS–2008–0162]**

### Privacy Act of 1974; United States Citizenship and Immigration Services—008 Refugee Access Verification Unit System of Records.

**AGENCY:** Privacy Office; DHS.

**ACTION:** Notice of Privacy Act system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974 and as part of the Department of Homeland Security's ongoing effort to review and update legacy system of records notices, the Department of Homeland Security is giving notice that it proposes to update and reissue the following legacy record system, Justice/INS–006 Refugee Access Verification Unit Records, December 26, 2002, as a Department of Homeland Security U.S. Citizenship and Immigration Services system of records titled, U.S. Citizenship and Immigration Services Refugee Access Verification Unit System of Records.

The identification of potential refugees and the initial processing of potential refugees is performed by the Department of State, outside of the United States, and information associated with this process is captured in the Department of States' Worldwide Refugee Processing System. Although the Department of Homeland Security U.S. Citizenship and Immigration Services has limited access to the system, it does not belong to Department of Homeland Security U.S. Citizenship and Immigration Services. There are four categories of fact patterns under which an individual can become eligible for resettlement in the United States as a refugee. The Department of Homeland Security U.S. Citizenship and Immigration Services has a separate system that contains information related to only one of these categories, which is when a family member in the United States files an Affidavit of Relationship. Information related to the other three categories is initially captured in the Department of States' Worldwide Refugee Processing System and then in the Department of Homeland Security U.S. Citizenship and Immigration Services' DHS–USCIS–001 A-File system (72 FR 1755 January 16, 2007) after the individual comes to the United States. In addition, information related to individuals for whom Affidavits of Relationships have been filed may also be captured in Department of Homeland Security U.S. Citizenship and Immigration Services' DHS–USCIS–007 Benefits Information System (73 FR 56596, September 29, 2008) as the applicant seeks to adjust his or her status.

Categories of individuals, categories of records and routine uses and purpose of this legacy system of records notice have been updated to better reflect the United States Citizenship and Immigration Services' Refugee Access Verification Unit records. Additionally, authorities for maintenance of the system, retention and disposal, and system manager have been updated to reflect the systems current operations. This updated system of records notice will be included in the Department of Homeland Security's inventory of record systems.

**DATES:** Written comments must be submitted on or before January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0162 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change and may be read at *http://www.regulations.gov*, including any personal information provided.
- *Docket:* For access to the docket, to read background documents, or comments received, go to *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact Donald K. Hawkins (202–272–8404), Privacy Officer, U.S. Citizenship and Immigration Services, 20 Massachusetts Avenue, NW., Washington, DC 20529. For privacy issues please contact Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

## I. Background

Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS) and the U.S. Citizenship and Immigration Services (USCIS) have relied on preexisting Privacy Act systems of records notices for the collection and maintenance of records handled by USCIS Refugee Access Verification Unit (RAVU).

As part of its efforts to streamline and consolidate its record systems, DHS is updating and reissuing a USCIS system of records under the Privacy Act (5 U.S.C. 552a) that deals with storing and reporting the results of the Affidavit of Relationship (AOR) review for refugee applicants. This record system allows DHS/USCIS to collect and preserve the records regarding the processing of AORs for potential refugee applicants. The collection and maintenance of this information will assist DHS/USCIS in accomplishing the following three functions: (1) Issuing its findings to the Department of State (DOS) in furtherance of the DOS' onward processing outside of the United States; (2) to permit the return of the AOR to the anchor relative due to a finding of ineligibility and; (3) to assist USCIS in tracking statistics regarding findings of fraud.

In accordance with the Privacy Act of 1974 and as part of the Department of Homeland Security's ongoing effort to review and update legacy system of records notices, the Department of Homeland Security is giving notice that it proposes to update and reissue the following legacy record system, Justice/INS–006 Refugee Access Verification Unit Records, December 26, 2002, as a Department of Homeland Security U.S. Citizenship and Immigration Services system of records titled, U.S. Citizenship and Immigration Services Refugee Access Verification Unit System of Records.

The identification of potential refugees and the initial processing of potential refugees is performed by the Department of State, outside of the United States, and information associated with this process is captured in the Department of States' Worldwide Refugee Processing System. Although the Department of Homeland Security U.S. Citizenship and Immigration Services has limited access to the system, it does not belong to Department of Homeland Security U.S. Citizenship and Immigration Services. There are four categories of fact patterns under which an individual can become eligible for resettlement in the United States as a refugee. The Department of Homeland Security U.S. Citizenship and Immigration Services has a separate system that contains information related to only one of these categories, which is when a family member in the United States files an Affidavit of Relationship. Information related to the other three categories is initially captured in the Department of States' Worldwide Refugee Processing System and then in the Department of Homeland Security U.S. Citizenship and Immigration Services' DHS–USCIS–001 A-File system (72 FR 1755, January 16, 2007) after the individual comes to the United States. In addition, information related to individuals for whom Affidavits of Relationships have been filed may also be captured in Department of Homeland Security U.S. Citizenship and

Immigration Services' DHS–USCIS–007 Benefits Information System (73 FR 56596, September 29, 2008) as he or she seeks to adjust his or her status.

Categories of individuals, categories of records and routine uses and purpose of this legacy system of records notice have been updated to better reflect the United States Citizenship and Immigration Services' Refugee Access Verification Unit records. Additionally, authorities for maintenance of the system, retention and disposal, and system manager have been updated to reflect the systems current operations. This updated system of records notice will be included in the Department of Homeland Security's inventory of record systems.

## II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

In addition, information pertaining to an individual's status as a refugee is as a matter of DHS policy, afforded the confidentiality protections contained in 8 CFR 208.6 which strictly limits the disclosure of information to third parties.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency record keeping practices transparent, to notify individuals regarding the uses of their records, and to assist individuals to more easily find such files within the agency. Below is the description of the Protected Status Application Information System of Records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this new system of records to the Office of Management and Budget and to Congress.

**System of Records**
**DHS/USCIS–008**

**SYSTEM NAME:**

United States Citizenship and Immigration Services Refugee Access Verification Unit Records.

**SECURITY CLASSIFICATION:**

Unclassified.

**SYSTEM LOCATION:**

Records are maintained at the United States Citizenship and Immigration Services Headquarters, Refugee Affairs Division in Washington, DC, and field locations.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Categories of individuals covered by this system include priority three (P3) refugee applicants and their relatives who have not yet received a refugee classification interview by DHS/USCIS; and anchor relatives such as lawful permanent residents and/or United States citizen relatives in the United States who have filed an Affidavit of Relationship (AOR) on behalf of a refugee applicant overseas under the P3 worldwide processing priorities.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Categories of records in this system may include:

- Applicant's name and the name of accompanying family members and their contact information;
- Anchor's Alien number (if applicable);
- Anchor relative's name and contact information;
- Interview worksheets;
- Other applications for USCIS benefits and related forms;
- AOR and AOR review checklists and decision notices;
- Biographic and demographic information of anchor relative and applicant such as family trees and documents establishing identity;
- Communication from voluntary agencies; Members of Congress; U.S. Government agencies and International organizations;
- AOR Review findings;
- Case number.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. 301; the Federal Records Act, 44 U.S.C. 3101; 8 U.S.C. 1522(b) (Authorization for Programs for Initial Domestic Resettlement of and Assistance to Refugees) and 8 U.S.C. 1157 (Annual Admission of Refugees and Admission of Emergency Situation Refugees).

**PURPOSE(S):**

The purpose of this system is to track and manage the review of Affidavits of Relationship (AORs) filed by anchor relatives in the United States on behalf of certain family members overseas seeking consideration for refugee resettlement under Priority Three (P3) to the United States.

**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, all or a portion of the records of information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. Any employee of DHS in his/her official capacity;

3. Any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or

4. The United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security 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 harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) or harm to the individual who relies upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate Federal, State, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To the Department of State (DOS), when necessary to accomplish an agency function related to this system of records.

I. To an attorney or representative who is acting on behalf of an individual covered by this system of records (as defined in 8 CFR 1.1(j)) in conjunction with any proceeding before DHS/USCIS or the Executive Office for Immigration Review.

J. To a former employee of the Department for purposes of responding to an official inquiry by a Federal, State, or local government entity or professional licensing authority, in accordance with applicable Department regulations; or facilitating communications with a former employee that may be necessary for personnel-related or other official purposes where the Department requires information and/or consultation assistance from the former employee regarding a matter within that person's former area of responsibility;

K. To Federal and foreign government intelligence or counterterrorism agencies or components where DHS becomes aware of an indication of a threat or potential threat to national or international security, or where such use is to assist in anti-terrorism efforts and disclosure is appropriate to the proper performance of the official duties of the person making the disclosure.

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

None.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Records in this system are stored electronically and on paper in secure facilities in a locked drawer behind a locked door.

**RETRIEVABILITY:**

Records may be retrieved by refugee applicant's name, refugee alien number, case number, and anchor relative's name.

**SAFEGUARDS:**

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

**RETENTION AND DISPOSAL:**

In accordance with National Archives and Records Administration approved schedule N1–563–04–5, the RAVU electronic master file records are maintained 20 years before destruction; case files are maintained at USCIS Headquarters for 2 years and then destroyed.

**SYSTEM MANAGER AND ADDRESS:**

Chief, Refugee Affairs Division, Refugee, Asylum and International Operations Directorate, 111 Massachusetts Avenue, Eighth Floor, Washington, DC 20529.

**NOTIFICATION PROCEDURE:**

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to National Records Center, FOIA/PA Office, P.O. Box 648010, Lee's Summit, MO 64064–8010. Specific FOIA contact information can be found at *http://www.dhs.gov/foia* under ''contacts.''

When seeking records about yourself from this system of records or any other USCIS system of records your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition, you should provide the following:

- An explanation of why you believe the Department would have information on you,
- Specify when you believe the records would have been created,
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information USCIS may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

**RECORD ACCESS PROCEDURES:**

See ''Notification procedure'' above.

**CONTESTING RECORD PROCEDURES:**

See ''Notification procedure'' above.

**RECORD SOURCE CATEGORIES:**

Information contained in this system of records is obtained from the individual who is the subject of these records as well as relatives, sponsors, Members of Congress, U.S. Government agencies, voluntary agencies, international organizations, and local sources at overseas posts.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, U.S. Department of Homeland Security.*

[FR Doc. E8–29837 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

**[Docket No. DHS–2008–0158]**

### Privacy Act of 1974; U.S. Customs and Border Protection—012 Closed Circuit Television System System of Records

**AGENCY:** Privacy Office, DHS.

**ACTION:** Notice of Privacy Act system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974 and as part of the Department of Homeland Security's ongoing effort to review and update legacy system of record notices, the Department of Homeland Security proposes to update and reissue the following legacy record system, Treasury/CS.226 Television System, October 18, 2001, as a U.S. Customs and Border Protection system of records notice titled, U.S. Customs and Border Protection—012 Closed Circuit Television System. Categories of individuals, categories of records, and the routine uses of this legacy system of records notice have been reviewed and updated to better reflect the U.S. Customs and Border Protection—012 Closed Circuit Television System record system. Additionally, elsewhere in today's **Federal Register**, a notice of proposed rulemaking is being issued which will exempt this system of records from certain aspects of the Privacy Act. This reissued system will be included in the Department of Homeland Security's inventory of record systems.

**DATES:** Written comments must be submitted on or before January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0158 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.
- *Docket:* For access to the docket, to read background documents, or comments received go to *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: Laurence E. Castelli (202–572–0280), Chief, Privacy Act Policy and Procedures Branch, U.S. Customs and Border Protection, Office of International Trade, Regulations & Rulings, Mint Annex, 1300 Pennsylvania Ave., NW., Washington, DC 20229. For privacy issues contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS) and U.S. Customs and Border Protection (CBP) have relied on preexisting Privacy Act system of records notice, Treasury/CS.226 Television System (66 FR 52984 October 18, 2001), for the collection and maintenance of records that concern the DHS/CBP—012 Closed Circuit Television System.

As part of its efforts to streamline and consolidate its record systems, DHS is updating and reissuing a DHS/CBP system of records notice under the Privacy Act (5 U.S.C. 552a) that concerns people involved in incidents or disturbances related to DHS/CBP inspections while seeking admission into the United States. This record system allows DHS/CBP to videotape persons being escorted within a port of entry. The collection and maintenance of this information assists DHS/CBP in recording individuals who are part of an incident or disturbance during a secondary inspection or individuals who received a secondary inspection due to an incident or disturbance.

In accordance with the Privacy Act of 1974 and as part of DHS's ongoing effort to review and update legacy system of record notices, DHS/CBP proposes to update and reissue the following legacy record system, Treasury/CS.226 Television System (66 FR 52984 October 18, 2001), as a DHS/CBP system of records notice titled, U.S. Customs and Border Protection—012 Closed Circuit Television System. Categories of individuals, categories of records, and the routine uses of this legacy system of records notice have been reviewed and updated to better reflect the DHS/CBP—012 Closed Circuit Television System record system. Additionally, elsewhere in today's **Federal Register**, a notice of proposed rulemaking is being issued which will exempt this system of records from certain aspects of the Privacy Act. This reissued system will be included in DHS's inventory of record systems.

#### II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the U.S. Government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass U.S. citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR Part 5.

The Privacy Act requires that each agency publish in the **Federal Register** a description denoting the type and character of each system of records in order to make agency recordkeeping practices transparent, to notify individuals about the use of their records, and to assist the individual to more easily find files within the agency. Below is a description of the Television System record system.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this revised system of records to the Office of Management and Budget and to the Congress.

**System of Records:**

DHS/CBP–012.

**SYSTEM NAME:**

U.S. Customs and Border Protection—012 Closed Circuit Television System.

**SECURITY CLASSIFICATION:**

Unclassified.

**SYSTEM LOCATION:**

Records are maintained at the U.S. Customs and Border Protection Headquarters in Washington, D.C. and in field offices.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Categories of individuals covered by this system include individuals involved in incidents or disturbances related to a DHS/CBP inspection while attempting to enter the U.S.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Categories of records in this system include:

- Individual's name;
- Date of Birth;
- Citizenship;
- Port of entry;
- Method of entry, including vehicle information;
- Date of entry;
- Time of entry;
- Search records, including the incident that required a secondary inspection, and items found during the inspection; and
- Audio-video cassette recording of the persons being escorted into, inside, and out of the secondary areas of the port of entry.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. 301; and the Federal Records Act, 44 U.S.C. 3101; 41 CFR Part 102; Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002); the immigration laws, including 8 U.S.C. 1222–1225 and 1357; the customs laws, including 19 U.S.C. 2, 482, 1433, 1434, 1459, 1461, 1484, 1499, 1581, 1582; 6 U.S.C 202, 231; the agriculture laws, including 7 U.S.C. 8303, 8304, 8307.

**PURPOSE(S):**

The purpose of this system is to record individuals who are sent to secondary when attempting to enter the U.S., or who are involved in an incident or disturbance while within CBP controlled space at the border. This record system will allow DHS/CBP to videotape persons being escorted within a port of entry.

**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, all or a portion of the records of information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. Any employee of DHS or any component in his/her official capacity;

3. Any employee of DHS or any component in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or

4. The U.S. or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS or CBP determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS or CBP collected the records.

B. To a congressional office in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS or CBP suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised;

2. DHS or CBP has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS, CBP, or another agency or entity) or harm to the individual who relies upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS or CBP's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS or CBP, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS/CBP officers and employees.

G. To appropriate Federal, State, local, tribal, or foreign governmental agencies or multilateral governmental organizations responsible for investigating or prosecuting the violations of, or for enforcing or implementing, a statute, rule, regulation, order, license, or treaty where DHS determines that the information would assist in the enforcement of civil or criminal laws.

H. To a Federal, State, or local agency, or other appropriate entity or individual, or through established liaison channels to selected foreign governments, in order to provide intelligence, counterintelligence, or other information for the purposes of intelligence, counterintelligence, or antiterrorism activities authorized by U.S. law, Executive Order, or other applicable national security directive.

I. To appropriate Federal, State, local, tribal, or foreign governmental agencies or multilateral governmental organizations where DHS is aware of a need to utilize relevant data for purposes of testing new technology and systems designed to enhance national security or identify other violations of law.

J. To an appropriate Federal, State, local, tribal, foreign, or international agency, if the information is relevant and necessary to a requesting agency's decision concerning the hiring or retention of an individual, or issuance of a security clearance, license, contract, grant, or other benefit, or if the information is relevant and necessary to a DHS or component decision concerning the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant or other benefit when disclosure is appropriate to the proper performance of the official duties of the person making the request.

K. To a court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations or in connection with criminal law proceedings or in response to a subpoena from a court of competent jurisdiction.

L. To third parties during the course of a law enforcement investigation to the extent necessary to obtain information pertinent to the investigation, provided disclosure is appropriate to the proper performance of the official duties of the officer making the disclosure.

M. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of DHS or any component or is necessary to demonstrate the accountability of DHS or a component's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

None.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD–ROM.

**RETRIEVABILITY:**

Records are retrieved by individual's name or date and time of the recording.

**SAFEGUARDS:**

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to this computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

**RETENTION AND DISPOSAL:**

All recordings with incidents are retained for six months. Those on which some action may be taken are retained for one year or until the close of the case. The electronic media used to make recording can be reused. Therefore, after the above stated retention period, CBP may reuse the electronic media and thus erase the previous recording.

**SYSTEM MANAGER AND ADDRESS:**

Port Directors, U.S. Customs and Border Protection, U.S. Customs and Border Protection Headquarters, 1300 Pennsylvania Avenue, NW., Mint Annex, Washington, DC 20229.

**NOTIFICATION PROCEDURE:**

The Secretary of Homeland Security has exempted this system from certain aspects of the notification, access, and amendment requirements of the Privacy Act. CBP will review each request to determine whether or not notification, access, or amendment should be provided. Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to CBP's FOIA Officer, 1300 Pennsylvania Avenue, NW., Mint Annex, Washington, DC 20229.

When seeking records about yourself from this system of records or any other CBP system of records your request must conform with the Privacy Act regulations set forth in 6 CFR Part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe CBP would have information on you,
- Specify when you believe the records would have been created,
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual verifying that individual's identity and certifying his/her agreement for you to access his/her records.

Without this bulleted information CBP may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

**RECORD ACCESS PROCEDURES:**

See ''Notification procedure'' above.

**CONTESTING RECORD PROCEDURES:**

See ''Notification procedure'' above.

**RECORD SOURCE CATEGORIES:**

Audio-video recording of persons being escorted within the port of entry.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

Pursuant to exemption 5 U.S.C. 552a(j)(2) of the Privacy Act, portions of this system are exempt from 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5) and (e)(8); (f), and (g). Pursuant to 5 U.S.C. 552a(k)(2), this system is exempt from the following provisions of the Privacy Act, subject to the limitations set forth in those subsections: 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f).

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29838 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

### Privacy Act of 1974; System of Records

**AGENCY:** Privacy Office, DHS.

**ACTION:** Notice of removal of one Privacy Act system of records notice.

**SUMMARY:** In accordance with the Privacy Act of 1974, the Department of Homeland Security is giving notice that it will remove four systems of records notices from its inventory of record systems because Customs and Border Protection no longer requires the systems. The four obsolete systems are: Treasury/CS.197 Private Aircraft/Vessel Inspection Reporting System (October 18, 2001), Treasury/CS.252 Valuables Shipped Under the Government Losses in Shipment Act (October 18, 2001), Treasury/CS.171 Pacific Basin Reporting Network (October 18, 2001), and Treasury/CS.050 Community Leader Survey (October 18, 2001).

**DATES:** *Effective Date:* January 20, 2009.

**FOR FURTHER INFORMATION CONTACT:** Hugo Teufel III, Chief Privacy Officer, Department of Homeland Security, Washington, DC 20528, by telephone (703) 235–0780 or facsimile 1–866–466–5370.

**SUPPLEMENTARY INFORMATION:** Pursuant to the provisions of the Privacy Act of 1974, 5 U.S.C. 552a, and as part of its ongoing integration and management efforts, the Department of Homeland Security (DHS) is removing four Customs and Border Protection (CBP) system of records notices from its inventory of record systems.

DHS inherited these record systems upon its creation in January of 2003. Upon review of its inventory of systems of records, DHS has determined it no longer needs or uses these system of records and is retiring the following: Treasury/CS.197 Private Aircraft/Vessel Inspection Reporting System (66 FR

52984 October 18, 2001), Treasury/CS.252 Valuables Shipped Under the Government Losses in Shipment Act (66 FR 52984 October 18, 2001), Treasury/CS.171 Pacific Basin Reporting Network (66 FR 52984 October 18, 2001), and Treasury/CS.050 Community Leader Survey (66 FR 52984 October 18, 2001).

Treasury/CS.197 Private Aircraft/Vessel Inspection Reporting System was originally established to track and assist the U.S. Customs Service in managing pilots and vessel masters arriving in the United States, but is no longer operational.

Treasury/CS.252 Valuables Shipped Under the Government Losses in Shipment Act was originally established to track and assist the U.S. Customs Service in collecting and transmitting funds for deposit, but is no longer operational.

Treasury/CS.171 Pacific Basin Reporting Network was originally established to track and assist the U.S. Customs Service in managing masters, operators, pilots, crew members and passengers traveling, in, around, or through the Pacific Basin, but is no longer operational.

Treasury/CS.050 Community Leader Survey was originally established to track individuals and organizations that may be identified as occupying a community leadership role and in a position to furnish information or pose influence to equal employment opportunity, but is no longer operational.

Eliminating these systems of records notices will have no adverse impacts on individuals, but will promote the overall streamlining and management of DHS Privacy Act record systems.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29840 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

**[Docket No. DHS–2008–0141]**

### Privacy Act of 1974; United States Coast Guard—021 Appointment of Trustee or Guardian for Mentally Incompetent Personnel Files System of Records

**AGENCY:** Privacy Office; DHS.

**ACTION:** Notice of Privacy Act system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974 and as part of the Department of Homeland Security's ongoing effort to review and update legacy system of records notices, the Department of Homeland Security is giving notice that it proposes to update and reissue the following legacy record system DOT/CG 637 Appointment of Trustee or Guardian for Mentally Incompetent Personnel (April 11, 2000) as a Department of Homeland Security system of records notice titled, DHS/USCG—021 Appointment of Trustee or Guardian for Mentally Incompetent Personnel. Categories of individuals, categories of records, and the routine uses of this legacy system of records notice have been reviewed and updated to better reflect the Department of Homeland Security, United States Coast Guard's Appointment of Trustee or Guardian for Mentally Incompetent Personnel record system. This new system will be included in the Department of Homeland Security's inventory of record systems.

**DATES:** Written comments must be submitted on or before January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0141 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change and may be read at *http://www.regulations.gov*, including any personal information provided.
- *Docket:* For access to the docket, to read background documents, or comments received, go to *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: David Roberts (202–475–3521), Privacy Officer, United States Coast Guard. For privacy issues please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (Nov. 25, 2002), the Department of Homeland Security (DHS) and its components and offices have relied on preexisting Privacy Act systems of records notices for the maintenance of records that concern the appointment of a trustee or guardian for mentally incompetent United States Coast Guard (USCG) personnel and for their dependents who are eligible for annuities.

As part of its efforts to streamline and consolidate its record systems, DHS is updating and reissuing a USCG system of records under the Privacy Act (5 U.S.C. 552a) that deals with the appointment of a trustee or guardian for mentally incompetent USCG personnel and for their dependents who are eligible for annuities. This record system will allow DHS/USCG to collect and preserve the records regarding the appointment of a trustee or guardian for mentally incompetent USCG personnel. The collection and maintenance of this information will assist DHS/USCG in meeting its obligation to maintain information on incompetent USCG military personnel, their dependents and survivors for the purpose of determining eligibility for DHS/USCG benefits such as military retired pay or the Survivor Benefit Plan for dependents, and the closely-related Veterans Affairs benefits.

In accordance with the Privacy Act of 1974 and as part of the Department of Homeland Security's ongoing effort to review and update legacy system of records notices, the Department of Homeland Security is giving notice that it proposes to update and reissue the following legacy record system DOT/CG 637 Appointment of Trustee or Guardian for Mentally Incompetent Personnel (65 FR 19476 4/11/2000) as a Department of Homeland Security/United States Coast Guard system of records notice titled, Appointment of Trustee or Guardian for Mentally Incompetent Personnel. Categories of individuals and categories of records have been reviewed, and the routine uses of this legacy system of records notice have been updated to better reflect the Department of Homeland Security and the United States Coast Guard's Appointment of Trustee or Guardian for Mentally Incompetent Personnel record system. This new system will be included in the Department of Homeland Security's inventory of record systems.

#### II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses and

disseminates personally identifiable information. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency from which information is stored and retrieved by the name of the individual or by some identifying number such as property address, mailing address, or symbol assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and lawful permanent residents. DHS extends administrative Privacy Act protections to all individuals where information is maintained on U.S. citizens, lawful permanent residents, and visitors. Individuals may request their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR 5.21. An approved trustee or guardian may do the same on behalf of an individual.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency record keeping practices transparent, to notify individuals regarding the uses to which personally identifiable information is put, and to assist individuals to more easily find such files within the agency. Below is the description of the Appointment of Trustee or Guardian for Mentally Incompetent Personnel Files System of Records.

## III. Health Insurance Portability and Accountability Act

This system of records contains individually identifiable health information. The Health Insurance Portability and Accountability Act of 1996, applies to most of such health information. Department of Defense 6025.18–R may place additional procedural requirements on the uses and disclosures of such information beyond those found in the Privacy Act of 1974 or mentioned in this system of records notice.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this new system of records to the Office of Management and Budget and to Congress.

**SYSTEM OF RECORDS**

DHS/USCG–021.

**SYSTEM NAME:**

United States Coast Guard—021 Appointment of Trustee or Guardian for Mentally Incompetent Personnel.

**SECURITY CLASSIFICATION:**

Unclassified.

**SYSTEM LOCATION:**

Records are maintained at the United States Coast Guard Headquarters in Washington, DC and field offices.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Categories of individuals covered by this system include Coast Guard military personnel (regular, reserve, active duty and retired) and their dependents or survivors who are mentally incompetent and the guardian or trustee.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Categories of records in this system include:

- Individual's name;
- Guardian trustee's name and contact information;
- Information relating to the mental incompetence of certain Coast Guard personnel, their dependents or survivors;
- Records used to assist USCG officials in appointing guardian trustees to mentally incompetent USCG personnel.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. 301; 10 U.S.C. 1448, 1449; 14 U.S.C. 632; 37 U.S.C. 601–604; 33 CFR 49.05; 49 CFR 1.45, 1.46.

**PURPOSE(S):**

The purpose of this system is to maintain information on mentally incompetent USCG military personnel, their dependents and survivors to determine eligibility for DHS/USCG benefits such as military retired pay or the Survivor Benefit Plan for survivors, and the closely-related Veterans Affairs benefits.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

Note: This system of records contains individually identifiable health information. The Health Insurance Portability and Accountability Act of 1996, applies to most of such health information. Department of Defense 6025.18–R may place additional procedural requirements on the uses and disclosures of such information beyond those found in the Privacy Act of 1974 or mentioned in this system of records notice. Therefore, routine uses outlined below may not apply to such health information.

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records of information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when:

1. DHS or any component thereof;

2. any employee of DHS in his/her official capacity;

3. any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or

4. the United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains or by the individual's approved trustee or guardian.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security 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 harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) that rely upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate Federal, State, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To prospective or approved guardian trustees or appointees, including but not limited to relatives, lawyers, and physicians or other designated representatives;

I. To the Department of Veteran's Affairs upon request for the determination of eligibility for benefits administered by that agency.

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

None.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD–ROM.

**RETRIEVABILITY:**

Records may be retrieved alphabetically by name.

**SAFEGUARDS:**

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions. The system maintains a real-time auditing function of individuals who access the system. Additional safeguards may vary by component and program.

**RETENTION AND DISPOSAL:**

Records are retained for five years after action is complete, then destroyed. (AUTH: NC1–26–76–2, Item 577)

**SYSTEM MANAGER AND ADDRESS:**

Director, Personnel Management Directorate, CG–12, United States Coast Guard Headquarters, 1900 Half St., SW., Washington, DC 20593–0001.

**NOTIFICATION PROCEDURE:**

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to USCG, Commandant (CG–611), 2100 2nd St., SW., Attn: FOIA Coordinator, Washington, DC 20593–0001.

When seeking records about yourself or on behalf of a mentally incompetent person for whom you have been appointed trustee or guardian from this system of records or any other USCG system of records your request must conform with the Privacy Act regulations set forth in 6 CFR Part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted to you under 28 U.S.C. 1746, a law that permits statements to be made under penalty or perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you or an incompetent person for whom you have been appointed trustee or guardian,
- Specify when you believe the records would have been created,
- If your request is seeking records pertaining to another living individual for you to access his/her records, you must include a statement from that individual certifying his/her agreement or documentation that confirms your authority to act on behalf of that individual.

Without this bulleted information the USCG will not be able to conduct an effective search, and your request may be denied due to lack of specificity, lack of compliance with applicable regulations, or insufficient authority to act on behalf of an incompetent individual.

**RECORD ACCESS PROCEDURES:**

See ''Notification procedure'' above.

**CONTESTING RECORD PROCEDURES:**

See ''Notification procedure'' above.

**RECORD SOURCE CATEGORIES:**

Coast Guard officials, legal representatives of individuals and/or individuals concerned, medical personnel, and complainants.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29844 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

**[Docket No. DHS–2008–0146]**

### Privacy Act of 1974; United States Coast Guard—027 Recruiting Files System of Records

**AGENCY:** Privacy Office; DHS.

**ACTION:** Notice of Privacy Act system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974 and as part of the Department of Homeland Security's ongoing effort to review and update legacy system of records notices, the Department of Homeland Security is giving notice that it proposes to update the following legacy record systems DOT/CG 627 Enlisted Recruiting Selection Record System and DOT/CG 628 Officer, Enlisted, and Recruiter Selection System File. These legacy records systems will be consolidated into a new Department of Homeland Security system of records notice titled Department of Homeland Security/ United States Coast Guard—027 Recruiting Files. Categories of individuals, categories of records, and the routine uses of these legacy system of records notices have been updated to better reflect the Department of Homeland Security and the United States Coast Guard's recruiting record system. Additionally, the exemptions for this legacy system of records notice transfer from the SORN's legacy agency

to the Department of Homeland Security. This new system will be included in the Department of Homeland Security's inventory of record systems.

**DATES:** Written comments must be submitted on or before January 20, 2009. This new system will be effective January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0146 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change and may be read at *http://www.regulations.gov*, including any personal information provided.
- *Docket:* For access to the docket, to read background documents, or comments received, go to *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: David Roberts (202–475–3521), Privacy Officer, United States Coast Guard. For privacy issues please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

## I. Background

Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS) and its components and offices have relied on preexisting Privacy Act systems of records notices for the maintenance of records that concern recruiting files.

As part of its efforts to streamline and consolidate its record systems, DHS is issuing a USCG consolidated system of records under the Privacy Act (5 U.S.C. 552a) that deals with USCG recruiting files. This record system will allow DHS/USCG to collect and preserve the records regarding the recruiting program. The collection and maintenance of this information will assist DHS/USCG in meeting its obligation to administer the USCG's recruiting program.

In accordance with the Privacy Act of 1974 and as part of DHS's ongoing effort to review and update legacy system of records notices, the Department of Homeland Security is giving notice that it proposes to update the following legacy record systems DOT/CG 627 Enlisted Recruiting Selection Record System (65 FR 19475 April 11, 2000) and DOT/CG 628 Officer, Enlisted, and Recruiter Selection System File (65 FR 19475 April 11, 2000). These legacy records systems will be consolidated into a new DHS/USCG system of records notice titled DHS/USCG—027 Recruiting Files. Categories of individuals, categories of records, and the routine uses of these legacy system of records notices have been updated to better reflect the DHS and the USCG's recruiting record system. This new system will be included in the Department of Homeland Security's inventory of record systems.

## II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR Part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency recordkeeping practices transparent, to notify individuals regarding the uses to which their records are put, and to assist individuals to more easily find such files within the agency. Below is the description of the Recruiting Files System of Records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this new system of records to the Office of Management and Budget and to Congress.

**System of Records:**

DHS/USCG–027.

**SYSTEM NAME:**

United States Coast Guard Recruiting Files.

**SECURITY CLASSIFICATION:**

Unclassified.

**SYSTEM LOCATION:**

Records are maintained at the United States Coast Guard Recruiting Command, Arlington, Virginia, United States Coast Guard Operations Systems Center, Kearneysville, West Virginia, USCG Headquarters in Washington, DC, and field offices.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Categories of individuals covered by this system include records and correspondence pertaining to prospective applicants, applicants for regular and reserve enlisted and officer programs, and any other individuals who have initiated correspondence pertaining to enlistment in the United States Coast Guard. This system also covers civilian and military personnel who have taken the following tests: Armed Services Vocational Aptitude Battery; United States Navy Officer Qualification Test; QQT; United States Navy and United States Marine Corps Aviation Selection Test, AST; United States Navy Basic Test Battery (BTB), BTB (retests); the Cooperative Tests for Advanced Electronic Training (AET TESTS); the 16 Personality Fact Test used for screening of enlisted personnel for recruiting duty; and Professional Examination for Merchant Mariners.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Categories of records in this system include:

- Individual's name;
- Date of birth;
- Social security number;
- Program of interest;
- Citizenship;
- Marital state;
- Race;
- Ethnicity;
- Gender;
- Personal history;
- E-mail and phone contact information;
- Education;
- Test scores, college majors, grades and transcripts;
- Professional qualifications;

- Adverse or disqualifying information, such as criminal record, medical data, and credit history;
- Mental aptitude;
- Medical documentation;
- Medical waivers;
- Physical qualifications;
- Character and interview appraisals;
- National Agency Checks and certifications;
- Service performance;
- Advertising responses;
- Applicant initiated inquiries;
- Congressional or special interests;
- Marketing data collected through the USCG recruiting Web site and telephone queries made by prospects; and
- Credit report results (per Homeland Security Presidential Directive–12)

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. 301; 10 U.S.C. 504, 1475–1480; 14 U.S.C. 350–373, 632; 46 U.S.C. 7306, 7313, 7316.

**PURPOSE(S):**

The purpose of this system is to document recruiting efforts and maintain recruiting files for the United States Coast Guard and United States Coast Guard Reserves. This system also provides test results if an applicant (military or civilian) applies for an officer program, or is already in the military and is recruited to a training program.

**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, all or a portion of the records of information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when:

1. DHS or any component thereof;

2. Any employee of DHS in his/her official capacity;

3. Any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or

4. The United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security 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 harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) or harm to the individual that rely upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate Federal, State, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To officials and employees of the Veterans Administrative and Selective Service System in the performance of their official duties related to enlistment and reenlistment eligibility and related benefits.

I. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of DHS or is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

None.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD–ROM.

**RETRIEVABILITY:**

Records may be retrieved alphabetically by name and social security number.

**SAFEGUARDS:**

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions. The system maintains a real-time auditing function of individuals who access the system. Additional safeguards may vary by component and program.

**RETENTION AND DISPOSAL:**

Recruiting records, including credit reports, are maintained for two years after the completion of the fiscal year. Test answer sheets are not maintained under the control of USCG; USCG maintains only the scores which are destroyed two years after the completion of the fiscal year. Accession

packages, which are the completed assessment for all potential Coast Guard personnel, are destroyed four years after the packages have been submitted to USCG Command for consideration. (AUTH: NC1–26–76–2, Item 587).

**SYSTEM MANAGER AND ADDRESS:**

Commander, United States Coast Guard Personnel Command, 2100 2nd Street, SW., Washington, DC 20539–0001.

**NOTIFICATION PROCEDURE:**

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to USCG, Commandant (CG–611), 2100 2nd St., SW., Attn: FOIA Coordinator, Washington, DC 20593–0001.

When seeking records about yourself from this system of records or any other USCG system of records, your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full name, current address, and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you,
- Specify when you believe the records would have been created, and
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the USCG will not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

**RECORD ACCESS PROCEDURES:**

See ''Notification procedure'' above.

**CONTESTING RECORD PROCEDURES:**

See ''Notification procedure'' above.

**RECORD SOURCE CATEGORIES:**

USCG recruiting personnel and administrative staff. Medical personnel or private physicians providing consultations or patient history. Character and employee references. Educational institutions, staff and faculty members. Selective Service System. Local, State, and Federal law enforcement agencies. Prior or current military service records. Members of Congress. Other officials and employees of the Coast Guard, Department of Defense and components thereof, in the performance of their duties and as specified by current instructions and regulations promulgated by competent authority. Recruiting officials and individuals being recruited or who have been recruited by the United States Coast Guard, United States Marine Corps, United States Navy, and the United States Navy Bureau of Medicine.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29845 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

**[Docket No. DHS–2008–0156]**

### Privacy Act of 1974; U.S. Customs and Border Protection–014 Regulatory Audit Archive System (RAAS) System of Records

**AGENCY:** Privacy Office; DHS.

**ACTION:** Notice of Privacy Act system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974 and as part of the Department of Homeland Security's ongoing effort to review and update legacy system of record notices, the Department of Homeland Security/U.S. Customs and Border Protection proposes to update and reissue the following legacy record system, Treasury/CS.206 Regulatory Audits of Customhouse Brokers, October 18, 2001, as a U.S. Customs and Border Protection system of records notice titled, U.S. Customs and Border Protection Regulatory Audits of Customs Brokers. Categories of individuals, categories of records, and the routine uses of this legacy system of records notice have been reviewed and updated to better reflect the Department of Homeland Security/U.S. Customs and Border Protection Regulatory Audit Archive System (RAAS). Additionally, the Department of Homeland Security is issuing a notice of proposed rulemaking concurrent with this system of records notice in the **Federal Register**. The exemptions for the legacy system of records notices will continue to be applicable until the final rule for this system of records notice is completed. This reissued system will be included in the Department of Homeland Security's inventory of record systems.

**DATES:** Written comments must be submitted on or before January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0156 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.
- *Docket:* For access to the docket, to read background documents, or comments received go to *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: Laurence E. Castelli (202–325–0280), Chief, Privacy Act Policy and Procedures Branch, U.S. Customs and Border Protection, Office of International Trade, Regulations & Rulings, Mint Annex, 1300 Pennsylvania Ave., NW., Washington, DC 20229. For privacy issues contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS)/U.S. Customs and Border Protection (CBP) have relied on preexisting Privacy Act system of records notices for the collection and maintenance of records that concern records on regulatory audits of customs brokers.

As part of its efforts to streamline and consolidate its record systems, DHS is updating and reissuing a DHS/CBP system of records under the Privacy Act (5 U.S.C. 552a) that deals with

regulatory audits of customs brokers. These audits are part of CBP's continuing oversight of Customs Brokers, who are licensed by CBP, pursuant to 19 U.S.C. 1641, to act as agents for importers in the entry of merchandise and payment of duties and fees. This SORN also covers information maintained with respect to other persons, engaged in international trade, who are the subject of a regulatory audit or are identified in and related to the scope of an audit report.

In accordance with the Privacy Act of 1974 and as part of DHS's ongoing effort to review and update legacy system of record notices, DHS proposes to update and reissue the following legacy record system, Treasury/CS.206 Regulatory Audits of Customhouse Brokers (66 FR 52984 October 18, 2001), as a DHS/CBP system of records notice titled, U.S. Customs and Border Protection—014 Regulatory Audit Archive System (RAAS). Categories of individuals and categories of records have been reviewed, and the routine uses of this legacy system of records notice have been updated to better reflect the DHS/CBP—014 Regulatory Audit Archive System (RAAS) record system. Additionally, DHS is issuing a notice of proposed rulemaking (NPRM) concurrent with this system of records notice (SORN) in the **Federal Register**. The exemptions for the legacy SORN will continue to be applicable until the final rule for this SORN is completed. This reissued system will be included in DHS's inventory of record systems.

## II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the U.S. Government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass U.S. citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires that each agency publish in the **Federal Register** a description denoting the type and character of each system of records in order to make agency recordkeeping practices transparent, to notify individuals about the use of their records, and to assist the individual to more easily find files within the agency. Below is a description of the Regulatory Audits of Customs Brokers System of Records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this revised system of records to the Office of Management and Budget and to the Congress.

**System of Records:**

DHS/CBP–014.

**SYSTEM NAME:**

U.S. Customs and Border Protection—014 Regulatory Audit Archive System (RAAS).

**SECURITY CLASSIFICATION:**

Unclassified.

**SYSTEM LOCATION:**

Records are maintained at the U.S. Customs and Border Protection Headquarters in Washington, DC and in field offices.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Categories of individuals covered by this system include persons licensed as a customs broker, employees of a customs broker, clients, and other persons engaged in international trade who are identified in an audit report. Additionally, individuals who have been given access to RAAS for authorized purposes.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Categories of records in this system include:

- Individual's name, including names of officers of customs broker firms or other business entities engaged in international trade and identified as a subject of an audit or related to the scope of an audit;
- Audit reports of subject accounts and records;
- Correspondence with the subject of the audits and such audit reports;
- Congressional inquiries concerning customs brokers or other audit subjects and disposition made of such inquiries; and
- License and permit numbers and dates issued and district or port covered.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. 301; the Federal Records Act, 44 U.S.C. 3101; 19 U.S.C. 1508, 1509, 1641; and 19 CFR parts 111, 143, and 163.

**PURPOSE(S):**

The purpose of this system is to collect and maintain records on the regulatory audits of customs brokers. These audits are part of CBP's continuing oversight of Customs Brokers, who are licensed by CBP, pursuant to 19 U.S.C. 1641, to act as agents for importers in the entry of merchandise and payment of duties and fees. The system also maintains the records of audits conducted on other persons or business entities engaged in international trade.

**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, all or a portion of the records of information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. Any employee of DHS or any component in his/her official capacity;

3. Any employee of DHS or any component in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or

4. The U.S. or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS or CBP determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS or CBP collected the records.

B. To a congressional office in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as

authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS or CBP suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised;

2. DHS or CBP has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS, CBP, or another agency or entity) or harm to the individual who relies upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS or CBP's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS or CBP, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS/CBP officers and employees.

G. To appropriate Federal, State, local, tribal, or foreign governmental agencies or multilateral governmental organizations responsible for investigating or prosecuting the violations of, or for enforcing or implementing, a statute, rule, regulation, order, license, or treaty where DHS determines that the information would assist in the enforcement of civil or criminal laws.

H. To an appropriate Federal, State, local, tribal, foreign, or international agency, if the information is relevant and necessary to a requesting agency's decision concerning the hiring or retention of an individual, or issuance of a security clearance, license, contract, grant, or other benefit, or if the information is relevant and necessary to a DHS decision concerning the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant or other benefit and disclosure is appropriate to the proper performance of the official duties of the person making the request.

I. To a court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations or in connection with criminal law proceedings or in response to a subpoena from a court of competent jurisdiction.

J. To third parties during the course of a law enforcement investigation to the extent necessary to obtain information pertinent to the investigation, provided disclosure is appropriate to the proper performance of the official duties of the officer making the disclosure.

K. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of DHS or is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

None.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD–ROM.

**RETRIEVABILITY:**

Individual's name or audit report file number.

**SAFEGUARDS:**

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to this computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

**RETENTION AND DISPOSAL:**

Regulatory Audit files are retained for 10 years, and then placed in General Service Administration long-term archival storage.

**SYSTEM MANAGER AND ADDRESS:**

Executive Director, Office of Regulatory Audit, Customs and Border Protection Headquarters, 1300 Pennsylvania Avenue, NW., Mint Annex, Washington, DC 20229.

**NOTIFICATION PROCEDURE:**

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to CBP's FOIA Officer, 1300 Pennsylvania Avenue, NW., Mint Annex, Washington, DC 20229.

When seeking records about yourself from this system of records or any other CBP system of records your request must conform with the Privacy Act regulations set forth in 6 CFR Part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you,
- Specify when you believe the records would have been created,
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information CBP may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

**RECORD ACCESS PROCEDURES:**

*See* ''Notification procedure'' above.

**CONTESTING RECORD PROCEDURES:**

*See* ''Notification procedure'' above.

**RECORD SOURCE CATEGORIES:**

The information contained in these files originates in connection with customs broker audits and audits of other persons engaged in international

commerce conducted by the regulatory audit staffs. The audits may be supplemented with information furnished by the Office of the Chief Counsel or its field offices, Office of International Trade, Office of Regulations and Rulings, and the Office of Investigations, U.S. Immigration and Customs Enforcement. These audits include examinations of brokers, importers, and other persons, who are engaged in international trade, business records, including data maintained in support of client customs business.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

This system is exempt from 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2).

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29846 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

### Privacy Act of 1974; System of Records

**AGENCY:** Privacy Office, DHS.

**ACTION:** Notice of removal of two Privacy Act systems of record notices.

**SUMMARY:** In accordance with the Privacy Act of 1974, the Department of Homeland Security is giving notice that it will remove two systems of record notices from its inventory of record systems because the Department no longer requires use of these systems, originally transferred to the Department of Homeland Security from the Department of Energy upon creation in January 2003. These two obsolete systems are: DOE–81, Counterintelligence Administrative and Analytical Records and Reports and DOE–84, Counterintelligence Investigative Records (September 1, 1989). Removing these system of records from the Department's inventory will in no way impact the use of these system of records by the Department of Energy.

**DATES:** *Effective Date:* January 20, 2009.

**FOR FURTHER INFORMATION CONTACT:** Hugo Teufel III, Chief Privacy Officer, Department of Homeland Security, Washington, DC 20528, by telephone (703) 235–0780 or facsimile 1–866–466–5370.

**SUPPLEMENTARY INFORMATION:** Pursuant to the provisions of the Privacy Act of 1974, 5 U.S.C. 552a, and as part of its ongoing integration and management efforts, the Department of Homeland Security (DHS) is removing two Department of Homeland Security (DHS) system of records notices from its inventory of record systems.

DHS inherited these record systems upon its creation in January of 2003. Upon review of its inventory of record systems, DHS has determined it no longer needs these two systems and is retiring the following:

DHS is retiring use of DOE–81 (59 FR 46528 September 1, 1989) Counterintelligence Administrative and Analytical Records and Reports. This system was originally established in order to maintain records concerning foreign intelligence threats; administrative inquiries and investigations; reports on foreign contacts and travel; classified and sensitive programs, personnel, information and activities; briefings and debriefings; intelligence on hostile and foreign intelligence entities; and counterintelligence training.

DHS is retiring use of DOE–84 (59 FR 46530 September 1, 1989) Counterintelligence Investigative Records. This system was originally established in order to maintain records on joint law enforcement counterintelligence-related investigations with the FBI or other Federal law enforcement agencies in order to detect and prevent foreign intelligence threats directed at or involving classified and sensitive information, programs, facilities, personnel, and other Departmental resources.

Eliminating these systems of record notices will have no adverse impacts on individuals, but will promote the overall streamlining and management of DHS Privacy Act record systems. Further, removing these systems of records from the Department's inventory will in no way impact the use of these systems of records by the Department of Energy.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29847 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

**[Docket No. DHS–2008–0145]**

### Privacy Act of 1974; United States Coast Guard—020 Substance Abuse Prevention and Treatment Program System of Records

**AGENCY:** Privacy Office; DHS.

**ACTION:** Notice of Privacy Act system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974 and as part of the Department of Homeland Security's ongoing effort to review and update legacy system of records notices, the Department of Homeland Security is giving notice that it proposes to update and reissue the following legacy record system, DOT/CG 638 Alcohol Abuse Prevention Program Record System as a Department of Homeland Security/ United States Coast Guard system of records notice titled, DHS/USCG—020 Substance Abuse Prevention and Treatment Program. This system of records notice will allow the USCG to collect and maintain the USCG's Substance Abuse Prevention and Treatment Program records. Categories of individuals, categories of records, and the routine uses of this legacy system of records notice have been reviewed and updated to better reflect the Department of Homeland Security/United States Coast Guard's—020 Substance Abuse Prevention and Treatment Program record system. This new system will be included in the Department of Homeland Security's inventory of record systems.

**DATES:** Written comments must be submitted on or before January 20, 2009. This new system will be effective January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0145 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change and may be read at *http://www.regulations.gov*, including any personal information provided.

• *Docket:* For access to the docket, to read background documents, or comments received, go to *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: David Roberts (202–475–3521), Privacy Officer, United States Coast Guard. For privacy issues please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

## I. Background

Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS)/United States Coast Guard (USCG) have relied on preexisting Privacy Act systems of records notices for the collection and maintenance of records that concern the DHS/USCG—020 Substance Abuse Prevention and Treatment Program.

As part of its efforts to streamline and consolidate its record systems, DHS is updating and reissuing a DHS/USCG system of records under the Privacy Act (5 U.S.C. 552a) that deals with active duty military personnel receiving substance abuse rehabilitation treatment. This record system will allow DHS/USCG to collect and maintain records regarding active duty military personnel receiving substance abuse rehabilitation treatment. The collection and maintenance of this information will assist DHS/USCG in meeting its obligation to assist active duty USCG personnel needing substance abuse rehabilitation treatment.

In accordance with the Privacy Act of 1974 and as part of the DHS's ongoing effort to review and update legacy system of records notices, DHS is giving notice that it proposes to update and reissue the following legacy record system DOT/CG 638 Alcohol Abuse Prevention Program Record System (65 FR 19475 4/11/2000) as a DHS/USCG system of records notice titled, Substance Abuse Prevention and Treatment Program. This system of records notice will allow the USCG to collect and maintain the USCG's Substance Abuse Prevention and Treatment Program records. Categories of individuals and categories of records have been reviewed, and the routine uses of this legacy system of records notice have been updated to better reflect the DHS/USCG's Substance Abuse Prevention and Treatment Program record system. This new system will be included in the DHS inventory of record systems.

## II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses and disseminates individual's information. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency from which information is stored and retrieved by the name of the individual or by some identifying number such as property address, mailing address, or symbol assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and lawful permanent residents. DHS extends administrative Privacy Act protections to all individuals where information is maintained on both U.S. citizens, lawful permanent residents, and visitors. Individuals may request their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR 5.21.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency record keeping practices transparent, to notify individuals regarding the uses of their records, and to assist individuals to more easily find such files within the agency. Below is the description of the Substance Abuse Prevention and Treatment Program System of Records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this new system of records to the Office of Management and Budget and to Congress.

## III. Health Insurance Portability and Accountability Act

This system of records contains individually identifiable health information. The Health Insurance Portability and Accountability Act of 1996, applies to most of such health information. Department of Defense 6025.18–R may place additional procedural requirements on the uses and disclosures of such information beyond those found in the Privacy Act of 1974 or mentioned in this system of records notice.

**SYSTEM OF RECORDS:**

DHS/USCG–020.

**SYSTEM NAME:**

United States Coast Guard—020 Substance Abuse Prevention and Treatment Program.

**SECURITY CLASSIFICATION:**

Unclassified.

**SYSTEM LOCATION:**

Records are maintained at the USCG Headquarters in Washington, DC and field offices.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Categories of individuals covered by this system include Coast Guard personnel, active duty and reserve, receiving substance abuse rehabilitation treatment, and those screened in connection with substance abuse issues.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Categories of records in this system include:

- Individual's name;
- Employee ID Number (EMPLID);
- Rate/Rank;
- History of substance abuse;
- Operation facility code;
- Treatment center;
- Diagnosis;
- Dates of treatment;
- Treatment records;
- Notes on aftercare; and
- Final disposition and type.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. 301; 5 U.S.C. 7901; 14 U.S.C. 632; 42 U.S.C. 4541; COMDTINST M6200.1A, the Coast Guard Health Promotion Manual.

**PURPOSE(S):**

The purpose of this system is to administer the USCG Substance Abuse Prevention and Treatment program, including to identify alcohol and drug abusers within the USCG; to treat, counsel, and rehabilitate individuals who participate in the USCG Substance Abuse Program; as a management tool to identify trends, judge the magnitude of drug and alcohol abuse, and to measure the effectiveness of drug and alcohol prevention efforts in the USCG.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

Note: For records of identity, diagnosis, prognosis, or treatment of any client/patient, irrespective of whether or when he/she ceases to be a client/patient, maintained in connection with the performance of any alcohol or drug abuse prevention and treatment function conducted, requested, or directly or indirectly assisted by any department or agency of the United

States, shall, except as provided therein, be confidential and be disclosed only for the purposes and under circumstances expressly authorized in 42 U.S.C. 290dd–2. The routine uses set forth below do not apply to this information. This statute takes precedence over the Privacy Act of 1974 to the extent that disclosure is more limited. However, access to the record by the individual to whom the record pertains is governed by the Privacy Act.

**Note:** For those records not described above, this system of records contains individually identifiable health information. The Health Insurance Portability and Accountability Act of 1996, applies to most of such health information. Department of Defense 6025.18–R may place additional procedural requirements on the uses and disclosures of such information beyond those found in the Privacy Act of 1974 or mentioned in this system of records notice. Therefore, routine uses outlined below may not apply to such health information.

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records of information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice (including United States Attorney Offices) or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. any employee of DHS in his/her official capacity;

3. any employee of DHS in his/her individual capacity where the Department of Justice or DHS has agreed to represent the employee; or

4. the United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of and with the consent of the individual to whom the record pertains in accordance with 42 U.S.C. 290dd–2(g).

C. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

D. To appropriate State and local authorities to report, under State law, incidents of suspected child abuse or neglect to the extent described under 42 CFR 2.12 and in accordance with 42 U.S.C. 290dd–2(e).

E. To any person or entity to the extent necessary to prevent an imminent and potential crime that directly threatens loss of life or serious bodily injury.

F. To report to appropriate authorities when an individual is potentially at risk to harm himself/herself or others.

G. To health care components of the Department of Veterans Affairs furnishing health care to veterans.

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

None.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD–ROM.

**RETRIEVABILITY:**

Records may be retrieved by individual name, EMPLID, or unit operation facility code.

**SAFEGUARDS:**

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individual who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

**RETENTION AND DISPOSAL:**

Records in this system are stored electronically in secure facilities behind a locked door. The records are stored on an electronic server. Records are destroyed when three years old or when superseded or obsolete (GRS 1, item 36).

**SYSTEM MANAGER AND ADDRESS:**

Commandant, CG–11, United States Coast Guard Headquarters, 2100 2nd Street, SW., Washington, DC 20593–0001.

**NOTIFICATION PROCEDURE:**

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to Commandant, CG–11, United States Coast Guard Headquarters, 2100 2nd Street, SW., Washington, DC 20593–0001.

When seeking records about yourself from this system of records or any other USCG system of records your request must conform to the Privacy Act regulations set forth in 6 CFR Part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted to you under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you,
- Specify when you believe the records would have been created,
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the USCG may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

**RECORD ACCESS PROCEDURES:**

See ''Notification procedure'' above.

**CONTESTING RECORD PROCEDURES:**

See ''Notification procedure'' above.

**RECORD SOURCE CATEGORIES:**

Information originates from personnel who submit to drug and alcohol testing, DHS and its components and offices, and testing and treatment facilities.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

Dated: December 10, 2008.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–29848 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of the Secretary

**[Docket No. DHS–2008–0165]**

### Privacy Act of 1974; United States Secret Service—003 Non-Criminal Investigation Information System System of Records

**AGENCY:** Privacy Office; DHS.

**ACTION:** Notice of Privacy Act system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974 and as part of the Department of Homeland Security's ongoing effort to review and update legacy system of record notices, the Department of Homeland Security proposes to retire portions of USSS.006 Non-Criminal Investigation Information System (August 28, 2001) into DHS/All 020 Internal Affairs, DHS/All–013 Claims, and DHS/OS–1 Office of Security Files and reissue the remaining portions of this system of records as DHS/USSS–003 Non-Criminal Investigation Information System. Categories of individuals, categories of records, and the routine uses of this legacy system of records notice have been reviewed updated to better reflect the Department of Homeland Security/United States Secret Service—003 Non-Criminal Investigation Information System. Additionally, DHS is issuing a Notice of Proposed Rulemaking (NPRM) concurrent with this SORN elsewhere in the **Federal Register**. The exemptions for the legacy system of records notices will continue to be applicable until the final rule for this SORN has been completed. This reissued system will be included in the Department's inventory of record systems.

**DATES:** Written comments must be submitted on or before January 20, 2009.

**ADDRESSES:** You may submit comments, identified by docket number DHS–2008–0165 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 1–866–466–5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.
- *Docket:* For access to the docket, to read background documents, or comments received go to *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: Latita Huff (202–406–6370), Privacy Point of Contact, United States Secret Service, 950 H St., NW., Washington, DC 20223. For privacy issues please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

Pursuant to the savings clause in the Homeland Security Act of 2002, the Department of Homeland Security (DHS) United States Secret Service (USSS) have relied on preexisting Privacy Act systems of records notices for the collection and maintenance of records that concern DHS/USSS Non-Criminal Investigation Information System records.

As part of its efforts to streamline and consolidate its Privacy Act record systems, DHS/USSS is updating and reissuing a DHS/USSS system of records under the Privacy Act (5 U.S.C. 552a) for USSS records that concern individuals involved in non-criminal statutory investigations and/or requirements. Information related to investigations into employee activities is retired into DHS/All–020 Internal Affairs published in the **Federal Register** on November 14, 2008 at 73 FR 67529; information related to claims against USSS is retired into DHS/All–013 Claims published in the **Federal Register** on October 28, 2008 at 73 FR 63987; and information related to employment and security clearance suitability is retired in DHS/OS1 Office of Security Files, published September 12, 2006 at 71 FR 53700. This will ensure that all organizational parts of USSS follow the same privacy rules for collecting and handling the USSS–003 Non-Criminal Investigation records.

In accordance with the Privacy Act of 1974 and as part of DHS's ongoing effort to review and update legacy system of records notices, DHS/USSS proposes to update and reissue USSS.006 Non-Criminal Investigation Information System (66 FR 45362 August 28, 2001). Categories of individuals, categories of records, and the routine uses of this legacy system of records notice have been updated to better reflect the DHS/USSS Non-Criminal Investigation Information System. Additionally, DHS is issuing a Notice of Proposed Rulemaking (NPRM) concurrent with this SORN elsewhere in the **Federal Register**. The exemptions for the legacy system of records notices will continue to be applicable until the final rule for this SORN has been completed. This reissued system will be included in the Department's inventory of record systems.

#### II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR part 5.

The Privacy Act requires that each agency publish in the **Federal Register** a description denoting the type and character of each system of records in order to make agency recordkeeping practices transparent, to notify individuals about the use of their records, and to assist the individual to more easily find files within the agency. Below is a description of the DHS/USSS–003 Non-Criminal Investigation Information System.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this revised system of records to the Office of Management and Budget and to the Congress.

**System of Records: DHS/USSS–003.**

**SYSTEM NAME:**

United States Secret Service–003 Non-Criminal Investigation Information System System of Records.

**SECURITY CLASSIFICATION:**

Unclassified and Classified.

**SYSTEM LOCATION:**

Records are maintained at the United States Secret Service Headquarters, 950 H St., NW., Washington, DC 20223 and field offices.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Categories of individuals covered by this system include individuals who are applicants for employment with the USSS and have taken a polygraph;

Qualified USSS law enforcement officers and qualified USSS retired law enforcement officers who carry concealed firearms;

Individuals who have admitted to the Secret Service that they viewed, have taken an interest in, or have engaged in prior activity regarding child pornography, the touching of a child for sexual gratification, or child abuse.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Categories of records in this system include:

- Individual's name;
- Social Security number;
- Address;
- Date of birth;
- Case number;
- Applicant Polygraph Examination Reports and Files;
- DHS Polygraph Examination Reports and Files;
- Records containing investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment or access to classified information; and
- Any group of records which have been created by the Law Enforcement Officer Safety Act of 2004, Public Law 108.277, § 1, codified at 18 U.S.C. 926B and 926C.
- Child Abuse reporting records.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. 301; the Federal Records Act, 44 U.S.C. 3101; 42 U.S.C. 13031; 18 U.S.C. 3056, Executive Order 10450; and Treasury Order 170–04.

**PURPOSE(S):**

The purpose of this system is to record and maintain files of individuals involved in non-criminal statutory investigations and/or 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, all or a portion of the records or information contained in this system may be disclosed outside the Department of Homeland Security (DHS) as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. Any employee of DHS in his/her official capacity;

3. Any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or

4. The United States or any agency thereof is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security 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 harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) or harm to the individual who relies upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate Federal, State, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To Federal, State, or local government agencies for the purpose of developing a relevant ongoing civil, criminal.

I. To private institutions and individuals for the purpose of confirming and/or determining suitability, eligibility, or qualification for Federal civilian employment or access to classified information, and for the purposes of furthering the efforts of the USSS to investigate the activities of individuals related to or involved in non-criminal civil and administrative investigations.

J. To another Federal agency or to an instrumentality of any government jurisdiction within or under the control of the United States for the purpose of determining suitability, eligibility, or qualifications for employment with or access to classified information in such other agency or instrumentality.

K. To a court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations or in connection with criminal law proceedings or in response to a subpoena from a court of competent jurisdiction.

L. To an appropriate Federal, State, local, tribal, foreign, or international

agency, if the information is relevant and necessary to a requesting agency's decision concerning the hiring or retention of an individual, or issuance of a security clearance, license, contract, grant, or other benefit, or if the information is relevant and necessary to a DHS decision concerning the hiring or retention of an employee, the letting of a contract, or the issuance of a license, grant or other benefit when disclosure is appropriate to the proper performance of the official duties of the person making the request.

M. To State and local school boards, private and public schools, daycare facilities, children's camps, and childcare transportation providers, information concerning one of their employees, or applicants for employment, when such an individual has admitted to the United States Secret Service that they viewed, have taken an interest in, or have engaged in prior activity regarding child pornography, the touching of a child for sexual gratification, or child abuse.

N. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of DHS or is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

None.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Paper and electronic records in this system are stored in secure facilities and/or behind locked doors. Electronic records media, such as magnetic tape, magnetic disk, digital media, and CD ROM are stored in proper environmental controls.

**RETRIEVABILITY:**

Records are indexed by name on file at Headquarters, the Office of Inspection, and in field offices and are retrieved through a manual search of index cards and/or through computer search of magnetic media. Access to the physical files is by case number obtained from the name indices.

**SAFEGUARDS:**

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

**RETENTION AND DISPOSAL:**

All judicial case records are retained for 30 years. Applicant security and background investigation records of USSS employees are retained for 20 years after retirement or separation of the employee. All other records, the disposition of which is not otherwise specified, are retained and destruction is not authorized. Magnetic media indices are retained for an indefinite period of time.

**SYSTEM MANAGER AND ADDRESS:**

Assistant Director, Human Resources and Training, and Assistant Director, Office of Investigation, U.S. Secret Service, 950 H St., NW., Washington, DC 20223.

**NOTIFICATION PROCEDURE:**

Pursuant to 5 U.S.C. 522a(j) and (k), this system of records generally may not be accessed by members of the public for purposes of determining if the system contains a record pertaining to a particular individual. Nonetheless individual requests will be reviewed on a case by case basis. Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to the USSS's FOIA Officer, Freedom of Information and Privacy Acts Branch, 245 Murray Drive, Building 410, Washington, DC 20223.

When seeking records about yourself from this system of records or any other USSS system of records your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Director, Disclosure and FOIA, *http://www.dhs.gov* or 1–866–431–0486. In addition, you should provide the following:

- An explanation of why you believe the Department would have information on you,
- Specify when you believe the records would have been created,
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information USSS may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

**RECORD ACCESS PROCEDURES:**

*See* ''Notification procedure'' above.

**CONTESTING RECORD PROCEDURES:**

*See* ''Notification procedure'' above.

**RECORD SOURCE CATEGORIES:**

Employees, Former Employees, and Applicants for employment with the United States Secret Service, Federal, State, and local governmental agencies, court systems, executive entities both foreign and domestic, educational institutions, private business, and members of the general public.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

Pursuant to exemption 5 U.S.C. 552a(j)(2) of the Privacy Act, portions of this system are exempt from 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5) and (e)(8); (f), and (g). Pursuant to 5 U.S.C. 552a(k)(2), (k)(3), (k)(5), and (k)(6), this system is exempt from the following provisions of the Privacy Act, subject to the limitations set forth in those subsections: 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f). In addition, to the extent a record contains information from other exempt systems of records, USSS will rely on the exemptions claimed for those systems.

**Hugo Teufel III,**

*Chief Privacy Officer, Department of Homeland Security.*

[FR Doc. E8–30112 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### U.S. Citizenship and Immigration Services

**[CIS No. 2464–08; DHS Docket No. USCIS–2008–0073]**

**RIN 1615–ZA76**

### H–2B Petitioner's Employment-Related or Fee-Related Notification

**AGENCY:** U.S. Citizenship and Immigration Services, DHS.

**ACTION:** Notice.

**SUMMARY:** This Notice announces the manner in which H–2B petitioners must notify U.S. Citizenship and Immigration Services regarding their employment of non-agricultural workers in H–2B nonimmigrant status or job placement fee information. These procedures are necessary to enable petitioners to comply with the notification requirements established by the Department of Homeland Security's regulations governing the H–2B nonimmigrant classification.

**DATES:** This Notice is effective January 18, 2009.

**FOR FURTHER INFORMATION CONTACT:** Hiroko Witherow, Service Center Operations, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., Washington, DC 20529, telephone (202) 272–8410.

**SUPPLEMENTARY INFORMATION:**

## I. Background

The H–2B nonimmigrant classification applies to alien workers seeking to perform non-agricultural labor or services of a temporary nature in the United States on a temporary basis. Immigration and Nationality Act (INA) sec. 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b); *see* 8 CFR 214.1(a)(2) (H–2B classification designation). Aliens seeking H–2B nonimmigrant status must be petitioned for by a U.S. employer. However, prior to filing the petition, the U.S. employer must complete a temporary labor certification process with the Department of Labor (DOL) for the job opening the employer seeks to fill with an H–2B worker.

After receiving a temporary labor certification, the U.S. employer files Form I–129, Petition for Nonimmigrant Worker, with the appropriate USCIS office to classify the beneficiary as an H–2B nonimmigrant. *See* 8 CFR 214.2(h)(5)(i)(A). Once the petition has been granted, the regulations impose additional responsibilities on H–2B petitioners. These responsibilities include notifying DHS of certain occurrences related to their H–2B workers, as discussed below.

*A. Employment-Related Notifications.*

The regulations require H–2B petitioners to provide notification to DHS within 2 work days in the following instances:

- When an H–2B worker fails to report to work within 5 work days of the employment start date on the H–2B petition;
- When the temporary labor or services for which H–2B workers were hired is completed more than 30 days early; or
- When the H–2B worker absconds from the worksite or is terminated prior to the completion of the temporary labor or services for which he or she was hired.

8 CFR 214.2(h)(6)(i)(F). The regulations also require that petitioners retain evidence of the notification filed with DHS for a one-year period beginning from the date of the notification. 8 CFR 214.2(h)(6)(i)(F)(*1*).

*B. Fee-Related Notifications.*

The regulations prohibit payment or agreement to pay a fee or other compensation by a beneficiary to any facilitator, recruiter, or similar employment service as a condition of the offer of obtaining the H–2B employment. 8 CFR 214.2(h)(6)(i)(B). However, the regulations provide petitioners with the opportunity to avoid denial or revocation (on notice) of their H–2B petition if they notify DHS regarding information they obtained following the filing of their H–2B petition concerning the beneficiary's payment of prohibited fees. 8 CFR 214.2(h)(6)(i)(B)(4). Notification of a beneficiary's payment or agreement to pay the prohibited fees must be made within 2 work days of the petitioner gaining such knowledge. *Id.*

This Notice specifies the manner in which H–2B petitioners must file employment-related and fee-related notifications with DHS in order to comply with the regulations. 8 CFR 214.2(h)(6)(i)(F) and 8 CFR 214.2(h)(6)(i)(B)(*4*).

## II. Employment-Related Notifications

*A. Filing Notifications.*

This Notice announces that beginning on January 18, 2009, H–2B petitioners must notify USCIS within 2 work days of an event specified in 8 CFR 214.2(h)(6)(i)(F)(*1*). The petitioner must include the following information in the notification.

(1) The reason for the notification;

(2) The reason for late notification, if applicable;

(3) The USCIS receipt number of the approved H–2B petition;

(4) The petitioner's name, address, telephone number, and employer identification number (EIN);

(5) The employer's name, address, and telephone number, if it is different from that of the petitioner;

(6) The name of the applicable H–2B worker;

(7) The date and place of birth of the subject H–2B worker; and

(8) The last known physical address and telephone number of the subject H–2B worker.

If all of the above information is not available, the employer must provide as much and as complete information as possible. USCIS acknowledges that petitioners may not know the names of the no-show H–2B workers if the workers are unnamed beneficiaries of the H–2B petition. Where an H–2B petitioner is reporting the failure of an H–2B worker to report to work within the prescribed time frame and the beneficiaries are unnamed, the petitioner must supply the number of workers who failed to report to work within the prescribed time frame, plus any of the additional items above that may be known or available.

Notices from employers should be provided to USCIS by e-mail. If e-mail notification is not possible paper notification via mail is acceptable. Notification by mail must be postmarked before the end of the 2 work day reporting window.

If the H–2B petition was approved by California Service Center:

*By e-mail: CSC-X.H-2BAbs@dhs.gov.*

*By mail:* California Service Center, Attn: Div X/BCU ACD, P.O. Box 30050, Laguna Niguel, CA 92607–3004.

If the H–2B petition was approved by Vermont Service Center:

*By e-mail:VSC.H2BABS@dhs.gov.*

*By mail:* Vermont Service Center, Attn: BCU ACD, 63 Lower Welden St., St. Albans, VT 05479.

## III. Fee-Related Notifications

This Notice announces that on January 18, 2009, H–2B petitioners may begin filing beneficiary-paid fee notifications to USCIS pursuant to 8 CFR 214.2(h)(6)(i)(B)(*4*). The notification must include the following information:

(1) The USCIS receipt number of the H–2B petition;

(2) The petitioner's name, address, and telephone number;

(3) The employer's name, address, and telephone number, if it is different from that of the petitioner; and the

(4) Name and address of the facilitator, recruiter, or placement service to which alien beneficiaries paid or agreed to pay the prohibited fees.

The petitioner should submit notices to USCIS by e-mail. If e-mail notification is not feasible for the H–2B petitioner, paper notification via mail is acceptable. Notices should be sent to the following addresses. Notification by mail must be postmarked before the end of the 2 work day reporting window.

If the H–2B petition was approved by California Service Center:

*By e-mail: CSC.H2BFee@dhs.gov.*

*By mail:* California Service Center, Attn: H2BFee, P.O. Box 10695, Laguna Niguel, CA 92607–1095.

If the H–2B petition was approved by Vermont Service Center:

*By e-mail: VSC.H2BPROPLACEMENT@dhs.gov.*

*By mail:* Vermont Service Center, Attn: BCU ACD, 75 Lower Welden St., St. Albans, VT 05479.

**IV. Paperwork Reduction Act**

This Notice sets forth the procedures for H–2B petitioners to notify USCIS when:

- An H–2B worker fails to report to work within 5 work days of the employment start date on the H–2B petition;
- When the temporary labor or services for which H–2B workers were hired is completed more than 30 days early; or
- When the H–2B worker absconds from the worksite or is terminated prior to the completion of the temporary labor or services for which he or she was hired.

Regulations require H–2B petitioners to retain evidence of such notification sent to USCIS for a one-year period.

This Notice further provides the procedures for H–2B petitioners to notify USCIS, after an H–2B petition has been filed, within 2 work days of learning that an H–2B alien worker paid a fee or other compensation to a facilitator, recruiter, or similar employment service as a condition of the offer of obtaining the H–2B employment.

These notification requirements are considered information collections covered under the Paperwork Reduction Act (PRA).

Since implementation will begin 30 days from the date of publication of this notice in the **Federal Register**, this new information collection has been submitted and approved by OMB under the emergency review and clearance procedures covered under the PRA. USCIS is requesting comments on this new information collection no later than January 18, 2009. When submitting comments on the information collection, your comments should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

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

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

**Overview of Information Collection**

a. *Type of information collection:* New information collection.

b. *Title of Form/Collection:* H–2B Petitioner's Employment-Related or Fee-Related Notification.

c. *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* No form number. U.S. Citizenship and Immigration Services.

d. *Affected public who will be asked or required to respond, as well as a brief abstract: Individuals or Households.* This information collection is necessary to provide employment-related or fee-related notification by an H–2B petitioner.

e. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 700 respondents at .50 hours (30 minutes) per response.

f. *An estimate of the total of public burden (in hours) associated with the collection:* Approximately 350 burden hours.

All comments and suggestions or questions regarding additional information should be directed to the Department of Homeland Security, U.S. Citizenship and Immigration Services, Chief, Regulatory Management Division, 111 Massachusetts Avenue, NW., 3rd Floor, Washington, DC 20529–2210, Attention: 202–272–8377.

**Paul A. Schneider,**

*Deputy Secretary.*

[FR Doc. E8–30098 Filed 12–18–08; 8:45 am]

**BILLING CODE 9117–97–P**

## DEPARTMENT OF HOMELAND SECURITY

### Customs and Border Protection

**[CBP Dec. 08–49]**

### Notice of Expansion of Temporary Worker Visa Exit Program Pilot To Include H–2B Temporary Workers

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** General notice.

**SUMMARY:** This notice announces that U.S. Customs and Border Protection is expanding a pilot program that implements a land-border exit system for certain temporary workers at certain designated ports of entry. Under the expansion of this pilot program, temporary workers within the H–2A and H–2B nonimmigrant classifications that enter the United States at the ports of San Luis, Arizona or Douglas, Arizona on or after August 1, 2009, must depart from either one of those ports and provide certain biographic and biometric information at one of the kiosks established for this purpose. Any nonimmigrant alien admitted under an H–2A or H–2B nonimmigrant visa at one of the designated ports of entry will be issued a CBP Form I–94, Arrival and Departure Record, and be presented with information material that explains the pilot program requirements.

**DATES:** The effective date of this notice is August 1, 2009.

**FOR FURTHER INFORMATION CONTACT:** Ms. Erin M. Martin via e-mail at *ERIN.Martin@dhs.gov.*

**SUPPLEMENTARY INFORMATION:**

**Background**

A pilot program for certain temporary workers was first proposed on February 13, 2008, when the Department of Homeland Security (DHS) published a notice of proposed rulemaking (73 FR 8230) to amend its regulations regarding the H–2A nonimmigrant classification.[1]

[1] The H–2A nonimmigrant classification applies to aliens seeking to perform agricultural labor or services of a temporary or seasonal nature in the United States. Immigration and Nationality Act (Act or INA) sec. 101(a)(15)(H)(ii)(a), 8 U.S.C. 1101(a)(15)(H)(ii)(a); *see* 8 CFR 214.1(a)(2) (designation for H–2A classification).

Specifically, DHS proposed to create 8 CFR 215.9 instituting a temporary worker visa exit pilot program and requiring certain H–2A temporary agricultural workers to participate in a pilot program that requires these workers to register with Customs and Border Protection (CBP) at the time of their departure from the United States. On December 18, 2008, a final rule was published in the **Federal Register** establishing the pilot program. Pursuant to the final rule, CBP published a notice, CBP Dec. 08–48, in the same **Federal Register** that requires H–2A temporary agricultural workers entering the U.S. at the ports of San Luis and Douglas, Arizona, on or after August 1, 2009, to register with CBP at the time of departure from the United States.

On August 20, 2008, DHS published a Notice of Proposed Rulemaking in the **Federal Register** (73 FR 49109) proposing changes to requirements affecting temporary non-agricultural workers within the H–2B nonimmigrant classification and their U.S. employers.[2] Among other things, DHS proposed to expand the temporary worker visa exit pilot program to include the H–2B nonimmigrant classification by requiring H–2B temporary nonagricultural workers admitted at a port of entry participating in the program to register with CBP at the time of departure from the United States. DHS is publishing the final rule in today's edition of the **Federal Register**, concurrent with this Notice.

The final rule amends 8 CFR 215.9 to provide that an alien admitted with a certain temporary worker visa at a port of entry participating in the Temporary Worker Visa Exit Program must also depart at the end of his or her authorized period of stay through a port of entry participating in the program and present designated biographic and/or biometric information upon departure. The amended § 215.9 further states that CBP will publish a notice in the **Federal Register** designating which temporary workers must participate in the Temporary Worker Visa Exit Program, which ports of entry are participating in the program, which biographical and/or biometric information would be required, and the format for submission of that information by the departing designated temporary workers.

[2] The H–2B nonimmigrant classification applies to foreign workers coming to the U.S. temporarily to perform temporary, non-agricultural labor or services. Immigration and Nationality Act (Act or INA) sec. 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b); *see* 8 CFR 214.1(a)(2) (designation for H–2B classification).

The instant notice is being issued pursuant to amended § 215.9. It contains all the required elements referenced in 8 CFR 215.9 as amended and expands the temporary worker visa exit pilot program to include both the H–2A and the H–2B classifications. The requirements of the pilot program, the designated ports, and the effective date of the pilot program will be the same for both H–2A and H–2B temporary workers. Therefore, any alien who is admitted into the United States with an H–2A or H–2B nonimmigrant visa at a designated port on or after August 1, 2009, will be subject to the expanded pilot program.

**Temporary Worker Visa Exit Program Pilot**

*General Requirements*

Any alien admitted into the United States at a designated port of entry with either an H–2A or H–2B nonimmigrant visa must depart from a designated port of entry and must submit certain biographic and biometric information at one of the kiosks established for this purpose.

*Designated Ports of Entry*

San Luis, Arizona.
Douglas, Arizona.

*Entry Procedures*

Any nonimmigrant alien admitted with an H–2A or H–2B nonimmigrant visa at one of the designated ports of entry will be issued a CBP Form I–94, Arrival and Departure Record, and be presented with information material that explains the pilot program requirements. The information material will instruct the alien to appear in person at one of the designated ports of entry to register his or her final departure from the United States at that port on or before the date that his or her work authorization expires.

*Exit Procedures*

An alien admitted with an H–2A or H–2B nonimmigrant visa must depart at a designated port on or before the date his or her work authorization expires. At the time of departure, the alien must present the following biographic and biometric information at a kiosk installed for this purpose:

- Biographic information—name, date of birth, country of citizenship, passport number, and the name of the Consulate where the alien's visa was issued. The biographic information will be provided by scanning the alien's travel document (visa). If the scan of the visa fails, the alien will scan his or her passport. If the scan of the passport fails, the alien will manually enter the required biographic information.
- Biometric information—a 4-finger scan from one hand.
- The departure portion of the CBP Form I–94—this must be deposited into a lockbox attached to the kiosk and the departing alien will receive a receipt verifying a successfully completed checkout registration.

*Kiosks*

Instructions for departure registration will be available in both English and Spanish for use by departing aliens at the kiosks.

Officer assistance will be available in the event that an alien is unable to utilize the designated kiosk to record his or her departure.

Dated: December 8, 2008.

**Jayson P. Ahern,**

*Acting Commissioner, U.S. Customs and Border Protection.*

[FR Doc. E8–30093 Filed 12–18–08; 8:45 am]

**BILLING CODE 9111–14–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5250–N–02]**

## Additional Allocations for Midwest Flood Community Development Block Grant (CDBG) Disaster Recovery Grantees under the Supplemental Appropriations Act, 2008

**AGENCY:** Office of the Secretary, HUD.

**ACTION:** Notice of allocations.

**SUMMARY:** This notice advises the public of the second allocation of CDBG disaster recovery grants for the purpose of assisting in the recovery in areas covered by a declaration of major disaster under title IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*) as a result of natural disasters that were recent as of the law's enactment in June 2008. As described in the supplementary information section of this notice, HUD is authorized by statute and regulations to waive statutory and regulatory requirements and specify alternative requirements, upon the request of the state grantees. This notice also describes how a state receiving an allocation may implement the common application, eligibility, and administrative waivers and the common alternative and statutory requirements for the grants.

**DATES:** Effective Date: December 24, 2008.

**FOR FURTHER INFORMATION CONTACT:** Jessie Handforth Kome, Director,

Disaster Recovery and Special Issues Division, Office of Block Grant Assistance, Department of Housing and Urban Development, 451 7th Street, SW., Room 7286, Washington, DC 20410, telephone number 202–708–3587. Persons with hearing or speech impairments may access this number through TTY by calling the Federal Information Relay Service at 800–877–8339. Facsimile inquiries may be sent to Ms. Kome at 202–401–2044. (Except for the ''800'' number, the telephone numbers are not toll free.)

**SUPPLEMENTARY INFORMATION:**

**Authority to Grant Waivers**

The Supplemental Appropriations Act, 2008 (Pub. L. 110–252, approved June 30, 2008) (Supplemental Appropriations Act) appropriates $300 million, to remain available until expended, in CDBG funds for necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure in areas covered by a 2008 declaration of major disaster under title IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*). The Supplemental Appropriations Act authorizes the Secretary to waive, or specify alternative requirements for, any provision of any statute or regulation that the Secretary administers in connection with the obligation by the Secretary or use by the recipient of these funds and guarantees, except for requirements related to fair housing, nondiscrimination, labor standards, and the environment (including requirements concerning lead-based paint), upon a request by the state and a finding by the Secretary that such a waiver would not be inconsistent with the overall purpose of the statute. Additionally, regulatory waiver authority is provided by 24 CFR 5.110, 91.600, and 570.5.

On September 11, 2008, at 73 FR 52870, the Department published its initial allocation for grant funds for the CDBG disaster recovery grants funded under the Supplemental Appropriations Act. In that notice, the Department noted that it would make two allocations, one to the three most affected states and a second when HUD had more information to better determine the needs of each state under this appropriation. Today's **Federal Register** notice allocates the balance of the $300 million allocation under the Supplemental Appropriations Act. Under the requirements of the Department of Housing and Urban Development Reform Act of 1989 (the HUD Reform Act), regulatory waivers must be justified and published in the **Federal Register**.

Except as described in this notice, statutory and regulatory provisions governing the CDBG program for states, including those at 24 CFR part 570, shall apply to the use of these funds. In accordance with the Supplemental Appropriations Act, HUD will reconsider every waiver granted under this notice on the 2-year anniversary of the day this notice is published.

**Additional Waivers**

Each state receiving an allocation may request additional waivers from the Department as needed to address the specific needs related to that state's recovery activities. The Department will respond separately to state requests for waivers of provisions not covered in this notice, after working with the state to tailor the program to best meet the unique disaster recovery needs in its impacted areas.

**Allocations**

The Supplemental Appropriations Act provides $300 million of supplemental appropriation for the CDBG program for:

> Necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure in areas covered by a declaration of major disaster under title IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*) as a result of recent natural disasters.

The law further notes:

> That funds provided under this heading shall be administered through an entity or entities designated by the Governor of each state. Provided further, that funds allocated under this heading shall not adversely affect the amount of any formula assistance received by a state under this heading: Provided further, that each state may use up to five percent of its allocation for administrative costs.

Table 1, shown below, lists the states receiving an allocation. Based on preliminary data, Iowa, Indiana, and Wisconsin received initial allocations for a subset of the funds. Those allocations were announced on August 4, 2008, and are included in the Table.

TABLE 1—FEDERALLY DECLARED DISASTER WITH AN INCIDENT DATE AND DECLARATION DATE IN MAY AND JUNE 2008

| Disaster No. | Incident date | Declared date | State | Disaster type | Allocation |
|---|---|---|---|---|---|
| 1753 | 3/20 to 5/19 | 5/8/08 | Mississippi | Severe Storms and Flooding | $2,281,287. |
| 1755 | 4/28 to 5/14 | 5/9/08 | Maine | Severe Storms and Flooding | $2,187,114. |
| 1756 | 5/10 to 5/13 | 5/14/08 | Oklahoma | Severe Storms, Tornadoes, and Flooding. | $1,793,876. |
| 1758 | 5/2 to 5/12 | 5/20/08 | Arkansas | Severe Storms, Flooding, and Tornadoes. | $4,747,501. |
| 1759 | 5/1 | 5/22/08 | South Dakota | Severe Winter Storm and Record and Near Record Snow. | $1,987,271. |
| 1760 | 5/10 to 5/11 | 5/23/08 | Missouri | Severe Storms and Tornadoes | $3,519,866. |
| 1762 | 5/21 | 5/26/08 | Colorado | Severe Storms and Tornadoes | $589,651. |
| 1763 | 5/25 and continuing | 5/27/08 | Iowa | Severe Storms, Tornadoes, and Flooding. | 1st: $85,000,000.<br>2nd: $71,690,815.<br>Total: $156,690,815. |
| 1766 | 5/30–6/27 | 6/8/08 | Indiana | Severe Storms and Flooding | 1st: $10,000,000.<br>2nd: $57,012,966.<br>Total: $67,012,966. |
| 1767 | 5/1 | 6/13/08 | Montana | Severe Winter Storms | $666,672. |
| 1768 | 6/5 and continuing | 6/14/08 | Wisconsin | Severe Storms, Tornadoes, and Flooding. | 1st: $5,000,000.<br>2nd: $19,057,378.<br>Total: $24,057,378. |
| 1769 | 6/3 to 6/7 | 6/19/08 | West Virginia | Severe Storms, Tornadoes, Flooding, Mudslides, and Landslides. | $3,127,935. |

TABLE 1—FEDERALLY DECLARED DISASTER WITH AN INCIDENT DATE AND DECLARATION DATE IN MAY AND JUNE 2008—Continued

| Disaster No. | Incident date | Declared date | State | Disaster type | Allocation |
|---|---|---|---|---|---|
| 1770 | 5/22 | 6/20/08 | Nebraska | Severe Storms, Tornadoes, and Flooding. | $5,557,736. |
| 1771 | 6/1 to 7/22 | 6/24/08 | Illinois | Severe Storms and Flooding | $17,341,434. |
| 1772 | 6/7 to 6/12 | 6/25/08 | Minnesota | Severe Storms and Flooding | $925,926. |
| 1773 | 6/1 to 8/13 | 6/25/08 | Missouri | Severe Storms and Flooding | $7,512,572. |

The appropriation calls for funding ''recent natural disasters.'' Since this appropriation was enacted on June 30, 2008, HUD has interpreted the language of ''recent natural disasters'' to be the 16 major natural disasters with an incident and declared date in May or June of 2008. There were no declared disasters in April 2008, which allows for a ''natural break.'' This limited the eligibility for an allocation to the 16 disasters shown in Table 1.

For the 16 natural disasters, HUD calculated ''unmet needs'' for housing, business, and infrastructure recovery. Unmet needs are defined as follows:

*1. Unmet housing needs.* The number of housing units with unmet needs times the estimated cost to repair those units (less repair funds already provided by the Federal Emergency Management Agency (FEMA)). Data were provided by FEMA on October 1, 2008, and by the Small Business Administration (SBA) on October 3, 2008. Unmet housing needs are calculated using three ''levels of FEMA damage''—$8,001 to $15,000; $15,001 to $28,800; and greater than $28,800. Unmet housing needs exist where:

a. The number of owner-occupied units with unmet needs equals: Units FEMA inspectors determined would require more than $8,000 to become habitable and that were determined by FEMA to be eligible for a repair or replacement grant (up to $28,800).

b. The number of rental units with unmet needs equals: Units that FEMA inspectors determined would require more than $8,000 to become habitable times the ''unmet need rate'' of owners. That is, if 50 percent of owner-occupied dwellings had damage not being covered by insurance or an SBA loan for a particular disaster, HUD assumes that 50 percent of rental units had damage not covered by insurance or an SBA loan.

c. The average cost to fully repair the home equals: The average real-property damage repair cost determined by the SBA for its disaster loan program (less the repair grant amount from FEMA) for the subset of homes inspected by SBA. Because SBA is inspecting for full-repair costs, it is a better estimate of the true cost to repair.

2. *Unmet business needs.* The sum of real-property and real-content loss of small businesses applying for an SBA disaster loan as verified by SBA inspectors, less the real-property and real-content loss approved for an SBA loan. Data were provided by the SBA on October 3, 2008.

3. *Unmet infrastructure needs.* The sum of the ''non-federal share'' of costs eligible for funding under FEMA's Public Assistance program. This reflects the greater of the current FEMA estimate of costs or the amount specifically determined eligible through FEMA's Public Assistance Worksheets. Data were provided by FEMA as of October 22, 2008.

**Waiver Justification**

The waivers, alternative requirements, and statutory changes described in the September 11, 2008, notice apply to the CDBG supplemental disaster recovery funds appropriated in the Supplemental Appropriations Act, not to funds provided under the regular CDBG program. These actions provide additional flexibility in program design and implementation and implement statutory requirements unique to this appropriation. The September 11, 2008, notice provides further justification for the waivers.

**Application for Allocations Under the Supplemental Appropriations Act**

The waivers and alternative requirements streamline the pre-grant process and set the guidelines for states' applications requesting their allocations. A state receiving an allocation under this notice will be granted the waivers and alternative requirements provided in the September 11, 2008, notice if the state requests in writing that HUD grant it the waivers and alternative requirements of that notice and describes good cause why such waivers should be granted. HUD encourages each grantee that receives an allocation under this notice to submit an Action Plan for Disaster Recovery to HUD as soon as practicable following an allocation announcement. By March 13, 2009, if a state has: (1) Failed to submit a substantially complete application, (2) submitted an application for less than its total allocation, or (3) waived its rights to the entire allocation, HUD may notify the state of the reduction in its allocation amount and proceed to reallocate the funds to another state receiving disaster recovery funds under this notice.

**Applicable Rules, Statutes, Waivers, and Alternative Requirements**

*1. General note.* Prerequisites to a grantee's receipt of CDBG disaster recovery assistance include adoption of a citizen participation plan; publication of its proposed Action Plan for Disaster Recovery; public notice and comment; and submission of an Action Plan for Disaster Recovery to HUD, including certifications. Except as described in this notice, statutory and regulatory provisions governing the CDBG program for states, including those at 42 U.S.C. 5301 *et seq.* and 24 CFR part 570, shall apply to the use of these funds.

2. The waivers provided in the September 11, 2008, notice will be granted and the alternative requirements of that notice provided to a state that receives an allocation of grant funds under this notice and that requests in writing that HUD grant it the waivers and alternative requirements of that notice and describes good cause for granting such waivers.

**Duration of Funding**

Availability of funds provisions in 31 U.S.C. 1551–1557, added by section 1405 of the National Defense Authorization Act for Fiscal Year 1991 (Pub. L. 101–510), limit the availability of certain appropriations for expenditure. This limitation may not be waived. However, the Supplemental Appropriations Act for these grants directs that these funds be available until expended unless, in accordance with 31 U.S.C. 1555, the Department determines that the purposes for which the appropriation has been made have been carried out and no disbursement has been made against the appropriation

for 2 consecutive fiscal years. In such case, the Department shall close out the grant prior to expenditure of all funds.

**Catalog of Federal Domestic Assistance**

The Catalog of Federal Domestic Assistance numbers for the disaster recovery grants under this notice are as follows: 14.219; 14.228.

**Finding of No Significant Impact**

A Finding of No Significant Impact (FONSI) with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332). The FONSI is available for public inspection between 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, an advance appointment to review the docket file must be scheduled by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Hearing or speech-impaired individuals may access this number through TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

Dated: December 9, 2008.

**Roy A. Bernardi,**

*Deputy Secretary.*

[FR Doc. E8–30185 Filed 12–18–08; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5186–N–51]**

## Federal Property Suitable as Facilities To Assist the Homeless

**AGENCY:** Office of the Assistant Secretary for Community Planning and Development, HUD.

**ACTION:** Notice.

**SUMMARY:** This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

**FOR FURTHER INFORMATION CONTACT:** Kathy Ezzell, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7266, Washington, DC 20410; telephone (202) 708–1234; TTY number for the hearing- and speech-impaired (202) 708–2565 (these telephone numbers are not toll-free), or call the toll-free Title V information line at 800–927–7588.

**SUPPLEMENTARY INFORMATION:** In accordance with 24 CFR part 581 and section 501 of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11411), as amended, HUD is publishing this Notice to identify Federal buildings and other real property that HUD has reviewed for suitability for use to assist the homeless. The properties were reviewed using information provided to HUD by Federal landholding agencies regarding unutilized and underutilized buildings and real property controlled by such agencies or by GSA regarding its inventory of excess or surplus Federal property. This Notice is also published in order to comply with the December 12, 1988 Court Order in *National Coalition for the Homeless* v. *Veterans Administration*, No. 88–2503–OG (D.D.C.).

Properties reviewed are listed in this Notice according to the following categories: Suitable/available, suitable/unavailable, suitable/to be excess, and unsuitable. The properties listed in the three suitable categories have been reviewed by the landholding agencies, and each agency has transmitted to HUD: (1) Its intention to make the property available for use to assist the homeless, (2) its intention to declare the property excess to the agency's needs, or (3) a statement of the reasons that the property cannot be declared excess or made available for use as facilities to assist the homeless.

Properties listed as suitable/available will be available exclusively for homeless use for a period of 60 days from the date of this Notice. Where property is described as for ''off-site use only'' recipients of the property will be required to relocate the building to their own site at their own expense. Homeless assistance providers interested in any such property should send a written expression of interest to HHS, addressed to Theresa Rita, Division of Property Management, Program Support Center, HHS, room 5B–17, 5600 Fishers Lane, Rockville, MD 20857; (301) 443–2265. (This is not a toll-free number.) HHS will mail to the interested provider an application packet, which will include instructions for completing the application. In order to maximize the opportunity to utilize a suitable property, providers should submit their written expressions of interest as soon as possible. For complete details concerning the processing of applications, the reader is encouraged to refer to the interim rule governing this program, 24 CFR part 581.

For properties listed as suitable/to be excess, that property may, if subsequently accepted as excess by GSA, be made available for use by the homeless in accordance with applicable law, subject to screening for other Federal use. At the appropriate time, HUD will publish the property in a Notice showing it as either suitable/available or suitable/unavailable.

For properties listed as suitable/unavailable, the landholding agency has decided that the property cannot be declared excess or made available for use to assist the homeless, and the property will not be available.

Properties listed as unsuitable will not be made available for any other purpose for 20 days from the date of this Notice. Homeless assistance providers interested in a review by HUD of the determination of unsuitability should call the toll free information line at 1–800–927–7588 for detailed instructions or write a letter to Mark Johnston at the address listed at the beginning of this Notice. Included in the request for review should be the property address (including zip code), the date of publication in the **Federal Register**, the landholding agency, and the property number.

For more information regarding particular properties identified in this Notice (*i.e.*, acreage, floor plan, existing sanitary facilities, exact street address), providers should contact the appropriate landholding agencies at the following addresses: *Energy:* Mr. Mark Price, Department of Energy, Office of Engineering & Construction Management, MA–50, 1000 Independence Ave, SW., Washington, DC 20585: (202) 586–5422; *GSA*: Mr. John Smith, Deputy Assistant Commissioner, General Services Administration, Office of Property Disposal, 18th & F Streets, NW., Washington, DC 20405; (202) 501–0084; *NAVY*: Mrs. Mary Arndt, Acting Director, Department of the Navy, Real Estate Services, Naval Facilities Engineering Command, Washington Navy Yard, 1322 Patterson Ave., SE., Suite 1000, Washington, DC 20374–5065; (202) 685–9305 (These are not toll-free numbers).

Dated: December 11, 2008.

**Mark R. Johnston,**

*Deputy Assistant Secretary for Special Needs.*

**Title V, Federal Surplus Property Program Federal Register Report for 12/19/2008**

**Suitable/Available Properties**

*Building*

California

Boyle Heights SSA Bldg.
N. Breed St.
Los Angeles, CA 90033
Landholding Agency: GSA
Property Number: 54200840010

Status: Surplus
GSA Number: 9–G–CA–1676
Comments: 10,815 sq. ft., requires seismic strengthening to satisfy substantial life-safety criteria; expected lateral loads in structure rather high

Missouri

Federal Bldg/Courthouse
339 Broadway St.
Cape Girardeau, MO 63701
Landholding Agency: GSA
Property Number: 54200840013
Status: Excess
GSA Number: 7–G–MO–0673
Comments: 47,867 sq. ft., possible asbestos/lead paint, needs maintenance & seismic upgrades, 30% occupied—tenants to relocate within 2 yrs

**Suitable/Available Properties**

*Land*

California

Tract 1607
Lake Sonoma
Rockpile Rd.
Geyserville, CA 85746
Landholding Agency: GSA
Property Number: 54200840011
Status: Surplus
GSA Number: 9–GR–CA–1504
Comments: approx. 139 acres, northern portion not accessible because of steep slopes, rare manzanita species

Michigan

Former Elf Comm. Facility
3041 County Road
Republic MI 49879
Landholding Agency: GSA
Property Number: 54200840012
Status: Excess
GSA Number: 1–N–MI–0827
Comments: 6.69 acres w/transmiter bldg, support bldg., gatehouse, endangered species

**Suitable/Unavailable Properties**

*Land*

Hawaii

6 Parcels
Naval Station
Pearl Harbor HI 96818
Landholding Agency: Navy
Property Number: 77200840012
Status: Unutilized
Comments: various acres; encumbered by substantial improvements owned by a private navy tenant

North Carolina

6.5 acre parcel
Marine Corps Base
Stone Bay Rifle Range
Camp Lejeune NC
Landholding Agency: Navy
Property Number: 77200840014
Status: Underutilized
Comments: wooded area/buffer zone

**Unsuitable Properties**

*Building*

California

Bldg. 5125
Lawrence Livermore Natl Lab
Livermore CA
Landholding Agency: Energy
Property Number: 41200840009
Status: Excess
Reasons: Within 2000 ft. of flammable or explosive material Secured Area

6 Bldgs.
Lawrence Livermore Natl Lab
Livermore CA
Landholding Agency: Energy
Property Number: 41200840010
Status: Excess
Directions: 1407, 1408, 1413, 1492, 1526, 1579
Reasons: Within 2000 ft. of flammable or explosive material Secured Area

6 Bldgs.
Lawrence Livermore Natl Lab
Livermore CA
Landholding Agency: Energy
Property Number: 41200840011
Status: Excess
Directions: 3775, 4161, 4316, 4388, 4905, 4906
Reasons: Within 2000 ft. of flammable or explosive material Secured Area

**Unsuitable Properties**

*Building*

California

Bldgs. 8710, 8711, 8806
Lawrence Livermore Natl Lab
Livermore CA
Landholding Agency: Energy
Property Number: 41200840012
Status: Excess
Reasons: Secured Area; Within 2000 ft. of flammable or explosive material

4 Bldgs.
Marine Corps Base
14113, 14114, 14126, 21401
Camp Pendleton CA
Landholding Agency: Navy
Property Number: 77200840010
Status: Excess
Reasons: Secured Area; Extensive deterioration

Connecticut

Structure 338
Naval Submarine Base
New London CT
Landholding Agency: Navy
Property Number: 77200840011
Status: Unutilized
Reasons: Extensive deterioration; Secured Area

**Unsuitable Properties**

*Building*

Hawaii

Bldgs. 1626, 1627, 1628
Naval Station
Pearl Harbor HI 96860
Landholding Agency: Navy
Property Number: 77200840018
Status: Excess
Reasons: Within 2000 ft. of flammable or explosive material Secured Area

Maine

Bldgs. 89, 129, 131
Portsmouth Naval Shipyard
Kittery ME
Landholding Agency: Navy
Property Number: 77200840013
Status: Excess
Reasons: Secured Area

Rhode Island

Bldgs. A105, 1323
Naval Station
Newport RI 02842
Landholding Agency: Navy
Property Number: 77200840015
Status: Excess
Reasons: Extensive deterioration

**Unsuitable Properties**

*Building*

Rhode Island

Bldgs. 391, 400, 658
Naval Station
Newport RI 02842
Landholding Agency: Navy
Property Number: 77200840016
Status: Excess
Reasons: Secured Area; Extensive deterioration

Virginia

11 Bldgs.
Naval Weapon Station
Yorktown VA 23691
Landholding Agency: Navy
Property Number: 77200840019
Status: Excess
Directions: 10, 11, 97, 97A, 98, 472, 526, 527, 528, 528A, 1592
Reasons: Extensive deterioration; Secured Area

8 Bldgs.
Naval Weapon Station
Yorktown VA 23691
Landholding Agency: Navy
Property Number: 77200840020
Status: Excess
Directions: 109, 110, 500A, 501A, 627, 629, 1249, 1462
Reasons: Extensive deterioration; Secured Area

**Unsuitable Properties**

*Building*

Virginia

5 Bldgs.
Naval Amphibious Base
Norfolk VA
Landholding Agency: Navy
Property Number: 77200840021
Status: Unutilized
Directions: 3375, 3420, 3550, 3695, 3891
Reasons: Extensive deterioration; Secured Area

Washington

Bldgs. 20, 62, 2616, 2663
Naval Air Station
Whidbey Island WA
Landholding Agency: Navy
Property Number: 77200840017
Status: Excess
Reasons: Secured Area

[FR Doc. E8–29816 Filed 12–18–08; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF THE INTERIOR

### Office of the Secretary, Office of the Special Trustee for American Indians; Privacy Act of 1974, as Amended; Addition of a New System of Records

**AGENCY:** Office of the Secretary, Office of the Special Trustee for American Indians (OST).

**ACTION:** Proposed addition of a new System of Records.

**SUMMARY:** In accordance with the Privacy Act of 1974, as amended (5 U.S.C. 552a), the Office of the Secretary is issuing public notice of its intent to add a new Privacy Act system of records, OS–08, entitled ''OST Parking Assignment Records.''

**DATES:** Comments must be received by January 28, 2009.

**ADDRESSES:** Any persons interested in commenting on this proposed addition of a new Privacy Act 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:** Parking Program Coordinator, Budget, Finance & Administration, Office of the Special Trustee for American Indians, U.S. Department of the Interior, 4400 Masthead Street, NE., Albuquerque, NM 87109.

**SUPPLEMENTARY INFORMATION:** The OST Parking Assignment Records system will contain information from individuals and potentially representatives of businesses seeking parking permits in spaces in the parking lot adjacent to the OST building. The system will contain application forms including, where applicable, such information as name, supervisor's name, location of employment, work telephone number, home telephone number, position title, vehicle(s) make and model, state of vehicle registration, license tag number, expiration date, color of vehicle, parking permit number, and number of carpool riders. Collection of data will be by individuals submitting a parking application form. The system will be effective as proposed unless we receive comments that lead us to change it. The Office of the Secretary will publish a revised notice if changes are made based upon a review of comments received.

Dated: December 16, 2008.

**Linda S. Thomas,**

*Office of the Secretary, Acting Privacy Act Officer.*

**SYSTEM NAME:**

''OST Parking Assignment Records.'' OS–08.

**SYSTEM LOCATION:**

Budget, Finance and Administration, Office of the Special Trustee for American Indians, U.S. Department of the Interior, 4400 Masthead Street, NE, Albuquerque, NM 87109.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Individuals requesting a parking permit or joining a carpool from the Federal government, including Government employees, contractors, and other individuals providing services or conducting business with the OST.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

The information collected will include applicant's name, supervisor's name, location of employment, work telephone number, home telephone number, position title, vehicle(s) make and model, state of vehicle registration, license tag number, expiration date, color of vehicle, parking permit number, and number of carpool riders if applicable. This list may not be exhaustive, but is indicative of the type of information included.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

40 U.S.C. 471, *et seq.,* FPMR Temporary Regulation D–69.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

The primary purposes of the system are:

(1) To manage the assignment of parking permits.

(2) To monitor the parking area for permit compliance and security surveillance.

(3) To assist individuals in locating carpools.

Disclosures outside the Department of the Interior may be made:

(1) To a Federal agency that has jurisdiction over parking spaces.

(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 acting in his or her individual capacity if DOI or DOJ has agreed to represent that employee or pay for private representation of the employee;

(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 other Federal agency appearing before the Office of Hearings and Appeals;

(C) Any DOI employee acting in his or her official capacity;

(D) Any DOI employee acting in his or her individual capacity if DOI or DOJ has agreed to represent that employee or pay for private representation of the employee;

(E) The United States, when DOJ determines that DOI is likely to be affected by the proceeding; and

(ii) DOI 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 Federal, State, local, or foreign agencies responsible for investigating or prosecuting the violation of or for enforcing or implementing a statute, rule, regulation, order, or license, when the disclosing agency becomes aware of a potential violation of a statute, rule, regulation, order, or license.

(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 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.

(7) 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.

(8) To state and local governments and tribal organizations to provide

information needed in response to court order and/or discovery purposes related to litigation, when the disclosure is compatible with the purpose for which the records were compiled.

(9) 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.

(10) 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 that there is a risk of harm to 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.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE STYSTEM:**

**STORAGE:**

Records are maintained in both manual and electronic computer database form. Original input documents are stored in standard office filing equipment in locked Government offices at the stated location.

**RETRIEVABILITY:**

Records are retrieved by name of individual, office telephone number, home telephone number, position title, vehicle(s) make and model, state of vehicle registration, license tag number, parking permit number, and number of carpool riders if applicable.

**SAFEGUARDS:**

Records are maintained with safeguards meeting the requirements of 43 CFR 2.51 for manual and computerized records. Access to records is limited to authorized personnel whose official duties require such access.

(1) Physical Security: Paper records are maintained in locked file cabinets or in secured, locked rooms within a secured Government facility. Electronic records are maintained in computers and servers which are in locked, secure rooms.

(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. Electronic data is protected through user identification, passwords, database permissions, and software controls. These security measures establish different degrees of access for different types of users. An audit trail is maintained and reviewed periodically to identify unauthorized access.

(3) Administrative Security: All DOI and contractor employees with access to the Parking permit files are required to complete Privacy Act, Records Management Act, and IT Security Awareness training prior to being given access to the system, and on an annual basis, thereafter. In addition, all employees accessing either the paper records or the electronic form of the records are supervised by a Federal government employee who has granted such access only on a need to know basis.

**RETENTION AND DISPOSAL:**

Records are retained and disposed of in accordance with General Records Schedule No. 11, Space and Maintenance Records, Item No. 4a, Credentials Files (Parking Permits).

**SYSTEM MANAGER(S) AND ADDRESS:**

Parking Program Coordinator, Budget, Finance and Administration, Office of the Special Trustee for American Indians, U.S. Department of the Interior, 4400 Masthead Street, NE., Albuquerque, NM 87109.

**NOTIFICATION PROCEDURES:**

An individual requesting notification of the existence of records on himself or herself should address his/her request to the appropriate bureau/office System Manager. The request must be in writing, signed by the requester, and meet the content requirement of 43 CFR 2.60.

**RECORDS ACCESS PROCEDURES:**

A request for access to records shall be addressed to the System Manager. The request must be in writing, signed by the requester, and meet the content requirements of 43 CFR 2.63.

**CONTESTING RECORDS PROCEDURES:**

A request for amendment of records maintained on himself or herself shall 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.

**RECORD SOURCE CATERGORIES:**

Individuals requesting a parking permit or joining a carpool.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

[FR Doc. E8–30187 Filed 12–18–08; 8:45 am]

**BILLING CODE 4301–02–P**

## DEPARTMENT OF THE INTERIOR

### Office of the Secretary

### Privacy Act of 1974; Amendment of Existing System of Records

**AGENCY:** Office of the Secretary, Department of the Interior.

**ACTION:** Proposed amendment of existing Privacy Act system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974 (5 U.S.C. § 552a), the Office of the Secretary of the Department of the Interior is issuing public notice of its intent to amend an existing Privacy Act system of records notice, OS–02, ''Individual Indian Monies (IIM) Trust Funds.'' The amendments will update the contact for further information, system locations, system manager and address, categories of records in the system, authority for maintenance of the system, routine uses of records maintained in the system, storage, safeguards, retention and disposal, procedures for contesting records, and records source categories.

**DATES:** Comments must be received by January 28, 2009

**ADDRESSES:** Any persons interested in commenting on these proposed amendments to an existing 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:** Chief of Staff, Office of the Principal Deputy Special Trustee, 4400 Masthead Street, NE., Suite 357, Albuquerque, NM 87109.

**SUPPLEMENTARY INFORMATION:** In this notice, the Department of the Interior is proposing to amend Interior OS–02, Individual Indian Monies (IIM) Trust Funds to reflect enhancements to the system which will enable the Office of the Secretary, Office of the Special Trustee for American Indians (OST) to further improve the level of services provided to individual beneficiaries of the Indian trust. These changes help the Secretary carry out fiduciary

responsibilities required under the American Indian Trust Fund Management Reform Act of 1994, Pub. L. 103–412, 108 Stat. 4239. In addition, these proposed amendments will update contact information, system locations, categories of records in the system, authority for maintenance of the system, routine uses of the system, records source categories, and procedures for storage, retention and disposal, and for contesting information. Thus, the Office of the Secretary proposes to amend Interior OS–02, Individual Indian Monies (IIM) Trust Funds to read as shown below. The system will be effective as proposed unless comments are received which would require a contrary determination. The Office of the Secretary will publish a revised notice if changes are made based upon a review of comments received.

Dated: December 16, 2008.

**Linda S. Thomas,**

*Office of the Secretary, Acting Privacy Officer.*

**SYSTEM NAME:**

Interior, OS–02, ''Individual Indian Monies (IIM) Trust Funds.''

**SYSTEM LOCATIONS:**

(a) U.S. Department of the Interior, Office of the Special Trustee for American Indians, 4400 Masthead Street, NE., Albuquerque, NM 87109.

(b) OST field locations including area, agency, and regional offices.

(c) Offices of contractors processing individual Indian trust fund accounts.

(d) Tribal offices of tribes that have compacted or contracted the individual Indian trust fund management function from OST under the Indian Self-Determination and Education Assistance Act, Pub. L. 93–638, 88 Stat. 2203, as amended.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Individual Indians, Alaska Natives, or their heirs, who have accounts held in trust status by the Department of the Interior.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

(a) Data on trust accounts in automated systems including the Trust Fund Accounting System (TFAS) and the Trust Beneficiary Call Center Tracking Software (ServiceCenter).

(b) Imaged documents concerning individual Indian trust accounts.

(c) Data related to financial and investment activity from individual Indian trust accounts.

(d) Data related to custodianship of investments for individual Indian trust accounts.

(e) Paper records related to individual Indian trust accounts, including jacket folders, and financial documents such as accounting, reconciliation, and transaction data related to receipts, disbursements, investments, and transfers.

The type of information contained in the categories above may include a person's name, aliases, sex, birth date, address, phone numbers, e-mail address, Social Security Number, account number, tribal membership number, blood quantum, and contact information for people who may know their whereabouts.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

25 U.S.C. 116, 117(a)(b)(c), 118, 119, 120, 121, 151, 159, 161(a), 162(a), 4011, 4043(b)(2)(B).

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

The system's main purposes are to:

(a) Manage the collection, investment, distribution, and disbursement of individual Indian trust income.

(b) Comply with relevant sections of the American Indian Trust Fund Management Reform Act of 1994, Pub. L. 103–412, 108 Stat. 4239.

(c) Improve customer satisfaction by achieving a high level of responsiveness to beneficiary inquiries by documenting and tracking each contact and providing accurate, consistent and timely resolutions.

(d) Enable beneficiaries to receive trust services in a more timely and convenient manner through modern technology.

(e) Provide information for Indian trust funds program management purposes.

Disclosures outside the Department of the Interior may be made to:

(a) Individual Indian trust account beneficiaries, their heirs, guardians, or agents.

(b) Contractors, but only after ensuring that all provisions of the Privacy Act, the Trade Secrets Act, the Indian Minerals Development Act, and all other applicable laws, regulations, and policies relating to contracting and security are met, who:

(1) Provide trust and other services to beneficiaries;

(2) Provide, use, operate or facilitate various components of the system;

(3) Service and maintain the system for the Department.

(c) The U.S. Department of Justice, or to a court, adjudicative or other administrative body, or to a party in litigation before a court or adjudicative or administrative body, when:

(1) One of the following is a party to the proceeding or has an interest in the proceeding:

(i) The Department or any component of the Department;

(ii) Any Department employee acting in his or her official capacity;

(iii) Any Department employee acting in his or her individual capacity where the Department or the Department of Justice has agreed to represent the employee; or

(iv) The United States, when the Department determines that the Department is likely to be affected by the proceeding; and

(2) We deem the disclosure to be:

(i) Relevant and necessary to the proceeding; and

(ii) Compatible with the purpose for which we compiled the information.

(d) The following components of the U.S. Department of Treasury:

(1) Financial Management Service (FMS) for the purpose of providing fiscal agency services to OST such as, but not limited to, issuing paper check disbursements to beneficiaries and operating the Direct Deposit program to send disbursements electronically to the beneficiary's account with a third-party financial institution;

(2) Internal Revenue Service (IRS) to report beneficiary taxable income on IRS Form 1099 and to collect debts owed to the government.

(e) The National Archives and Records Administration and their contractors, for the purpose of providing long-term storage of inactive individual Indian trust records at the American Indian Records Repository at Lenexa, Kansas.

(f) Another federal agency to enable that agency to respond to an inquiry by the individual to whom the record pertains.

(g)(1) To any of the following entities or individuals, when the circumstances set forth in paragraph (2) are met:

(i) The U.S. Department of Justice (DOI);

(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 acting in his or her individual capacity if DOI or DOJ has agreed to represent that employee or pay for private representation of the employee;

(2) When:

(i) One of the following is a party in the proceeding or has an interest in the proceeding:

(A) DOI or any component of DOI;

(B) Any other Federal agency appearing before the Office of Hearings and Appeals;

(C) Any DOI employee acting in his or her official capacity;

(D) Any DOI employee acting in his or her individual capacity if DOI has agreed to represent that employee or pay for private representation of the employee;

(E) The United States, when DOJ determines that DOI is likely to be affected by the proceeding; and

(ii) DOI deems the disclosure to be:

(A) Relevant and necessary to the proceeding; and

(B) Compatible with the purpose for which the records were compiled.

(h) A congressional office in response to an inquiry received by that office from the individual to whom the record pertains.

(i) 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 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.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

The OST currently stores records in one of two ways:

(a) Paper records (such as jacket files, financial data files, ledgers, and reports) placed in file cabinets; others are stored in boxes on shelves.

(b) Automated data and images stored on appropriate media including but not limited to magnetic tape and on optical and electro-mechanical disks.

**RETRIEVABILITY:**

Records are retrieved using either:

(a) Identifiers linked to individual Indian trust beneficiaries such as name, social security numbers, tribe, tribal enrollment, or census numbers, or

(b) Organizational links and identifiers such as account numbers, tribal codes, trust account codes, and other identifiers.

**SAFEGUARDS:**

Following the requirements under 5 U.S.C. 552a(e)(10) and 43 CFR 2.51(a)(b) for security standards, as well as Office of Management and Budget and Departmental Guidance and the implementation of appropriate National Institute of Standards and Technology policies and procedures, the Office of the Secretary has taken security measures to protect system documentation by equipping our offices and workplaces with the following safeguards:

(1) Physical Security: Paper or micro format records are maintained in locked file cabinets and/or in locked or secured rooms that are staffed by agency personnel or by those under specific contract, compact or agreement to work with such records. Storage facilities are protected by locked entryways or security guards.

(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. Electronic data is protected through user identification, cipher lock, key card, and other access controls such as passwords, database permissions, and software controls.

(3) Administrative Security: All DOI and contractor employees with access to this system are required to complete Privacy Act, Federal Records Act, and Security Awareness training prior to being given access to the system, and on an annual basis, thereafter. In addition, warning signs are posted to limit access to files except by employees and contractors. Finally, there are sign-in and sign-out logs for access to storage facilities by requesters researching, acquiring, or delivering documents.

**RETENTION AND DISPOSAL:**

The OST creates, receives and maintains records until such time as they become inactive. The inactive records are then transferred to the American Indian Records Repository (AIRR) in Lenexa, Kansas which is operated in cooperation with the National Archives and Records Administration. Records are held in accordance with approved records retention schedules.

**SYSTEM MANAGER AND ADDRESS:**

Chief of Staff, Office of the Principal Deputy Special Trustee, 4400 Masthead Street NE., Suite 357, Albuquerque, NM 87109.

**NOTIFICATION PROCEDURES:**

To determine whether your records are in this Privacy Act system of records, contact the System Manager at the address listed above in writing. The request must meet the requirements of 43 CFR 2.60. Provide the following information with your request:

(a) Proof of your identity.

(b) List of all of the names by which you have been known, such as maiden name or alias.

(c) Your Social Security Number.

(d) Mailing address.

(e) Tribe, tribal enrollment or census number.

(f) Bureau of Indian Affairs home agency.

(g) Time period(s) that records belonging to you may have been created or maintained, to the extent known by you. (See 43 CFR 2.60(b)(3)).

**RECORD ACCESS PROCEDURES:**

To request access to records, contact the System Manager at the address listed above in writing. The request must meet the requirements of 43 CFR 2.63. Provide the following information with your request:

(a) Proof of your identity.

(b) List of all of the names by which you have been known, such as maiden name or alias.

(c) Your Social Security Number.

(d) Mailing address.

(e) Tribe, tribal enrollment or census number.

(f) Bureau of Indian Affairs home agency.

(g) Time period(s) that records belonging to you may have been created or maintained, to the extent known by you.

(h) Specific description or identification of the records you are requesting (including whether you are asking for a copy of all of your records or only a specific part of them), and the maximum amount of money that you are willing to pay for their copying. (See 43 CFR 4.63(b)(5)).

**CONTESTING RECORD PROCEDURES:**

To request an amendment of a record, contact the System Manager at the address listed above in writing. The request must meet the requirements of 43 CFR 2.71.

**RECORDS SOURCE CATEGORIES:**

(a) Office of the Special Trustee for American Indians, Bureau of Indian Affairs, Minerals Management Service, Bureau of Land Management, Office of Hearings and Appeals, and other appropriate agencies in the Department of the Interior. Other federal, state, and local agencies.

(b) Individual Indian trust beneficiaries, their heirs, relatives and acquaintances. Depositors into the accounts and claimants against the accounts.

(c) Tribal offices if the IIM function is contracted or compacted under the Indian Self-Determination and Education Assistance Act, Pub. L. 93–638, 88 Stat. 2203, as amended. Other tribal offices including enrollment, social services, and education.

(d) Courts of competent jurisdiction, including tribal courts.

(e) Contractors, including but not limited to:

(1) credit bureaus;

(2) news media;

(3) missing persons locators;

(4) and mail list vendors.

(5) Internet searches;

(6) public utilities; and

(7) professional, religious, and social organizations.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

[FR Doc. E8–30192 Filed 12–18–08; 8:45 am]

**BILLING CODE 4310–10–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R4–R–2008–N0284; 40136–1265–0000–S3]**

### Culebra National Wildlife Refuge, Puerto Rico

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

**ACTION:** Notice of intent to prepare a comprehensive conservation plan and environmental assessment; request for comments.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), intend to prepare a comprehensive conservation plan (CCP) and associated National Environmental Policy Act documents for Culebra National Wildlife Refuge (NWR). We provide this notice in compliance with our CCP policy to advise other agencies and the public of our intentions, and to obtain suggestions and information on the scope of issues to consider in the planning process.

**DATES:** To ensure consideration, we must receive your written comments by February 2, 2009. Special mailings, newspaper articles, and other media announcements will inform people of the opportunities for written input throughout the planning process.

**ADDRESSES:** Comments, questions, and requests for information should be sent to: Ana Roman, Culebra NWR, P.O. Box 190, Culebra, Puerto Rico 00775.

**FOR FURTHER INFORMATION CONTACT:** Ana Roman; Telephone: 787/742–0115; Fax: 787/742–1303.

**SUPPLEMENTARY INFORMATION:**

**Introduction**

With this notice, we initiate our process for developing a CCP for Culebra NWR in Puerto Rico.

This notice complies with our CCP policy to (1) advise other Federal and State agencies and the public of our intention to conduct detailed planning on this refuge; and (2) obtain suggestions and information on the scope of issues to consider in the environmental document and during development of the CCP.

**Background**

*The CCP Process*

The National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C. 668dd–668ee) (Improvement Act), which amended the National Wildlife Refuge System Administration Act of 1966, requires us to develop a CCP for each national wildlife refuge. The purpose in developing a CCP is to provide refuge managers with a 15-year strategy for achieving refuge purposes and contributing to the mission of the National Wildlife Refuge System, consistent with sound principles of fish and wildlife management, conservation, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation, wildlife photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Improvement Act.

Each unit of the National Wildlife Refuge System is established for specific purposes. We use these purposes as the foundation for developing and prioritizing the management goals and objectives for each refuge within the National Wildlife Refuge System mission, and to determine how the public can use each refuge. The planning process is a way for us and the public to evaluate management goals and objectives for the best possible conservation approach to this important wildlife habitat, while providing for wildlife-dependent recreation opportunities that are compatible with the refuge's establishing purposes and the mission of the National Wildlife Refuge System.

Our CCP process provides participation opportunities for State and local governments; agencies; organizations; and the public. At this time we encourage input in the form of issues, concerns, ideas, and suggestions for the future management of Culebra NWR. Special mailings, newspaper articles, and other media outlets will be used to announce opportunities for input throughout the planning process.

We will conduct the environmental assessment in accordance with the requirements of the National Environmental Policy Act of 1969, as amended (NEPA) (42 U.S.C. 4321 et seq.); NEPA regulations (40 CFR parts 1500–1508); other appropriate Federal laws and regulations; and our policies and procedures for compliance with those laws and regulations.

Portions of the Culebra Archipelago were designated as a wildlife reserve in 1909, subject to naval and lighthouse purposes. Numerous islands of the Archipelago, as well as the Flamenco Peninsula, were used for gunnery and bombing practice by the U.S. Navy until its departure in 1976. The following year, jurisdiction of those areas was transferred to the Commonwealth of Puerto Rico and the Service. On-site administration of the refuge was established in 1983. Approximately one quarter (1,510 acres) of the Culebra Archipelago's total land mass is now included within the refuge.

Culebra NWR is administered as a unit of the Caribbean Islands National Wildlife Refuge Complex. The refuge is composed of lands on the main island of Culebra and 22 small islands nearby. Wildlife habitats on these lands include subtropical dry forest, a unique habitat known as the boulder forest, mangroves, and grasslands. These habitats support flora and fauna including a seabird nesting colony on Flamenco Peninsula and nesting beaches utilized by leatherback and hawksbill sea turtles. Culebra NWR focuses on protecting, monitoring, and managing significant seabird colonies and endangered marine turtles, as well as restoring and protecting native tropical vegetative communities.

**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.

**Authority:** This notice is published under the authority of the National Wildlife Refuge System Improvement Act of 1997, Public Law 105–57.

Dated: November 18, 2008.

**Cynthia K. Dohner,**

*Acting Regional Director.*

[FR Doc. E8–30270 Filed 12–18–08; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R4–2008–N0285; 40136–1265–0000–S3]**

### Desecheo National Wildlife Refuge, Puerto Rico

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

**ACTION:** Notice of intent to prepare a comprehensive conservation plan and environmental assessment; request for comments.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), intend to prepare a comprehensive conservation plan (CCP) and associated National Environmental Policy Act documents for Desecheo National Wildlife Refuge (NWR). We provide this notice in compliance with our CCP policy to advise other agencies and the public of our intentions, and to obtain suggestions and information on the scope of issues to consider in the planning process.

**DATES:** To ensure consideration, we must receive your written comments by February 2, 2009 Special mailings, newspaper articles, and other media announcements will inform people of the opportunities for written input throughout the planning process.

**ADDRESSES:** Comments, questions, and requests for information should be sent to: Joseph Schwagerl, Caribbean Islands National Wildlife Refuge, P.O. Box 510, Boquerón, Puerto Rico, 00622.

**FOR FURTHER INFORMATION CONTACT:** Joseph Schwagerl; Telephone: 787/851–7258; Fax: 787/255–6725; E-mail: *joseph_schwagerl@fws.gov*.

**SUPPLEMENTARY INFORMATION:**

#### Introduction

With this notice, we initiate our process for developing a CCP for Desecheo NWR off the coast of the main island of Puerto Rico.

This notice complies with our CCP policy to (1) advise other Federal and State agencies and the public of our intention to conduct detailed planning on this refuge; and (2) obtain suggestions and information on the scope of issues to consider in the environmental document and during development of the CCP.

#### Background

*The CCP Process*

The National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C. 668dd–668ee) (Improvement Act), which amended the National Wildlife Refuge System Administration Act of 1966, requires us to develop a CCP for each national wildlife refuge. The purpose in developing a CCP is to provide refuge managers with a 15-year strategy for achieving refuge purposes and contributing to the mission of the National Wildlife Refuge System, consistent with sound principles of fish and wildlife management, conservation, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation, wildlife photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Improvement Act.

Each unit of the National Wildlife Refuge System is established for specific purposes. We use these purposes as the foundation for developing and prioritizing the management goals and objectives for each refuge within the National Wildlife Refuge System mission, and to determine how the public can use each refuge. The planning process is a way for us and the public to evaluate management goals and objectives for the best possible conservation approach to this important wildlife habitat, while providing for wildlife-dependent recreation opportunities that are compatible with the refuge's establishing purposes and the mission of the National Wildlife Refuge System.

Our CCP process provides participation opportunities for State and local governments; agencies; organizations; and the public. At this time we encourage input in the form of issues, concerns, ideas, and suggestions for the future management of Desecheo NWR. Special mailings, newspaper articles, and other media outlets will be used to announce opportunities for input throughout the planning process.

We will conduct the environmental assessment in accordance with the requirements of the National Environmental Policy Act of 1969, as amended (NEPA) (42 U.S.C. 4321 *et seq.*); NEPA regulations (40 CFR parts 1500–1508); other appropriate Federal laws and regulations; and our policies and procedures for compliance with those laws and regulations.

The Desecheo NWR was established in 1976, when administrative jurisdiction was transferred from the National Institute of Health to the Service. The total area of this island refuge is 360 acres. It is located approximately 14 miles off the coast of the main island of Puerto Rico and is administered by the Caribbean Islands National Wildlife Refuge Complex, headquartered in Boquerón, Puerto Rico. Before its establishment as a refuge, Desecheo Island had been under the control of the Spanish Crown, the Commonwealth of Puerto Rico, the U.S. military (for bombing and survival training), and the National Institute of Health (which introduced rhesus monkeys for medical research). At one time it contained the largest Brown booby nesting colony in the world. Today, there is little or no seabird nesting on the island. The native forest of Desecheo NWR has been severely degraded by introduced rats, goats, and monkeys. As a result of prior military training activities, there is still unexploded ordnance on the refuge; therefore, it is closed to all public use. The refuge objectives are to restore and protect historic seabird colonies and natural island ecosystems.

#### 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.

**Authority:** This notice is published under the authority of the National Wildlife Refuge System Improvement Act of 1997, Public Law 105–57.

Dated: November 7, 2008.

**Cynthia K. Dohner,**

*Acting Regional Director.*

[FR Doc. E8–30183 Filed 12–18–08; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R4–R–2008–N0269; 40136–1265–0000–S3]**

### Swanquarter National Wildlife Refuge, Hyde County, NC

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

**ACTION:** Notice of availability: Final comprehensive conservation plan and finding of no significant impact.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce the availability of our final comprehensive conservation plan (CCP) and finding of no significant impact (FONSI) for Swanquarter National Wildlife Refuge (NWR). In the final CCP, we describe how we will manage this refuge for the next 15 years.

**ADDRESSES:** A copy of the CCP may be obtained by writing to: Swanquarter NWR, 38 Mattamuskeet Road, Swan Quarter, NC 27885. The CCP may also be accessed and downloaded from the Service's Website: *http://southeast.fws.gov/planning/.*

**FOR FURTHER INFORMATION CONTACT:** Bruce Freske, Refuge Manager; Telephone: 252/926–4021.

**SUPPLEMENTARY INFORMATION:**

#### Introduction

With this notice, we finalize the CCP process for Swanquarter NWR. We started this process through a notice in the **Federal Register** on November 3, 2000 (65 FR 66256). For more about the process, please see that notice.

Swanquarter NWR is on the Pamlico Sound in Hyde County, North Carolina, and was established by Presidential Order on June 23, 1932. The Service has acquired all of the property within the refuge's acquisition boundary. The refuge consists of 16,411 acres of saltmarsh islands and forested wetlands interspersed with potholes, creeks, and drains. Marsh vegetation is dominated by black needlerush and sawgrass. The mainland is forested by loblolly pine, pond pine, and bald cypress. Approximately 8,800 acres of the refuge have been designated a wilderness area. An additional 27,082 acres of adjacent, non-refuge open water are closed by Presidential Proclamation to the taking of migratory birds.

Swanquarter NWR is in the South Atlantic Coastal Plain Ecosystem and is part of the migration corridor for migratory birds that use the Atlantic Flyway. Wildlife species of management concern at the refuge include the American black duck, lesser scaup, canvasback, redhead, surf scoter, seaside sparrow, sharp-tailed sparrow, brown-headed nuthatch, black-throated green warbler, black rail, yellow rail, clapper rail, Forster's tern, peregrine falcon, bald eagle, osprey, black bear, red wolf, Carolina pygmy rattlesnake, and the American alligator. The white-tailed deer is also a resident game species.

We announce our decision and the availability of the final CCP and FONSI for Swanquarter NWR in accordance with National Environmental Policy Act (NEPA) [40 CFR 1506.6(b)] requirements. We completed a thorough analysis of impacts on the human environment, which we included in the Draft CCP/EA.

The CCP will guide us in managing and administering Swanquarter NWR for the next 15 years. Alternative B, as we described in the final CCP, is the foundation for the CCP.

#### Background

The National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C. 668dd–668ee) (Improvement Act), which amended the National Wildlife Refuge System Administration Act of 1966, requires us to develop a CCP for each national wildlife refuge. The purpose in developing a CCP is to provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System, consistent with sound principles of fish and wildlife management, conservation, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation, wildlife photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Improvement Act.

#### Comments

We released the draft comprehensive conservation plan and environmental assessment (Draft CCP/EA) to the public, announcing and requesting comments in a notice of availability in the **Federal Register** on July 3, 2008 (73 FR 38242). All comments were considered and thoroughly evaluated. Responses to the comments are contained in Appendix D of the final CCP.

#### Selected Alternative

After considering the comments we received, we have selected Alternative B for implementation. Under Alternative B, the preferred alternative, the refuge will continue to provide habitat for migratory birds, threatened and endangered species, and other waterfowl and fauna. Surveying and monitoring will be expanded to obtain baseline data on other species, and will include mammals, reptiles, amphibians, and fish. The refuge will monitor the effects of management activities on both flora and fauna and adapt as needed. The public use and environmental education and outreach programs will be increased to include conducting two to ten programs for local school groups. Fishing and hunting opportunities will be expanded by increasing the number of use days and introducing deer hunting with archery equipment. An interpretive trail or boardwalk will be developed to provide greater access to the public.

**Authority:** This notice is published under the authority of the National Wildlife Refuge System Improvement Act of 1997, Public Law 105–57.

Dated: October 6, 2008.

**Cynthia K. Dohner,**

*Acting Regional Director.*

[FR Doc. E8–30273 Filed 12–18–08; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R9–IA–2008–N0326; 96300–1671–0000–P5]**

### Issuance of Permits

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

**ACTION:** Notice of issuance of permits for endangered species.

**SUMMARY:** The following permits were issued.

**ADDRESSES:** Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to: U.S. Fish and Wildlife Service, Division of Management Authority, 4401 North Fairfax Drive, Room 212, Arlington, Virginia 22203; fax 703/358–2281.

**FOR FURTHER INFORMATION CONTACT:** Division of Management Authority, telephone 703/358–2104.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that on the dates below, as

authorized by the provisions of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), the Fish and Wildlife Service issued the requested permits subject to certain conditions set forth therein. For each permit for an endangered species, the Service found that (1) the application was filed in good faith, (2) the granted permit would not operate to the disadvantage of the endangered species, and (3) the granted permit would be consistent with the purposes and policy set forth in Section 2 of the Endangered Species Act of 1973, as amended.

ENDANGERED SPECIES

| Permit number | Applicant | Receipt of application FEDERAL REGISTER notice | Permit issuance date |
|---|---|---|---|
| 053639 | USFWS/National Fish and Wildlife Forensics Laboratory. | 73 FR 49698; August 22, 2008 | Nov. 5, 2008. |
| 707102 | Priour Brothers Ranch | 72 FR 70339; December 11, 2007 | Jan. 29, 2008. |
| 704025 | H & L Sales, Inc | 72 FR 65351; November 20, 2007 | Jan. 29, 2008. |
| 150411 | Alaska Department of Fish and Game | 72 FR 29542; May 29, 2007 | Feb. 8, 2008. |
| 165762 | University of California-Davis | 72 FR 62484; November 5, 2007 | Feb. 21, 2008. |
| 146704 | Memphis Zoological Gardens | 72 FR 9770; March 5, 2007 | July 21, 2008. |
| 172290 | National Zoological Park | 73 FR 5206; January 29, 2008 | July 22, 2008. |
| 172374 | White Oak Conservation Center | 73 FR 5206; January 29, 2008 | July 22, 2008. |
| 174619 | Woodland Park Zoological Gardens | 73 FR 14266; March 17, 2008 | Aug. 22, 2008. |
| 178755 | Chattanooga Zoo At Warner Park | 73 FR 21979; April 23, 2008 | Sept. 29, 2008. |
| 52166 | Memphis Zoological Gardens | 73 FR 21979; April 23, 2008 | Sept. 29, 2008. |
| 185779 | Chattanooga Zoo At Warner Park | 73 FR 36891; June 30, 2008 | Sept. 29, 2008. |
| 179127 | Dallas World Aquarium Corp. | 73 FR 21981; April 23, 2008 | Oct. 1, 2008. |
| 180803 | Laguna Vista Ranch, Ltd. | 73 FR 36891; June 30, 2008 | Nov. 12, 2008. |
| 188579 | Smithsonian Institution | 73 FR 47207; August 13, 2008 | Nov. 12, 2008. |
| 188631 | Barbara Dicely | 73 FR 47207; August 13, 2008 | Nov. 12, 2008. |
| 189831 | Metro Richmand Zoo | 73 FR 49699; August 22, 2008 | Nov. 12, 2008. |

Dated: November 28, 2008.

**Lisa J. Lierheimer,**

*Senior Permit Biologist, Branch of Permits, Division of Management Authority.*

[FR Doc. E8–30149 Filed 12–18–08; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R9–IA–2008–N0327; 96300–1671–0000–P5]**

### Receipt of Applications for Permit

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

**ACTION:** Notice of receipt of applications for permit.

**SUMMARY:** The public is invited to comment on the following applications to conduct certain activities with endangered species.

**DATES:** Written data, comments or requests must be received by January 20, 2009.

**ADDRESSES:** Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents within 30 days of the date of publication of this notice to: U.S. Fish and Wildlife Service, Division of Management Authority, 4401 North Fairfax Drive, Room 212, Arlington, Virginia 22203; fax 703/358–2281.

**FOR FURTHER INFORMATION CONTACT:** Division of Management Authority, telephone 703/358–2104.

**SUPPLEMENTARY INFORMATION:**

#### Endangered Species

The public is invited to comment on the following applications for a permit to conduct certain activities with endangered species. This notice is provided pursuant to Section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*). Written data, comments, or requests for copies of these complete applications should be submitted to the Director (address above).

*Applicant: Richard W.B. French, Fort Worth, TX, PRT–200421*

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

*Applicant: Paul I. Freiderich, Patterson, CA, PRT–200383*

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

*Applicant: Douglass A. Hoofman, Sand Lake, MI, PRT–198158*

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

*Applicant: Steven V. Slaton, Covington, LA, PRT–199022*

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

*Applicant: Lynn R. Hoffman, League City, TX, PRT–199099*

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Dated: November 28, 2008.

**Lisa J. Lierheimer,**

*Senior Permit Biologist, Branch of Permits, Division of Management Authority.*

[FR Doc. E8–30148 Filed 12–18–08; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[NV–040–07–5110–CF05; N–82888; 8–08807; TAS: 14X5017]**

### Notice of Availability of the Draft Environmental Impact Statement for the Bald Mountain Mine North Operations Area Project in White Pine County, Nevada

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of availability.

**SUMMARY:** In accordance with section 102(2)(c) of the National Environmental Policy Act of 1969 and 43 CFR 3809, the Bureau of Land Management (BLM) Ely District, Nevada has prepared a Draft Environmental Impact Statement (EIS) for a proposed expansion of the existing Plans of Operation for Barrick Gold U.S. Inc.'s Bald Mountain Mine and Mooney Basin Mine located in White Pine County, Nevada. The two existing mines would be combined into one new expanded operation which would be called the North Operations Area. The Draft EIS analyzes the environmental effects of the Proposed Action, two action alternatives, and the No Action Alternative.

**DATES:** Comments on the Draft EIS will be accepted for 45 days after the date this Notice of Availability (NOA) is published in the **Federal Register**. BLM will host public meetings in Ely, Elko, and Eureka, Nevada, to provide the public with an opportunity to review the proposal and project information. Federal, state, and local agencies, and other individuals or organizations that may be interested in, or affected by, the BLM's decision on this proposed Plan of Operation are invited to participate in these public meetings. The BLM will notify the public of the meeting dates, times, and locations at least 15 days prior to the meetings. Announcements of the public meeting will be made by news release to the media, individual letter mailings, and posting on the BLM Web site: *http://www.blm.gov/nv/st/en/fo/ely_field_office.html.* Comments received on the Draft EIS will be considered in preparing the Final EIS. Documents pertinent to this proposal may be examined at the Ely District Office.

**ADDRESSES:** Comments may be submitted by any of the following methods:

- E-mail: *lynn_bjorklund@nv.blm.gov*
- Fax: 775–189–1910
- Mail: Bureau of Land Management, Ely District, Attention: Lynn Bjorklund, HC33 Box 33500, Ely, Nevada, 89301

**FOR FURTHER INFORMATION:** For further information and/or to have your name added to the mailing list, contact Lynn Bjorklund, Ely Field Office, at 775 289–1893 or by email to *lynn_bjorklund@nv.blm.gov.*

**SUPPLEMENTARY INFORMATION:** Barrick Gold U.S. Inc. has submitted a proposal to expand and combine their existing Bald Mountain and Mooney Basin Mines into one project area to be administered under one Plan of Operation called North Operations Area. The mines are located approximately 65 miles northwest of Ely, Nevada. This proposed expansion is entirely on unpatented mining claims on BLM-administered public land.

The Proposed North Operations Area would include 4,160 acres of previously permitted disturbance and 3,920 acres of new disturbance, for a total of 8,080 acres. The project would consist of extending existing open pits, expanding existing rock disposal areas and heap leach facilities, construction of a truck shop, additional exploration, concurrent reclamation and continuing operation of existing facilities.

Individual respondents may request confidentiality. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, be advised that your entire comment, which includes your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold from public review your personal identifying information, we cannot guarantee that we will be able to do so. All submissions from organizations, businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses will be available for public inspection in their entirety. The minutes and list of attendees for each public meeting will be available to the public and open for 60 days after the meeting to any participants who wish to clarify the views they expressed. All comments will be available to the public for review at the BLM Ely District Office throughout the EIS process.

**Authority:** 43 CFR 3809.

**Michael J. Herder,**

*Acting District Manager, Ely District Office.*

[FR Doc. E8–30079 Filed 12–18–08; 8:45 am]

**BILLING CODE 4310–HC–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[MT–070–1990–EX]**

### Notice of Availability of Draft Environmental Impact Statement for the Graymont Western U.S., Inc. Proposed Mine Expansion, Broadwater County, MT

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of availability.

**SUMMARY:** Graymont Western U.S., Inc. submitted a Plan of Operations on February 22, 2006, to expand their Limestone Hills quarry operation on unpatented mining claims on public lands west of Townsend, Montana. In accordance with the National Environmental Policy Act of 1969 (NEPA, 42 U.S.C. 4321, *et seq.*) and the Federal Land Policy and Management Act of 1976 (FLPMA, 43 U.S.C. 1701, *et seq.*), a Draft Environmental Impact Statement (DEIS) has been prepared for the Graymont Western U.S., Inc. Proposed Mine Expansion administered by the Bureau of Land Management's (BLM) Butte Field Office and the Montana Department of Environmental Quality (DEQ). Operations on public lands are on mining claims located in accordance with the General Mining Law of 1872, as amended (30 U.S.C. 22, *et seq.*). The DEIS addresses alternatives associated with Graymont Western U.S., Inc. Proposed Mine Expansion and recommends a preferred Alternative, allowing the expansion.

**DATES:** The BLM and the DEQ will accept written comments on the Draft EIS for 60 days following the date the Environmental Protection Agency (EPA) publishes its Notice of Availability in the **Federal Register**. Future meetings or hearings and any other public involvement activities will be announced at least 15 days in advance through public notices, media news releases, and/or mailings

**ADDRESSES:** The Draft EIS will be available for public review at the following locations: the BLM Butte Field Office, 106 North Parkmont, Butte Montana; the DEQ Office, 1520 East Sixth Avenue, Helena, Montana; the Helena Public Library, 120 South Last Chance Gulch, Helena, Montana; the

Townsend Public Library, 201 North Spruce Street, Townsend, Montana; and online at *http://www.deq.mt.gov.*

You may submit comments by any of the following methods:

*E-mail: ghallsten@mt.gov* or *david_r_williams@blm.gov*.

*Fax:* 406–444–4386 or 406–533–7660.

Send written comments to: Graymont Western U.S., Inc. Proposed Mine Expansion DEIS, Attention: Greg Hallsten, Montana Department of Environmental Quality, Director's Office, PO Box 200901, Helena, MT 59620–0901; or David Williams, Bureau of Land Management, Butte Field Office, 106 North Parkmont, Butte, MT 59701.

**FOR FURTHER INFORMATION CONTACT:** For further information and/or to request a copy of the document, contact: Greg Hallsten, Montana Department of Environmental Quality, PO Box 200901, Helena, MT 59620–0901; or David Williams, Bureau of Land Management, Butte Field Office, 106 North Parkmont, Butte, MT 59701.

**SUPPLEMENTARY INFORMATION:** Graymont Western U.S., Inc. submitted a Plan of Operations on February 22, 2006, to the BLM and the DEQ to expand their existing operation, located on unpatented mining claims on public lands west of Townsend, Montana. This proposal is a continuation of mining along a prominent limestone ridge which forms the crest of the ''Limestone Hills.'' Mining was originally permitted here beginning in 1981 and has continued since then. The principal concern, developed through public meetings and agency review, was potential loss of mule deer and mountain sheep habitat and winter browse vegetation, principally mountain mahogany.

The DEIS evaluates three alternatives: No Action, the Proposed Action, and Alternative A, Modified Pit Backfill, which is the agency preferred alternative. The No Action Alternative would limit mine disturbance to the currently permitted 735 acres of disturbance, and the mine would continue to operate until it reached the permitted limits, estimated at 7 to 12 years. The Proposed Action Alternative would allow for an additional 1,313 acres of disturbance and allow operations to continue for 35 to 50 years. The Modified Pit Backfill Alternative modifies the proposed action to require reclamation at the site to provide for more diverse topography and soils that favor winter browse species, but the Alternative does not change the proposed disturbance acreage or years of future operations.

The Draft EIS and documents related to this EIS, including public comments, will be posted on the DEQ Web site (*http://www.deq.mt.gov*) and may be published as part of the Final EIS. The public is invited to review and comment on the range and adequacy of the draft alternatives and associated environmental effects. 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. All submissions from organizations and businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be available for public inspection in their entirety.

**Rick M. Hotaling,**

*Field Manager.*

[FR Doc. E8–30076 Filed 12–18–08; 8:45 am]

**BILLING CODE 4310–DN–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[UT–920–08–5101–ER–J108; UTU–79766, NVN–82385]**

### Notice of Availability of the Draft Environmental Impact Statement for a Proposed Liquid Petroleum Products Pipeline from Woods Cross, UT, to Northeast Las Vegas, NV, and Draft Amendment of the Pony Express Resource Management Plan

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of Availability.

**SUMMARY:** In accordance with Section 102 of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*), the Council on Environmental Quality's regulations implementing the NEPA (40 CFR parts 1500–1508), and applicable agency guidance, a Draft Environmental Impact Statement (DEIS) and Draft Pony Express Resource Management Plan (RMP) amendment have been prepared in response to UNEV, LLC's right-of-way (ROW) application to construct and operate a liquid petroleum products pipeline on public lands from Woods Cross, Utah, to northeast Las Vegas, Nevada.

**DATES:** This notice initiates a 90-day public comment period. During this period, the public is invited to submit comments on the DEIS and Draft Pony Express RMP Amendment to be considered in the development of the Final EIS and Record of Decision. To ensure comments will be considered, the BLM must receive written comments on the DEIS and Draft Plan Amendment within 90 days following the date the Environmental Protection Agency publishes a Notice of Availability in the **Federal Register**.

Public meetings will be held in the following locations: Salt Lake City, Tooele, Delta, and Cedar City, Utah, and Las Vegas, Nevada. Times and dates of these meetings will be announced through the Utah BLM Web site (*http://www.blm.gov/ut/st/en/prog/more/lands_and_realty/major_projects/unev_pipeline_eis.html*), press releases, local newspapers, and other local media. The BLM will announce public meetings and other opportunities to submit comments on this project at least 15 days prior to the event.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, be advised 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 from public review your personal identifying information, we cannot guarantee that we will be able to do so.

If you comment as or on behalf of an organization or business, BLM will release your comments to the public in their entirety, including all personal identifying information. The BLM will not consider a request from an organization or business, or anyone commenting on behalf of an organization or business to withhold any personal identifying information from release to the public.

**ADDRESSES:** Comments related to the DEIS should be mailed to Joe Incardine, National Project Manager, Bureau of Land Management, Utah State Office, P.O. Box 45155, Salt Lake City, UT 84145–0155. Comments may also be transmitted by facsimile to the attention of Joe Incardine at: (801) 539–4222, sent via e-mail to: *UT_UNEV_Pipeline_EIS@blm.gov*, or hand delivered to: BLM Utah State Office, 440 West 200 South, Suite 500, Salt Lake City, Utah. E-mails should include ''UNEV Draft EIS'' in the subject line.

**FOR FURTHER INFORMATION CONTACT:** Joe Incardine at the BLM Utah State Office, P.O. Box 45155, Salt Lake City, UT

84145–0155; by phone: (801) 524–3833; or by e-mail: *Joe_Incardine@blm.gov*.

**SUPPLEMENTARY INFORMATION:** UNEV, LLC is seeking a ROW grant to install approximately 400 miles of 12-inch-diameter liquid petroleum products pipeline from Woods Cross, Utah, to Las Vegas, Nevada. The subsequent construction and operation of the liquid petroleum products pipeline and facilities would occur in Davis, Salt Lake, Tooele, Juab, Millard, Beaver, Iron, and Washington Counties in Utah and Lincoln and Clark Counties in Nevada to increase the capacity and improve the efficiency of the fuel delivery system into Southern Utah and the Las Vegas, Nevada, area. The pipeline would be available to accept shipments of refined products from multiple refineries in the Salt Lake City, Utah, area, as well as refineries in Wyoming and Montana.

**UNEV's ROW Application**

UNEV has filed its ROW application to respond to the high population growth and increasing demand for petroleum products for the benefit of Utah and Nevada's existing and future petroleum products consumers, while balancing the needs of resources and other public interests in the area. Its pipeline is designed to:

- Follow the recommendation of the *Clark County Blue Ribbon Commission to Improve the Reliability of Southern Nevada's Fuel Supply* to provide a new petroleum products pipeline to Las Vegas from a source outside of California.
- Increase the capacity of the fuel delivery system into southern Utah and Nevada to address private, commercial, industrial, and military demand for refined fuel products.
- Enhance the reliability and efficiency of the current fuel delivery system for multiple refineries in the Salt Lake City area.

**Pipeline Routes**

UNEV proposes to install a 12-inch, welded steel, common carrier mainline pipeline for refined liquid petroleum products such as multiple grades of gasoline and diesel fuel. The pipeline would extend approximately 399 miles from a cluster of five refineries in the North Salt Lake City area, including Holly Corporation's Woods Cross Refinery, to the Apex Industrial Park northeast of Las Vegas, Nevada. A 10-inch service line to the Salt Lake International Airport would extend 2.4 miles from the mainline at milepost (MP) 4.5. An 8-inch lateral pipeline would extend approximately 9 miles from the mainline at MP 256 to the proposed Cedar City Terminal. The project would include an inlet pumping station at the origin; a pressure reduction station at a lateral terminal northwest of Cedar City, Utah; a pressure reduction site at MP 355.5, and a receiving terminal near Las Vegas. The proposed pipeline route would generally travel west past the Salt Lake International Airport to Lake Point, Tooele County, and then south through Tooele Valley. The route would continue south passing near the communities of Delta and Milford, Utah, and 20–30 miles west of Cedar City and St. George, Utah, before arriving at Apex in Nevada. The southern third of the utility corridor (from MP 250 to the Las Vegas Terminal) contains two natural gas pipelines owned by Kern River Gas Transmission Company, the most recent of which was completed in 2003.

The Airport alternative route is 3.35 miles long and would diverge from the proposed alignment at MP 6.6 and rejoin it at MP 10. At MP 6.6 the alternative alignment would continue west on the west side of the airport but within property owned by the Blackhawk Duck Club. This alternative was developed to address concerns from local duck clubs.

The Tooele County alternative route was developed to address concerns of the Tooele County Commission regarding the proposed route along the eastern side of the northern Tooele Valley from approximately MP 25.3 (near Lake Point) to MP 38.7 (north of the Tooele Ordinance Depot). The alternative route would split from the proposed route near Lake Point and run west southwest, crossing State Highway 36, proceeding southwest and along the north side of State Highway 138, north of the Tooele Airport. The route would cross the highway along the east side of Sheep Lane where the route would head south, running east of the Miller Motor Sports Park. Near the south end of the Park, the route would turn southeast and parallel an abandoned railroad ROW. The alternative route would run southeast and then curve south to rejoin the proposed UNEV route south of the crossing of State Highway 112.

The Rush Lake alternative route in Tooele County was developed to address concerns of the Salt Lake Field Office about an area having possible soil contamination within the Jacob Smelter Superfund Site OU2 Boundary, as well as to address the building of the proposed pipeline within wetlands adjacent to Rush Lake which are frequently inundated. This alternative departs from the proposed route alignment at the northern end of Rush Lake east of Stockton, Utah, and parallels the proposed alignment approximately 0.25 mile to the west. It would rejoin the proposed route at approximately MP 49.

The Millard County alternative route was developed to reduce impacts to private land owners that would result from the proposed alignment between MP 132.5 to MP 143.2. This alternative pipeline alignment would be located west of Lynndyl and Delta, Utah, and would split from the proposed route near MP 110, continue west around Delta, and tie back into the original route at approximately MP 161. This alternative route is approximately 63 miles long.

**Draft RMP Amendment**

The proposed pipeline ROW alignment would fall outside of current utility corridors designated by the BLM in the Pony Express RMP. For the project to be in compliance with the Pony Express RMP, this RMP would need to be amended to designate a new utility corridor. The DEIS addresses the establishment of a new utility corridor that would accommodate the proposed pipeline ROW.

The planning issues for the draft RMP amendment include:

- Access to and transportation on the public lands.
- Wildlife habitat and management of summer and winter ranges and migration corridors for antelope, mule deer, and elk.
- Cumulative effect of land uses and human activities on Threatened, Endangered, Candidate, and Sensitive species and their habitats.
- Vegetation, including impacts of invasive non-native species.
- Management of cultural and paleontological resources, including National Historic Trails.
- North Oquirrh Management Area.
- Visual Resource Management.
- Air and water quality.
- Sociology and economics.

The planning criteria for the draft RMP amendment include:

- Recognize valid existing rights.
- Comply with laws, regulations, executive orders and BLM supplemental program guidance.
- Comply with the Endangered Species Act and follow interagency agreements with the U.S. Fish and Wildlife Service regarding consultation.
- Ensure, within applicable laws and policies, that management prescriptions and planning actions complement those of neighboring federal, tribal, state, county and municipal planning jurisdictions.
- Coordinate with Indian Tribes to identify sites, areas and objects

important to their culture and religious heritage.

• Evaluate cultural and paleontological resources for possible interpretation, preservation, conservation and enhancement.

• Management decisions will consider a reasonable range of alternatives that focus on the relative values of resources and ensure responsiveness to the issues. Management prescriptions will reflect multiple use resource principles.

• Address the social and economic impacts of the alternatives.

• Include management direction for public lands managed by BLM.

• Provide for public safety and welfare.

**Selma Sierra,**

*State Director.*

[FR Doc. E8–30101 Filed 12–18–08; 8:45 am]

**BILLING CODE 4310–DQ–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[UTU 6443, UTU 012532, and UTU 0146037]**

### Opening of National Forest System Lands; Utah

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of Realty Action.

**SUMMARY:** Public Land Order No. 7708 partially revoked 3 Public Land Orders and revoked 1 Public Land Order in its entirety. This order opens part of those previously withdrawn lands to mining and opens the remainder to such forms of disposition as may by law be made of National Forest System lands and to mining.

**DATES:** *Effective Date:* January 20, 2009.

**FOR FURTHER INFORMATION CONTACT:** Rhonda Flynn, BLM Utah State Office, 440 West 200 South, Suite 500, Salt Lake City, Utah 84101–1345, 801–539–4132.

**SUPPLEMENTARY INFORMATION:** 1. Public Land Order No. 7708 (73 FR 31880 (2008)) revoked Public Land Order No. 1391 (22 FR 1003 (1957)) insofar as it affected the lands described below. The United States Forest Service has decided that those previously withdrawn lands, described below, can be opened to such forms of disposition as may by law be made of National Forest System lands, including location and entry under the United States mining laws:

**Uinta National Forest**

*Uinta Special Meridian*

T. 1 N., R. 11 W.,
Sec. 29, SW¼SW¼SE¼ and SE¼SE¼SW¼;
Sec. 32, NW¼NW¼NE¼, NE¼NE¼NW¼, W½NE¼NW¼, and E½NW¼NW¼.
T. 1 S., R. 11 W.,
Sec. 23, SW¼SW¼SE¼ and SE¼SE¼SW¼;
Sec. 26, W½NW¼NE¼ and E½NE¼NW¼.

The areas described aggregate 140 acres in Wasatch County.

2. Public Land Order No. 7708 (73 FR 31880 (2008)) revoked Public Land Order Nos. 4060 (31 FR 10033 (1966)), 4567 (34 FR 1139 (1969)), and 4664 (34 FR 8915 (1969)) insofar as they affected the lands described below. The United States Forest Service has decided that those previously withdrawn lands, described below, can be opened to location and entry under the United States mining laws:

**Uinta National Forest**

*Uinta Special Meridian*

T. 3 S., R. 12 W.,
Sec. 23, SE¼SE¼SW¼, S½SW¼SE¼, and SW¼SE¼SE¼;
Sec. 26, NE¼NE¼NW¼, N½NW¼NE¼, and NW¼NE¼NE¼.

*Salt Lake Meridian*

T. 4 S., R. 2 E.,
Sec. 1, all lands West of the 7,600 foot elevation contour in lots 1 and 8 (lands inside the Lone Peak Wilderness).
T. 10 S., R. 2 E.,
Sec. 3, SE¼SE¼NW¼, W½SW¼NE¼, and NE¼SW¼NE¼.
T. 12 S., R. 2 E.,
Sec. 20, NE¼SE¼NE¼, W½SE¼NE¼, and SW¼NE¼.
T. 7 S., R. 4 E.,
Sec. 24, E½NW¼SE¼, SW¼NW¼SE¼, and NW¼NE¼SE¼.
T. 8 S., R. 5 E.,
Sec. 11, N½NW¼NE¼ and SW¼NW¼NE¼.

The areas described aggregate 287 acres in Utah and Wasatch Counties.

3. At 10 a.m. on January 20, 2009, the lands described in Paragraph 1 shall be opened to such forms of disposition as may by law be made of National Forest System lands, including location and entry under the United States mining laws and the lands described in Paragraph 2 shall be opened to location and entry under the United States mining laws, subject to valid existing rights, the provisions of existing withdrawals, other segregations of record, and the requirements of applicable law. Appropriation of lands described in this order under the general mining laws prior to the date and time of restoration is unauthorized. Any such attempted appropriation, including attempted adverse possession under 30 U.S.C. 38 (2000), shall vest no rights against the United States. Acts required to establish a location and to initiate a right of possession are governed by State law where not in conflict with Federal law. The Bureau of Land Management will not intervene in disputes between rival locators over possessory rights since Congress has provided for such determinations in local courts.

**Authority:** 43 CFR 2091.6.

Dated: December 11, 2008.

**Selma Sierra,**

*State Director.*

[FR Doc. E8–29891 Filed 12–18–08; 8:45 am]

**BILLING CODE 4310–11–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[UTU 42838]**

### Opening of National Forest System Lands; Utah

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of Realty Action.

**SUMMARY:** Public Land Order No. 7657 partially revoked the Secretarial Order dated December 15, 1906 and revoked the Secretarial Order dated July 27, 1907 in its entirety. This order opens those previously withdrawn lands to such forms of disposition as may by law be made of National Forest System lands and to mining.

**DATES:** *Effective Date:* January 20, 2009.

**FOR FURTHER INFORMATION CONTACT:** Rhonda Flynn, BLM Utah State Office, 440 West 200 South, Suite 500, Salt Lake City, Utah 84101–1345, 801–539–4132.

**SUPPLEMENTARY INFORMATION:** 1. Public Land Order No. 7657 (71 FR 12712 (2006)) partially revoked the Secretarial Order dated December 15, 1906 and revoked the Secretarial Order dated July 27, 1907, in its entirety. The United States Forest Service has decided that those previously withdrawn lands, described below, can be opened to such forms of disposition as may by law be made of National Forest System lands, including location and entry under the United States mining laws:

a. Secretarial Order dated December 15, 1906.

**Dixie National Forest**

**Salt Lake Meridian**

T. 36 S., R. 7 W.,

sec. 7, NE¼SE¼ and NE¼SE¼SE¼.
T. 38 S., R. 8 W.,
sec. 12, lots 3 and 4 and W½SE¼.
The areas described aggregate approximately 200 acres in Garfield and Kane Counties.

b. Secretarial Order dated July 27, 1907

**Salt Lake Meridian**

T. 36 S., R. 7 W.,
sec. 8, SW¼NW¼ and SW¼;
sec. 17, NW¼.
The area described contains 360 acres in Garfield County.

2. At 10 a.m. on January 20, 2009, the lands described in Paragraph 1 shall be opened to such forms of disposition as may by law be made of National Forest System lands, including location and entry under the United States mining laws, subject to valid existing rights, the provisions of existing withdrawals, other segregations of record, and the requirements of applicable law. Appropriation of lands described in this order under the general mining laws prior to the date and time of restoration is unauthorized. Any such attempted appropriation, including attempted adverse possession under 30 U.S.C. 38 (2000), shall vest no rights against the United States. Acts required to establish a location and to initiate a right of possession are governed by State law where not in conflict with Federal law. The Bureau of Land Management will not intervene in disputes between rival locators over possessory rights since Congress has provided for such determinations in local courts.

**Authority:** 43 CFR 2091.6.

Dated: December 11, 2008.

**Selma Sierra,**

*State Director.*

[FR Doc. E8–29894 Filed 12–18–08; 8:45 am]

**BILLING CODE 4310–11–P**

## DEPARTMENT OF THE INTERIOR

### Minerals Management Service

### Beaufort Sea and Chukchi Sea Planning Areas Oil and Gas Lease Sales 209, 212, 217, and 221

**AGENCY:** Minerals Management Service (MMS), Interior.

**ACTION:** Notice of Availability of a Draft Environmental Impact Statement (DEIS) and announcement of Public Hearings.

**SUMMARY:** The purpose of the proposed Federal actions addressed in this DEIS (OCS EIS/EA MMS 2008–055) is to offer for lease areas in the Beaufort Sea and Chukchi Sea Outer Continental Shelf (OCS) that may contain economically recoverable oil and natural gas resources. These lease sales would provide qualified bidders the opportunity to bid on certain blocks in the Beaufort Sea and Chukchi Sea OCS to gain conditional rights to explore, develop, and produce oil and natural gas.

This DEIS is a draft of the National Environmental Policy Act (NEPA) analysis that will enable the Minerals Management Service (MMS) to make informed decisions on the configuration of the lease sales and the applicable mitigation measures. In the DEIS, the potential direct, indirect, and cumulative environmental impacts of the proposed sales and alternatives, including projected exploration and development and production activities on the physical, biological, and human environments in the Beaufort Sea and Chukchi Sea areas, are analyzed.

The DEIS integrates the biological assessment elements required under Section 7 of the Endangered Species Act (per Section 402.06 of the Act) for species under jurisdiction of the U.S. Fish and Wildlife Service. The DEIS reflects the information in the MMS Biological Assessment and the National Marine Fisheries Service (NMFS) Biological Opinion (dated July 17, 2008) for the bowhead, fin, and humpback whales.

**SUPPLEMENTARY INFORMATION:** In the DEIS, the MMS has examined the potential environmental effects of the Proposed Actions and alternatives. The Proposed Actions (Alternative 2 for each planning area) are to conduct Beaufort and Chukchi Sea OCS Lease Sales 209, 212, 217, and 221 in the years 2010, 2010, 2011, and 2012, respectively. The resource estimates and scenario information included in the DEIS analysis are presented as a range of activities that could be associated with each sale, including exploration seismic surveying, on-lease ancillary activities, exploration and delineation drilling, development and production of OCS oil and natural gas resources, decommissioning, and lease abandonment.

The Proposed Actions combined would offer for lease approximately 13,449 whole and partial blocks (about 73.4 million acres) identified as the program areas in the 2007–2012 5-Year Program. The proposed Chukchi Sea Sale area excludes a zone within 25 miles of the Chukchi Sea coast. Water depths in the Beaufort Sea and Chukchi Sea sale areas vary from approximately 10 meters (33 feet) to approximately 3,800 meters (12,467 feet).

Alternative 1 (No Lease Sale) for each sale area is equivalent to cancellation of a Proposed Action as scheduled in the approved 5-Year Program. The opportunity to discover and develop the estimated oil and gas resources that could have resulted from a Proposed Action would be precluded or postponed, and any potential environmental impacts resulting from a Proposed Action would not occur or would be postponed.

Beaufort Sea Alternative 3 (Barrow Deferral) is the Proposed Action excluding an area comprising approximately 15 whole or partial blocks along the Beaufort coastline east of Barrow beginning at the three-mile limit. This alternative was developed to reduce potential impacts to bowhead whale subsistence hunters as well as various wildlife species and associated habitats. Beaufort Sea Alternative 4 (Cross Island Deferral) is the Proposed Action excluding an area comprising approximately 41 whole or partial blocks north and east of Cross Island. This alternative was developed to protect a portion of the Nuiqsut Bowhead whale subsistence hunting area. Beaufort Sea Alternative 5 (Eastern Deferral) is the Proposed Action excluding an area comprising approximately 80 whole or partial blocks along the coastline east of Kaktovik. This alternative was developed to provide protection for a portion of the Kaktovik's bowhead whale subsistence hunting area. Beaufort Sea Alternative 6 (Deepwater Deferral) is the Proposed Action excluding an area comprising approximately 4,357 whole or partial blocks in areas off the continental shelf. This alternative defers areas that are generally deeper than 100 meters.

Chukchi Sea Alternative 3 (Coastal Deferral) is the Proposed Action excluding an area comprising approximately 882 whole or partial blocks near the eastern or shoreward edge of the program area. This alternative was developed as the Corridor II deferral for Sale 193 to reduce potential impacts to subsistence hunting. Chukchi Sea Alternative 4 (Ledyard Bay Deferral) is the Proposed Action excluding the area comprising approximately 191 whole or partial blocks of the proposed sale area that is within the Ledyard Bay Critical Habitat. This alternative was developed to protect the designated critical habitat area for the federally listed threatened spectacled eider. Chukchi Sea Alternative 5 (Hanna Shoal Deferral) is the Proposed Action excluding an area comprising approximately 241 whole or partial blocks at Hanna Shoal. This

alternative was developed to reduce potential impacts to an ecologically important area for Pacific walruses and gray whales. Chukchi Sea Alternative 6 (Deepwater Deferral) is the Proposed Action excluding an area comprising approximately 1,020 whole or partial blocks in areas off the continental shelf. This alternative defers areas that are generally in waters deeper than 100 meters (328 feet).

*DEIS Availability:* To obtain a copy of the DEIS, you may contact the Minerals Management Service, Alaska OCS Region, 3801 Centerpoint Drive, Suite 500, Anchorage, Alaska 99503–5820, telephone (907) 334–5200. You may also view the DEIS on the MMS Web site at *http://www.mms.gov/alaska* or at the following locations:

Alaska Pacific University, Academic, Academic Support Center Library, 4101 University Drive, Anchorage, Alaska 99508.

Alaska Resources Library and Information Service (ARLIS), 3211 Providence Drive, Suite 111, Anchorage, Alaska 99508.

Alaska State Library, Government Publications, State Office Building, 333 Willoughby, Juneau, Alaska 99801.

City of Point Hope, P.O. Box 169, Point Hope, Alaska 99766.

City of Wainwright, P.O. Box 9, Wainwright, Alaska 99782.

Fairbanks North Star Borough, Noel Wien Library, 1215 Cowles Street, Fairbanks, Alaska 99701.

Point Lay Tribal Council, P.O. Box 59031, Point Lay, Alaska 99759.

Tuzzy Consortium Library, P.O. Box 749, Barrow, Alaska 99723.

Environmental Protection Agency, Region 10 Library, 1200 6th Avenue, OMP–104, Seattle, Washington 98101.

University of Alaska Anchorage, Consortium Library, 3211 Providence Drive, Anchorage, Alaska 99508.

University of Alaska Fairbanks, Elmer E. Rasmuson Library, Government Documents, 310 Tanana Drive, Fairbanks, Alaska 99709.

University of Alaska Fairbanks, Geophysical Institute, Government Documents, Fairbanks, Alaska 99775.

Z. J. Loussac Library, 3600 Denali Street, Anchorage, Alaska 99503.

*Written Comments:* Interested parties may submit their written comment on this DEIS until March 16, 2009, to the Regional Director, Alaska OCS Region, Minerals Management Service, 3801 Centerpoint Drive, Suite 500, Anchorage, Alaska 99503–5820, or online at *http://ocsconnect.mms.gov.* Our practice is to make comments, including names and addresses of respondents available for public review. Individual commenters may ask that we withhold their name, home address, or both from the public record, and we will honor such a request to the extent allowable by law. If you submit comments and wish us to withhold such information, you must state so prominently at the beginning of your submission. We will not consider anonymous comments, and we will make available for inspection in their entirety all comments submitted by organizations or businesses or by individuals identifying themselves as representatives of organizations or businesses.

*Public Hearings:* Public hearings will be held to receive comments on the DEIS. The hearings will provide the MMS with additional information that will help in evaluating potential effects of the leasing program in the Beaufort and Chukchi Seas. The public hearing in Anchorage is scheduled as follows:

**Anchorage, Alaska**

January 15, 2009, 7 p.m., Centerpoint Building, 3801 Centerpoint Drive, 1st Floor Conference Room, Contact: Mr. Albert Barros, (907) 334–5209.

Public hearings will be scheduled in the following communities between January 16 and March 15, 2009. The dates, time, and locations for these hearings will be announced to the public on the MMS Web site, through the media, and by letters to the communities.

Kaktovik, Alaska; Wainwright, Alaska; Point Lay, Alaska; Point Hope, Alaska; Barrow, Alaska; and Nuiqsut, Alaska.

**FOR FURTHER INFORMATION CONTACT:** Minerals Management Service, Alaska OCS Region, 3801 Centerpoint Drive, Suite 500, Anchorage, Alaska 99503–5820, Ms. Deborah Cranswick, telephone (907) 334–5267.

Dated: November 21, 2008.

**Chris C. Oynes,**

*Associate Director for Offshore Energy and Minerals Management.*

[FR Doc. E8–30246 Filed 12–18–08; 8:45 am]

**BILLING CODE 4310–MR–P**

## DEPARTMENT OF THE INTERIOR

### Minerals Management Service

**[Docket No. MMS–2008–MRM–0027]**

### Notice of Establishment of the Indian Oil Valuation Negotiated Rulemaking Committee

**AGENCY:** Minerals Management Service, Interior.

**ACTION:** Establishment of Advisory Committee.

**SUMMARY:** As required by section 9 (a) (2) of the Federal Advisory Committee Act (FACA) (5 U.S.C. Appendix 2), the Department of the Interior (Department) is giving notice of the establishment of the Indian Oil Valuation Negotiated Rulemaking Committee (Committee) to develop specific recommendations regarding Indian oil valuation. The Department has determined that the establishment of this Committee is in the public interest and will assist the Minerals Management Service (MMS) in performing its duties under the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA) (30 U.S.C. 1701 *et seq.*). Copies of the Committee's charter will be filed with the appropriate committees of Congress and the Library of Congress in accordance with section 9 (c) of FACA.

**ADDRESSES:** You may submit comments by the following methods:

- Electronically go to *http://www.regulations.gov.* In the ''Comment or Submission'' column, enter ''MMS–2008–MRM–0027'' to view supporting and related materials for this notice. Click on ''Send a comment or submission'' link to submit public comments. 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. All comments submitted will be posted to the docket.
- Mail comments to Hyla Hurst, Regulatory Specialist, Minerals Management Service, Minerals Revenue Management, P.O. Box 25165, MS 302B2, Denver, Colorado 80225.
- Hand-carry comments or use an overnight courier service. Our courier address is Building 85, Room A–614, Denver Federal Center, West 6th Ave. and Kipling St., Denver, Colorado 80225.

**FOR FURTHER INFORMATION CONTACT:** Mr. Donald T. Sant, Senior Policy Advisor, Minerals Management Service, Minerals Revenue Management, P.O. Box 25165, MS 300B2, Denver, Colorado 80225–

0165, telephone number (303) 231–3899, fax number (303) 231–3409.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

On April 28, 2008, the Department published a notice of intent to establish an Indian Oil Valuation Negotiated Rulemaking Committee (73 FR 22970). In that notice, the Department requested interested parties to nominate representatives for membership on the Committee. The Department received 1 comment opposing the establishment of a negotiated rulemaking committee and 10 responses nominating individuals to serve on the Committee. The Department believes that using a negotiated rulemaking committee to make specific recommendations regarding valuation of oil from Indian leases would help the agency in developing a rulemaking. Therefore, the Department is establishing the Indian Oil Valuation Negotiated Rulemaking Committee.

**II. Statutory Provisions**

The Negotiated Rulemaking Act of 1996 (NRA) (5 U.S.C. 561 *et seq.* ); the Federal Advisory Committee Act (5 U.S.C. Appendix 2, section 1 *et seq.* ); the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA) (30 U.S.C. 1701 *et seq.* ); the Indian Mineral Development Act of 1982 (25 U.S.C. 2101–2108; and 25 U.S.C. 2 and 9); 30 CFR part 206; 25 CFR part 225; and Indian oil and gas lease and agreement terms.

**III. The Committee and Its Process**

In a negotiated rulemaking, a proposed rule is developed by a committee composed of representatives of government and the interests that will be significantly affected by the rule. Decisions are made by ''consensus.''

''[C]onsensus'' means unanimous concurrence among the interests represented on a negotiated rulemaking committee established under this subchapter, unless such committee (A) agrees to define such term to mean a general but not unanimous concurrence; or (B) agrees upon another specified definition.

5 U.S.C. 562(2) (A) and (B).

The negotiated rulemaking process is initiated by the Agency's identification of interests potentially affected by the rulemaking under consideration. Those interests were identified by the comments received regarding the **Federal Register** notice published on April 28, 2008.

**IV. Membership of the Committee**

The MMS believes that the interests significantly affected by this rule will be represented by the representatives listed below:

A representative of the Shoshone and Arapaho Tribes of the Wind River Reservation;

A representative of the Ute Indian Tribe;

A representative of the allottees at Fort Berthold, North Dakota;

A representative of the allottees of Oklahoma Indian Land/Mineral Owners of Associated Nations;

A representative of the Blackfeet Nation;

A representative of the Council of Petroleum Accountants Societies (COPAS) Revenue Committee;

A representative of the Independent Petroleum Association of Mountain States;

A representative of Peak Energy Resources;

A representative of Resolute Natural Resources;

A representative of Chesapeake Energy;

Two representatives of the Minerals Management Service; and

A representative of the Assistant Secretary for Indian Affairs.

If anyone believes their interests will not be adequately represented by these organizations, they must demonstrate and document that assertion through an application submitted no later than 10 calendar days following publication of this notice. You may fax your documentation to (303) 231–3409.

The first meeting date will be published in a **Federal Register** notice. Future meetings will be determined at this first meeting and notice of the dates published in the **Federal Register**.

**Certification**

I hereby certify that the Indian Oil Valuation Negotiated Rulemaking Committee is in the public interest.

Dated: December 10, 2008.

**Foster L. Wade,**

*Deputy Assistant Secretary for Land and Minerals Management.*

[FR Doc. E8–30139 Filed 12–18–08; 8:45 am]

**BILLING CODE 4310–MR–P**

## DEPARTMENT OF INTERIOR

### National Park Service

### Draft Legislative Environmental Impact Statement on the Harvest of Glaucous-Winged Gull Eggs by the Huna Tlingit in Glacier Bay National Park

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice of Availability of the Draft Legislative Environmental Impact Statement on the Harvest of Glaucous-Winged Gull Eggs by the Huna Tlingit in Glacier Bay National Park.

**SUMMARY:** The National Park Service announces the availability of a Draft Legislative Environmental Impact Statement (LEIS) for the Harvest of Glaucous-Winged Gull Eggs by the Huna Tlingit in Glacier Bay National Park. The document describes and analyzes the environmental impacts of a preferred alternative and one additional action alternative for managing a limited harvest of glaucous-winged gull eggs. A no action alternative is also evaluated. This notice announces the public comment period, the locations of public hearings, and solicits comments on the draft LEIS.

**DATES:** Comments on the draft LEIS must be received no later than March 6, 2009.

**ADDRESSES:** Written comments on the draft LEIS should be submitted to Mary Beth Moss, Project Manager, Glacier Bay National Park and Preserve, PO Box 140, Gustavus, AK 99829.

Submit comments electronically through the NPS Planning, Environment and Public comment system (PEPC) at *http://parkplanning.nps.gov.* The draft LEIS may be viewed and retrieved at this Web site as well. Hard copies of the draft LEIS are available by request from the aforementioned address. See **SUPPLEMENTARY INFORMATION** for the locations of public hearings.

**FOR FURTHER INFORMATION CONTACT:** Mary Beth Moss, Project Manager, Glacier Bay National Park and Preserve, Telephone: 907 317–1270.

**SUPPLEMENTARY INFORMATION:** The purpose of the draft LEIS is to analyze the effects of the limited collection of glaucous-winged gull eggs within Glacier Bay National Park by Hoonah Indian Association (HIA; the federally recognized government of the Huna Tlingit) tribal members if legislation authorizing collection were enacted. Glacier Bay is the traditional homeland of the Huna Tlingit. The Huna Tlingit harvested eggs at gull rookeries in Glacier Bay, including the large nesting site on South Marble Island, prior to the park being established in 1925. Egg collection was curtailed in the 1960s. The Migratory Bird Treaty Act prohibited the harvest of gull eggs, and by statute and NPS regulations, harvest is precluded within park boundaries.

In the late 1990s, at the behest of tribal leaders, the NPS agreed to explore ways to authorize this important cultural tradition. Section 4 of the Glacier Bay National Park Resource Management Act of 2000 (Pub. L. 106–455) requires the Secretary of Interior, in

consultation with local residents, to assess whether sea gull eggs can be collected in the park on a limited basis without impairing the biological sustainability of the gull population in the park. The Act further requires that if the study determines that the limited collection of sea gull eggs can occur without impairing the biological sustainability of the gull population in the park, the Secretary shall submit recommendations for legislation to Congress. Sea gull eggs cannot be collected absent legislation.

NPS commissioned ethnographic and biological studies to inform the analysis included in this draft LEIS. The draft LEIS considers a reasonable range of alternatives based on project objectives, park resources and values, and public input that include:

*Alternative 1 (No Action):* This alternative would not propose legislation to authorize the harvest of glaucous-winged gull eggs in Glacier Bay National Park. Glaucous-winged gulls would continue to breed in Glacier Bay without human disturbance.

*Alternative 2:* This alternative would propose legislation to authorize harvest of glaucous-winged gull eggs at up to two designated locations on a single pre-selected date on or before June 9 of each year. Approximately 12 tribal members would have the opportunity to harvest eggs each year.

*Alternative 3 (NPS Preferred Alternative):* Alternative 3 would propose legislation to authorize harvest of glaucous-winged gull eggs at several designated locations in Glacier Bay National Park on two separate dates. The first harvest would occur on or before June 9th; a second harvest at the same sites would occur within nine days of the first harvest. The logistics of vessel transportation would limit the number of sites that could be visited in a given day. Depending on weather and other conditions, as well as the sites selected, harvest would likely occur at three to four sites. Approximately 24 tribal members would have the opportunity to harvest eggs each year.

Both action alternatives would propose legislation authorizing the management of harvest activities under the guidelines of a harvest management plan cooperatively developed by the NPS and the HIA. NPS would conduct monitoring activities to ensure that park resources and values were not impacted. The Superintendent would retain the authority to close gull colonies to harvest.

Public hearings are scheduled in Alaska at the following locations: Anchorage, Juneau, Gustavus, and Hoonah, Alaska. The specific dates and times of the meetings and public hearings will be announced in local media.

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 to withhold your personal identifying information from public review we cannot guarantee that we will be able to do so. We will always make submissions from organizations or businesses, and from individuals identifying themselves as representatives of or officials of organizations or businesses, available for public inspection in their entirety.

Dated: October 17, 2008.

**Sue E. Masica,**

*Regional Director, Alaska.*

[FR Doc. E8–30133 Filed 12–18–08; 8:45 am]

**BILLING CODE 4312–HX–P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

### Draft General Management Plan Amendment/Environmental Impact Statement, Petrified Forest National Park, Arizona

**AGENCY:** National Park Service, Department of Interior.

**ACTION:** Notice of Termination of Environmental Impact Statement for the General Management Plan, Petrified Forest National Park, in favor of an Environmental Assessment.

**SUMMARY:** The National Park Service (NPS) is terminating preparation of an Environmental Impact Statement (EIS) for the General Management Plan amendment, Petrified Forest National Park, Arizona. A Notice of Intent to prepare the EIS for the Petrified Forest National Park General Management Plan Amendment was published at 72 FR 159, pages 46244 and 46245, August 17, 2007. The National Park Service has since determined that an Environmental Assessment (EA) rather than an EIS is the appropriate level of environmental documentation for the plan.

**SUPPLEMENTARY INFORMATION:** The Petrified National Park Expansion Act of 2004 (Pub. L. 108–430) added approximately 125,000 acres in private and other agency ownership to the existing Petrified Forest National Park, and directed the National Park Service to develop a plan to manage the addition lands. A general management plan amendment will establish the overall management direction of the addition lands for the next 15 to 20 years. The plan amendment was originally scoped as an EIS. Publication of the **Federal Register** Notice was followed with a newsletter to affected agencies and interested parties, and a public meeting in Holbrook, Arizona. However, few comments were received during the scoping process. The NPS planning team has developed two alternative management concepts for the addition lands. The ''*No-Action*'' concept would allow for the continuation of existing conditions, and the addition lands would remain a mix of private, state, and NPS ownership, with a small proportion of those lands owned and managed by the NPS. Current land uses, activities, and structures would remain, and resources would not necessarily be well protected.

The ''*Preferred*'' concept would allow for cautious NPS management of addition lands within NPS jurisdiction, while gathering as much information about them as possible. Resource inventories, condition assessments, and research would be conducted to increase understanding of the addition lands. This concept provides for a higher level of resource protection than the *No-Action* concept. These management concepts will be expanded upon and refined through the planning/environmental assessment process.

**DATES:** The NPS will notify the public by mail, Web site, and other means, of public review periods and meetings associated with the draft GMP amendment/EA. All public review and other written public information will be made available online at *http://parkplanning.nps.gov/pefo.*

**FOR FURTHER INFORMATION CONTACT:** Cliff Spencer, Superintendent, Petrified Forest National Park, P.O. Box 2217, Petrified Forest, Arizona 86028; telephone, (928) 524–6228, extension 225; e-mail *cliff_spencer@nps.gov*.

Dated: December 8, 2008.

**Michael D. Snyder,**

*Regional Director, Intermountain Region, National Park Service.*

[FR Doc. E8–30135 Filed 12–18–08; 8:45 am]

**BILLING CODE 4310–7V–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Reclamation

### Southern Delivery System, Colorado

**AGENCY:** Bureau of Reclamation, Interior.

**ACTION:** Notice of Availability of Southern Delivery System Final

Environmental Impact Statement, Colorado.

**SUMMARY:** Pursuant to the National Environmental Policy Act of 1969 (NEPA), the Bureau of Reclamation (Reclamation), is notifying the public that Reclamation, in cooperation with the U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, U.S. Bureau of Land Management, and U.S. Fish and Wildlife Service, has prepared and made available to the public a final environmental impact statement (Final EIS) for the proposed Southern Delivery System (SDS) project. The non-federal Project Participants (City of Colorado Springs, City of Fountain, Security Water District, and Pueblo West Metropolitan District) have made a request to Reclamation to issue long term excess capacity, conveyance, and exchange contracts for the use of Fryingpan-Arkansas Project facilities. Reclamation needs to decide if the requested contracts will be issued. The Project Participants' purpose is to provide a safe, reliable, and sustainable water supply for their customers through the foreseeable future. The Project Participants' needs are the following:

- The Project Participants have a need to use developed and undeveloped water supplies to meet most or all projected future demands through 2046.
- The Project Participants have a need to develop additional water storage, delivery, and treatment capacity to provide system redundancy.
- The Project Participants have a need to perfect and deliver their existing Arkansas Basin water rights.

Reclamation published a Draft EIS on February 29, 2008. Reclamation published a Supplemental Information Report on October 3, 2008 to update and provide additional information that was not in the Draft EIS. Revisions were made to the Final EIS to incorporate additional analyses presented in the Supplemental Information Report, and responses to comments on the Draft EIS and Supplemental Information Report. The Final EIS includes written responses to all public comments on both the Draft EIS and Supplemental Information Report. It also identifies the Participants' Proposed Action as Reclamation's preferred alternative.

**DATES:** Reclamation will not make a decision on the proposed action until at least 30 days after the release of the Final EIS. After the 30-day waiting period, Reclamation will complete a Record of Decision (ROD). The ROD will indicate the action selected for implementation and will discuss factors and rationale used in making the decision.

**ADDRESSES:** Ms. Kara Lamb, Bureau of Reclamation, Eastern Colorado Area Office, 11056 W. County Road 18E, Loveland, CO 80537–9711; telephone (970) 663–3212; facsimile (970) 962–4326; e-mail: *klamb@gp.usbr.gov*. The Draft EIS, Supplemental Information Report, and Final EIS, are also available on the project Web site at: *http://www.sdseis.com*.

**SUPPLEMENTARY INFORMATION:** The Final EIS considers six action alternatives and a no action alternative:

- The No Action Alternative represents the most likely future water development project in the absence of a major Reclamation action.
- The Participants' Proposed Action represents the Southern Delivery System project as the Participants propose to construct and operate it.
- The Wetland Alternative was developed to minimize the wetland acres disturbed.
- The Arkansas River Alternative was developed to provide both the highest minimum flow in the Arkansas River through Pueblo and minimize water quality effects on the lower Arkansas River.
- The Fountain Creek Alternative was developed to minimize geomorphic and water quality effects on Fountain Creek by minimizing the use of Fountain Creek for receiving and conveying reusable return flows on the Arkansas River.
- The Downstream Intake Alternative would use an untreated water intake from the Arkansas River downstream of Fountain Creek.
- The Highway 115 Alternative would convey untreated water through a pipeline that generally follows Colorado 115 between the Arkansas River and Colorado Springs.

Copies of the Final EIS are available at the following locations:

- Bureau of Reclamation, Eastern Colorado Area Office, 11056 W. County Road 18E, Loveland, CO 80537.
- Buena Vista/ North Chaffee County Library, 131 Linderman Avenue, Buena Vista, CO 81211.
- Cañon City Public Library, 516 Macon Avenue, Cañon City, CO 81212.
- Pikes Peak Library District—Penrose Library, 20 N Cascade Avenue, Colorado Springs, CO 80903.
- Pueblo City-County Library District, 100 E Abriendo Avenue, Pueblo, CO 81004.
- Woodruff Memorial Library, 522 Colorado Avenue, La Junta, CO 81050.

Dated: December 9, 2008.

**Bobbi C. Sherwood-Widmann,**

*Acting Assistant Regional Director, Great Plains Region.*

[FR Doc. E8–29565 Filed 12–18–08; 8:45 am]

**BILLING CODE 4310–MN–P**

## INTERNATIONAL TRADE COMMISSION

**[Inv. No. 337–TA–662]**

### In the Matter of Certain Tunable Laser Chips, Assemblies and Products Containing Same; Notice of Investigation

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Institution of investigation pursuant to 19 U.S.C. 1337.

**SUMMARY:** Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on November 7, 2008, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of JDS Uniphase Corporation of Milpitas, California. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation, of certain tunable laser chips, assemblies, and products containing same that infringes certain claims of U.S. Patent Nos. 6,658,035 and 6,687,278. The complaint, as supplemented, further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainant requests that the Commission institute an investigation and, after the investigation, issue an exclusion order and cease and desist orders.

**ADDRESSES:** The complaint, except for any confidential information contained therein, is available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Room 112, Washington, DC 20436, telephone 202–205–2000. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *http://www.usitc.gov*. The public record for

this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

**FOR FURTHER INFORMATION CONTACT:** Mareesa A. Frederick, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2055.

*Authority:* The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2008).

*Scope of Investigation:* Having considered the complaint, the U.S. International Trade Commission, on December 4, 2008, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation, of certain tunable laser chips, assemblies, and products containing same that infringes one or more of claims 1, 3, 4, 30–39, 43–49, 51, 67–73, and 77–80 of U.S. Patent No. 6,658,035 and claims 1–6, 8–10, 12–17, 19–21, and 23–26 of U.S. Patent No. 6,687,278, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is—JDS Uniphase Corporation, 430 N. McCarthy Boulevard, Milpitas, California 95035.

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Bookham, Inc., 2584 Junction Avenue, San Jose, California 95134;

Syntune AB, Torshamnsgatan 30A, S–164 40, Kista, Sweden;

Cyoptics, Inc., 9999 Hamilton Boulevard, Breinigsville, Pennsylvania 18031;

Tellabs, Inc., One Tellabs Center, 1415 West Diehl Road, Naperville, Illinois 60563;

Adva Optical Networking, Campus Martinsried, Fraunhoferstrasse 9a, 82152 Martinsried/Munich, Germany;

Ciena Corp., 1201 Winterson Road, Linthicum, Maryland 21090;

Nortel Networks Corp., 195 The West Mall, Toronto, Ontario, Canada, M9C 5K1.

(c) The Commission investigative attorney, party to this investigation, is Mareesa A. Frederick, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., Room 401, Washington, DC 20436; and

(3) For the investigation so instituted, Paul J. Luckern, Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(d) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: December 5, 2008.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

[FR Doc. E8–30176 Filed 12–18–08; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation Nos. 701–TA–459 and 731–TA–1155 (Preliminary)]**

## Commodity Matchbooks from India; Determinations

On the basis of the record [1] developed in the subject investigations, the United States International Trade Commission (Commission) determines, pursuant to section 703(a) of the Tariff Act of 1930 (19 U.S.C. 1671b(a)) (the Act), that there is a reasonable indication that an industry in the United States is injured by reason of imports from India of commodity matchbooks, provided for in subheading 3605.00.00 of the Harmonized Tariff Schedule of the United States, that are alleged to be subsidized by the Government of India. The Commission further determines, pursuant to section 733(a) of the Act (19 U.S.C. 1673b(a)), that there is a reasonable indication that an industry in the United States is injured by reason of imports from India of commodity matchbooks, that are alleged to be sold in the United States at less than fair value (LTFV).

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

### Commencement of Final Phase Investigations

Pursuant to section 207.18 of the Commission's rules, the Commission also gives notice of the commencement of the final phase of its investigations. The Commission will issue a final phase notice of scheduling, which will be published in the **Federal Register** as provided in section 207.21 of the Commission's rules, upon notice from the Department of Commerce (Commerce) of affirmative preliminary determinations in the investigations under section 703(b) and section 733(b) of the Act, or, if the preliminary determinations are negative, upon notice of affirmative final determinations in those investigations under section 705(a) and section 735(a) of the Act. Parties that filed entries of appearance in the preliminary phase of the investigations need not enter a separate appearance for the final phase of the investigations. Industrial users and, if the merchandise under investigation is sold at the retail level, representative consumer organizations have the right to appear as parties in Commission antidumping and countervailing duty investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations.

### Background

On October 29, 2008, a petition was filed with the Commission and Commerce by D.D. Bean & Sons Co., alleging that an industry in the United States is materially injured or threatened with material injury by reason of subsidized imports of commodity matchbooks from India, and by reason of LTFV imports from India. Accordingly, effective October 29, 2008, the Commission instituted countervailing duty and antidumping duty investigation Nos. 701–TA–459 and 731–TA–1155 (Preliminary).

Notice of the institution of the Commission's investigations and of a public conference to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of November 5, 2008 (73 FR 65881). The conference was held in Washington, DC, on November 17, 2008, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determinations in these investigations to the Secretary of Commerce on December 15, 2008. The views of the Commission are contained in USITC Publication 4054 (December 2008), entitled *Commodity Matchbooks from India: Investigation Nos. 701–TA–459 and 731–TA–1155 (Preliminary).*

By order of the Commission.

Issued: December 15, 2008.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

[FR Doc. E8–30178 Filed 12–18–08; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 731–TA–745 (Second Review)]**

### Steel Concrete Reinforcing Bar From Turkey; Determination

On the basis of the record [1] developed in the subject five-year review, the United States International Trade Commission (Commission) determines, pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. 1675(c)), that revocation of the antidumping duty order on steel concrete reinforcing bar from Turkey would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[2]

### Background

The Commission instituted this review on February 1, 2008 (73 FR 6206) and determined on May 6, 2008 that it would conduct a full review (73 FR 27847, May 14, 2008). Notice of the scheduling of the Commission's review and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** on June 11, 2008 (73 FR 33116). The hearing was held in Washington, DC, on October 16, 2008, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determination in this review to the Secretary of Commerce on December 15, 2008. The views of the Commission are contained in USITC Publication 4052 (December 2008), *entitled Steel Concrete Reinforcing Bar from Turkey: Investigation No. 731–TA–745 (Second Review).*

By order of the Commission.

Issued: December 15, 2008.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

[FR Doc. E8–30179 Filed 12–18–08; 8:45 am]

**BILLING CODE 7020–02–P**

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR § 207.2(f)).

[2] Commissioners Charlotte R. Lane and Irving A. Williamson dissenting.

## DEPARTMENT OF JUSTICE

### Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980

Notice is hereby given that on December 9, 2008, a Complaint was filed and a proposed Consent Decree was lodged with the United States District Court for the District of Massachusetts in *United States of America* v. *City of Attleboro, Massachusetts, et al.*, Civil Action No. 1:08–cv–120378.

In this action the United States seeks reimbursement of response costs incurred by EPA for response actions at the Shpack Landfill Superfund Site (''Site'') in Norton and Attleboro Massachusetts, and performance of studies and response work at the Site consistent with the National Contingency Plan, 40 CFR part 300, pursuant to Sections 106 and 107 of the Comprehensive Environmental, Response, Compensation, and Liability Act, 42 U.S.C. 9606 and 9607 (''CERCLA''). The Consent Decree provides that the settling parties will perform the chemical portion of the cleanup work at the Site, currently estimated at $29 million, as well as reimburse EPA for up to $2.9 million of EPA's future costs. The Consent Decree includes a covenant not to sue by the United States under Sections 106 and 107 of CERCLA, §§ 9606 and 9607, and Section 7003 of the Resource Conservation and Recovery Act (''RCRA''), 42 U.S.C. 6973.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Commenters may request an opportunity for a public meeting in the affected area, in accordance with Section 7003(d). Comments should be addressed to the Principal Deputy Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *City of Attleboro, Massachusetts, et al.*, D.J. Ref. 90–11–2–08360.

The Consent Decree may be examined at the Office of the United States Attorney, 1 Courthouse Way, John Joseph Moakely Courthouse, Suite 9200, Boston, MA 02210, and U.S. EPA Region 1, One Congress St., Suite 1100, Boston, MA 02114. During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $125.50 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

**Ronald G. Gluck,**

*Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. E8–30142 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–15–P**

## DEPARTMENT OF LABOR

### Bureau of International Labor Affairs; Request for Information on Efforts by Certain Countries To Eliminate the Worst Forms of Child Labor

**AGENCY:** The Bureau of International Labor Affairs, United States Department of Labor.

**ACTION:** Request for information on efforts by certain countries to eliminate the worst forms of child labor.

**SUMMARY:** This notice is a request for information for use by the Department of Labor (DOL) in preparation of an annual report on certain trade beneficiary countries' implementation of international commitments to eliminate the worst forms of child labor. This will be the eighth such report by DOL under the Trade and Development Act of 2000 (TDA).

**DATES:** Submitters of information are requested to provide their submission to the Office of Child Labor, Forced Labor and Human Trafficking at the e-mail or physical address below by 5 p.m., January 26, 2009.

**ADDRESSES:** E-mail submissions should be addressed to Tina McCarter at *mccarter.tina@dol.gov.* Written submissions should be addressed to Ms. McCarter at the Office of Child Labor, Forced Labor and Human Trafficking, Bureau of International Labor Affairs, USDOL, 200 Constitution Avenue, NW., Room S–5317, Washington, DC 20210.

**FOR FURTHER INFORMATION CONTACT:** Tina McCarter or Charita Castro, Bureau of International Labor Affairs, Office of Child Labor, Forced Labor and Human Trafficking, at (202) 693–4843, fax: (202) 693–4830, or via e-mail to *mccarter-tina@dol.gov* or *castro.charita@dol.gov.* DOL's international child labor reports can be found on the Internet at *http://www.dol.gov/ILAB/media/reports/iclp/main.htm* or can be obtained from the Office of Child Labor, Forced Labor and Human Trafficking.

**SUPPLEMENTARY INFORMATION:** The Trade and Development Act of 2000 [Pub. L. 106–200] established a new eligibility criterion for receipt of trade benefits under the Generalized System of Preferences (GSP), Caribbean Basin Trade and Partnership Act (CBTPA), and Africa Growth and Opportunity Act (AGOA). The TDA amends the GSP reporting requirements of the Trade Act of 1974 (Section 504) [19 U.S.C. 2464] to require that the President's annual report on the status of internationally recognized worker rights include ''findings by the Secretary of Labor with respect to the beneficiary country's implementation of its international commitments to eliminate the worst forms of child labor.'' Title II of the TDA and the TDA Conference Report [Joint Explanatory Statement of the Committee of Conference, 106th Cong.2d.sess. (2000)] indicate that the same criterion applies for the receipt of benefits under CBTPA and AGOA, respectively.

In addition, the Andean Trade Preference Act (ATPA), as amended and expanded by the Andean Trade Promotion and Drug Eradication Act (ATPDEA) [Pub. L. 107–210, Title XXXI], includes as a criterion for receiving benefits ''[w]hether the country has implemented its commitments to eliminate the worst forms of child labor as defined in section 507(6) of the Trade Act of 1974.''

**Scope of Report**

Countries and non-independent countries and territories presently eligible under the GSP and to be included in the report are: Afghanistan, Albania, Algeria, Angola, Anguilla, Argentina, Armenia, Bangladesh, Belize, Benin, Bhutan, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, British Indian Ocean Territory, British Virgin Islands, Burkina Faso, Burundi, Cambodia, Cameroon, Cape Verde, Central African Republic, Chad, Christmas Island, Cocos Islands, Colombia, Comoros, Democratic Republic of the Congo, Republic of Congo, Cook Islands, Costa Rica, Cote d'Ivoire, Croatia, Djibouti, Dominica, East Timor, Ecuador, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Falkland Islands, Fiji, Gabon, the Gambia, Georgia, Ghana, Gibraltar, Grenada, Guinea, Guinea-Bissau, Guyana, Haiti, Heard Island and MacDonald Islands, India, Indonesia, Iraq, Jamaica, Jordan, Kazakhstan, Kenya, Kiribati, Kyrgyz Republic, Lebanon, Lesotho, Liberia, Macedonia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Moldova, Mongolia, Montenegro, Montserrat, Mozambique, Namibia, Nepal, Niger, Nigeria, Niue, Norfolk Island, Oman, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Pitcairn Islands, Russia, Rwanda, Saint Helena, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Sao Tomé and Principe, Senegal, Serbia, Seychelles, Sierra Leone, Solomon Islands, Somalia, South Africa, Sri Lanka, Suriname, Swaziland, Tanzania, Thailand, Togo, Tokelau Island, Tonga, Trinidad and Tobago, Tunisia, Turkey, Turks and Caicos Islands, Tuvalu, Uganda, Ukraine, Uruguay, Uzbekistan, Vanuatu, Venezuela, Wallis and Futuna, West Bank and Gaza Strip, Western Sahara, Republic of Yemen, Zambia, and Zimbabwe.

Countries eligible or potentially eligible for additional benefits under the AGOA and to be included in the report are: Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Chad, Comoros, Republic of Congo, Democratic Republic of the Congo, Djibouti, Ethiopia, Gabon, the Gambia, Ghana, Guinea, Guinea Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, South Africa, Swaziland, Tanzania, Togo, Uganda, and Zambia.

Countries potentially eligible for additional benefits under the CBTPA and to be included in the report are: Barbados, Belize, Costa Rica, Guyana, Haiti, Jamaica, Panama, Saint Lucia, and Trinidad and Tobago.

Countries potentially eligible for additional benefits under the ATPA/ATPDEA and to be included in the report are: Bolivia, Colombia, Ecuador, and Peru.

In addition, the following countries will be included in the report as required by the Department of Labor Appropriations, 2006, Conference Report, H.R. Rep. 109–337 (2005): Bahrain, Chile, Dominican Republic, El Salvador, Guatemala, Honduras, Morocco, and Nicaragua.

**Information Sought**

The Department invites interested parties to submit information relevant to the findings to be made by DOL under the TDA for all listed countries. Information provided through public submission will be considered by DOL in preparing its findings. Materials submitted should be confined to the specific topic of the study. In particular, DOL's Bureau of International Labor Affairs is seeking submissions on the following topics:

1. Whether the country has adequate laws and regulations proscribing the worst forms of child labor. Specifically, DOL is seeking the following information:

(a) What laws have been promulgated on child labor? What is the country's minimum age for admission to work? Are there exceptions to the minimum age law? What is the minimum age for admission to hazardous work, and what additional provisions have been enacted regarding children's involvement in hazardous work?

(b) What laws have been promulgated on the worst forms of child labor, such as forced child labor and trafficking or child prostitution and pornography? Please specify what worst forms of child labor are prohibited and describe penalties for violations. What is the minimum age for military recruitment and/or involvement in armed conflict?

(c) If the country has ratified International Labor Organization (ILO) Convention 182, has it developed a list of occupations considered to be worst

forms of child labor, as called for in article 4 of the Convention?

2. Whether the country has adequate laws and regulations as well as formal institutional mechanisms for the implementation and enforcement of such laws and regulations; specifically:

(a) What legal remedies are available to government agencies that enforce child labor and worst forms of child labor laws (civil fines, criminal penalties, court orders, etc.), and are they adequate to deter violations?

(b) To what extent are violations investigated and addressed?

(c) What level of resources does the government devote to investigating child labor and worst forms of child labor cases? How many inspectors does the government employ to address child labor? How many police or other law enforcement officials address worst forms of child labor issues? How many child labor investigations have been conducted over the past year and how many have resulted in fines, penalties, or convictions? How many investigations into worst forms of child labor violations have been conducted over the past year and how many have resulted in prosecutions and convictions?

(d) Has the government provided training activities for officials charged with enforcing child labor or worst forms of child labor laws?

3. Whether social programs exist in the country to prevent the engagement of children in the worst forms of child labor, and to assist in the removal of children engaged in the worst forms of child labor; specifically:

(a) What initiatives has the government supported specifically to prevent or withdraw children from exploitive work situations, such as school scholarships conditioned on a child's withdrawal from child labor? (If possible, please provide information on funding levels for such initiatives.)

4. Whether the country has a comprehensive policy for the elimination of the worst forms of child labor; specifically:

(a) Does the country have a comprehensive policy or national program of action on child labor or any of its forms?

(b) Does the country specifically incorporate child labor in poverty reduction, development, educational or other social policies or programs, such as Poverty Reduction Strategy Papers, etc.? If so, to what degree has the country implemented the policy and/or program of action and achieved its goals and objectives?

(c) Is education free in law and in practice? Is education compulsory in law and in practice?

Please note that although many anti-poverty programs may have indirect impacts on child labor, the TDA calls for governments to take specific actions to address the problem. Therefore, the DOL's report focuses, and information is requested on, efforts that name child labor as an explicit objective, target group, or condition for participation in government policies and programs.

5. Whether the country is making continual progress toward eliminating the worst forms of child labor; specifically:

(a) In what sectors/work activities/goods do children work and how has this changed over the past year? Information on age and gender of working children, disaggregated by industry/work activity/good, is appreciated.

Please note that in order to provide comparable statistics on child work and education across countries in the TDA report, DOL relies on the Understanding Children's Work Project (see *http://www.ucw-project.org/*) and UNESCO Institute of Statistics data (*http://stats.uis.unesco.org/*); therefore, such data is NOT being requested in this Notice.

(b) To what extent are children working in slavery or practices similar to slavery, such as debt bondage, serfdom, and forced or compulsory labor? Please indicate industries where this occurs and, if applicable, specific goods that such children produce.

(c) To what extent are children trafficked to work? Are children trafficked for commercial sex or for labor exploitation? Information on the industries into which children are trafficked and the goods that they produce in this situation is appreciated. Are they trafficked across national borders or within the country (specify source, destination and transit countries/regions/communities, if possible).

DOL greatly appreciates submission of original sources. Information submitted may include reports, newspaper articles, or other materials. Governments that have ratified ILO Convention 182 are requested to submit copies of their most recent article 22 submissions under the Convention, especially those with information on types of work determined in accordance with article 4 of the Convention. Copies of any recent government child labor surveys or data sets are also particularly appreciated.

**Definition of Worst Forms of Child Labor**

The term ''worst forms of child labor'' is defined in section 412(b) of the TDA as comprising:

''(A) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labor, including forced or compulsory recruitment of children for use in armed conflict;

(B) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;

(C) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in relevant international treaties; and

(D) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.''

The TDA Conference Report noted that the phrase, ''work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children,'' is to be defined as in article II of Recommendation No. 190, which accompanies ILO Convention 182. This includes:

''(a) Work which exposes children to physical, psychological, or sexual abuse;

(b) Work underground, under water, at dangerous heights or in confined spaces;

(c) Work with dangerous machinery, equipment and tools, or which involves the manual handling or transport of heavy loads;

(d) Work in an unhealthy environment which may, for example, expose children to hazardous substances, agents or processes, or to temperatures, noise levels, or vibrations damaging to their health;

(e) Work under particularly difficult conditions such as work for long hours or during the night or work where the child is unreasonably confined to the premises of the employer.''

The TDA Conference Report further indicated that this phrase be interpreted in a manner consistent with the intent of article 4 of ILO Convention 182, which states that such work shall be determined by national laws or regulations or by the competent authority in the country involved. In addition, the TDA Conference report indicated that the phrase generally not apply to situations in which children work for their parents on bona fide family farms or holdings.

This notice is a general solicitation of comments from the public.

**Marcia Eugenio,**

*Acting Associate Deputy Under Secretary, International Labor Affairs Bureau.*

[FR Doc. E8–30140 Filed 12–18–08; 8:45 am]

**BILLING CODE 4510–28–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

### Notice of Availability of Funds and Solicitation for Grant Applications for the Older Worker Demonstration

*Announcement Type:* Notice of Solicitation for Grant Applications.

*Funding Opportunity Number:* SGA/DFA PY–08–06.

*Catalog Federal Assistance Number:* 17.268.

**SUMMARY:** The U.S. Department of Labor (DOL), Employment and Training Administration (ETA) announces the availability of approximately $10 million in funds for Older Worker Demonstration Grants. These grants will be awarded though a competitive process as a part of the High Growth Job Training Initiative (HGJTI). The grants are intended to address the workforce challenges facing older individuals by developing models for talent development in regional economies that recognize older workers as a valuable labor pool and include employment and training strategies to retain and/or connect older workers to jobs in high growth, high demand industries critical to the regional economy.

Grants awarded under the Older Worker Demonstration should focus on providing training and related services for individuals age 55 and older that result in employment and advancement opportunities in high growth industries and economic sectors. The proposed strategies must take place in the context of regional talent development efforts designed to contribute to a strong regional economy, and must be developed and implemented by a strategic regional partnership. The preferred eligible applicants for this solicitation are entities that represent the local workforce investment system, but other entities may apply. It is anticipated that the number of awards will range from 10 to 13, with award amounts ranging from $750,000 to $1,000,000.

This solicitation provides background information and describes the application submission requirements, outlines the process that eligible entities must use to apply for funds covered by this solicitation, and details how grantees will be selected.

**KEY DATES:** The closing date for receipt of applications under this announcement is February 19, 2009. Applications must be received at the address below no later than 4 p.m. (Eastern Time). A Virtual Prospective Applicant Conference will be held for this grant competition in January. The date and access information for this Virtual Prospective Applicant Conference will be posted on the ETA Web site at: *http://www.workforce3one.org/.*

**ADDRESSES:** Mailed applications must be addressed to the U.S. Department of Labor, Employment and Training Administration, Division of Federal Assistance, Attention: Melissa Abdullah, Reference SGA/DFA PY–08–06, 200 Constitution Avenue, NW., Room N–4716, Washington, DC 20210. Applicants may alternatively apply on-line through Grants.gov as discussed in Part IV(C) of this solicitation. Telefacsimile (FAX) applications will not be accepted. Applicants are advised that U.S. Postal Service mail delivery in the Washington area may be delayed due to mail decontamination procedures. Hand delivered proposals will be received at the above address.

**SUPPLEMENTARY INFORMATION:** This solicitation consists of eight parts:

- Part I provides the funding opportunity description. It contains background on talent development in the global economy, the aging of the American workforce, and the workforce challenges faced by older individuals; provides information on the Older Worker Demonstration; and outlines the critical elements and focus areas for this solicitation.
- Part II describes the award amount and performance period for the award.
- Part III describes the eligible applicants and other grant specifications.
- Part IV provides information on the application and submission process and various funding restrictions.
- Part V describes the criteria against which applications will be reviewed and explains the review and selection process.
- Part VI provides award administration information.
- Part VII contains ETA agency contact information.
- Part VIII lists additional resources of interest to applicants and other information.

## Part I. Funding Opportunity Description

*A. Background*

1. Talent Development in a Global Economy

Globalization of the economic marketplace is now well recognized, as is the fact that American businesses must now compete not only with companies across the street, but also with companies across the globe. Global competition is typically seen as a national challenge. In reality, regions are where companies, workers, researchers, entrepreneurs and governments come together to create a competitive advantage in the global marketplace. That advantage stems from the ability to transform new ideas and new knowledge into advanced, high quality products or services—in other words, to innovate.

Regions that are successful in creating a competitive advantage demonstrate the ability to organize ''innovation assets''—people, institutions, capital, and infrastructure—to generate growth and prosperity in the region's economy. These regions are successful because they have connected three key elements: workforce skills and lifelong learning strategies, investment and entrepreneurship strategies, and regional infrastructure and economic development strategies.

In the new global economy, a region's ability to develop, attract, and retain a well educated and skilled workforce is a key factor in our nation's economic competitiveness. A region may possess a strong infrastructure and the investment resources for success, but without the talented men and women to use those elements for economic growth, they will be underutilized. Talent can also drive infrastructure and investment because investment capital is smart money and will follow talent, while infrastructure can be built to support a growing economy.

The aging of the American workforce will clearly impact a region's ability to develop, attract, and retain a well educated and skilled workforce. As regions respond to current and anticipated skills shortages and, in some industries and occupations, to labor shortages, they often overlook a key asset—the mature workforce. Older workers are an experienced and highly skilled pool of labor that can help regions meet their competitive needs.

2. Aging of the American Workforce

The United States is in the throes of a demographic metamorphosis. Currently, 12.4 percent of the U.S.

population—or one in every eight persons—is over the age of 65. By the year 2030, the percentage of those ages 65 and older in the U.S. population is expected to jump to nearly 20 percent. Compounded with declining birth rates, the implications of this shift are tremendous.

The graying of America will be reflected in its workforce. The number of people in the labor force ages 55 to 64 is projected to increase by over 36 percent between 2006 and 2016, and the number of participants ages 65 to 74 is expected to grow by 83 percent. As the workforce ages, greater numbers of people will leave due to disability or retirement. More than 25 percent of the working population will reach retirement age by 2010, resulting in a potential worker shortage of nearly 10 million.

The United States therefore faces a significant challenge in meeting demands for workers over the next several years. This projected tide of retirements could significantly influence productivity and profits. Furthermore, unless the wave of retirements is more gradual than anticipated, employers not only will have fewer workers but will also have fewer leaders. In many companies, younger workers remain relatively inexperienced because of the predominance of Baby Boomers in important management and other leadership positions. The loss of older workers' critical organizational knowledge and expertise could be costly to employers.

There is some disagreement among analysts about the extent to which, or even whether, significant worker shortages will result from the aging of the workforce. However, worker shortages have already appeared in some industries, such as health care, energy, and transportation. There is also considerable evidence that many employers have not yet recognized the possible consequences of an aging workforce. It is important that all employers, but particularly those with an older workforce and those in high-growth, high-demand industries, plan how they will meet their workforce and skill needs and how they can tap into the experience and talents of the growing pool of older workers.

Possible labor and skill shortages could offer opportunities for the aging workforce, as well. Many older workers will maintain employment or become reemployed for a plethora of reasons including social interaction and a desire to achieve ''productive aging'' through employment. However, the most compelling motives are economic in nature. Personal savings are significantly lower than in the past, there has been an overall trend away from defined-benefit pension plans and towards defined-contribution annuities, and declining numbers of employers are offering retiree health insurance. The result will be more people continuing to work or seeking employment past traditional retirement ages.

By capitalizing on older workers' desires for continued participation in the workforce, employers can minimize job vacancies, retain important skills and knowledge, and remain competitive and productive. Such a response will place older workers in a position to increase their personal retirement savings and realize other tangible and intangible benefits that result from their continued participation in the workforce. In addition, fully utilizing the mature workforce can help regional economies maintain the educated and skilled workforce that is a key factor in global competitiveness. Finally, the U.S. economy will benefit and financial pressures will be eased on important programs like Social Security and Medicare.

3. Workforce Challenges Faced by Older Individuals

While many older individuals want to or need to stay engaged in the workforce and employers can benefit from the skills offered by aging employees, older individuals continue to face challenges to full participation in the labor market. These include the following:

*Need to increase skills to keep pace with technological and organizational change and limited access to training.* As a result of technological and organizational change, job requirements are continually changing. Therefore, individuals increasingly must acquire new skills and upgrade their existing skills. Older persons who wish to continue working, either in their current field or in a new field, need to remain competitive by updating their skills. In comparison to younger workers, however, older workers are less likely to receive skills training. One study found that the hours of training received decline with age—while workers ages 25 to 34 participated in an average of 37 hours of employer-provided training in a year, employees ages 55 and older participated in 9 hours.[1] Rates of training accessed through the public workforce investment system also decline with age.[2]

*Health problems, disabilities and limited flexible work arrangements.* Some older workers may experience health problems, have disabilities, or have physical limitations that pose challenges to employment. The job opportunities for older workers with health concerns may depend on the availability of critical health-related employee benefits. Access to these benefits—*e.g.*, health insurance, sick leave, short- and long-term disability—varies greatly across employers. Workplace accommodations may affect the opportunities of older workers with health conditions, and some employers may not know how to make such accommodations. Additionally, as workers age, they may desire to work fewer hours or to have more flexibility in their work arrangements to facilitate improved work-life balance. Flexibility in work arrangements can encourage older individuals to remain working.

*Lack of skills and confidence of some older individuals to search for a new job.* To appeal to employers, older workers must identify and promote their strengths, including professional maturity, years of experience, and work ethic.[3] Older workers also have a higher level of commitment and loyalty to employers, lower turnover and absenteeism rates, and fewer on-the-job accidents.[4] However, some older individuals lack the skills and self-confidence to promote these strengths or search for jobs, and may not be familiar with the public and private resources that can aid older workers who are job hunting or changing careers.

*Lack of knowledge on how to start a business.* Some older workers have been impacted by corporate downsizing, outsourcing, and job loss. For some aging workers exiting out of jobs prematurely, their most viable option may be starting their own small business. Many public and private resources are available to help individuals start their own business, but some older workers (particularly those who have been dislocated or who have very low income) may not know how to access such services.

[1] Kelly S. Mikelson and Demetra Smith Nightengale, *Estimating Public and Private Expenditures on Occupational Training in the United States,* the Urban Institute and Johns Hopkins University, December 2004.

[2] David W. Stevens, *Older Worker Flows Through Core, Intensive, and Training Services, and Employment Status and Earnings First Quarter After Exit,* University of Baltimore Jacob France Institute, April 2004.

[3] Stephanie Overton, *The Changing Face of Retirement,* Radford University News to Use, December 2003.

[4] Future Work Institute, *Some Facts About Older Workers: Hot Topic Research, http://www.futureworkinstitute.com/services/hottopic/archetypes/HotTopics_Aging.pdf.*

*Employer barriers to engaging older individuals and age discrimination in the workplace.* The external barriers faced by older workers in obtaining employment, whether related to health, skills, or financial matters, may negatively affect employers' efforts to find qualified older candidates. Some employers may avoid developing an older workforce because of concerns over the costs of older workers due to benefits, pensions, salaries and flexibility demands. Research is beginning to show that some employers may overestimate the costs associated with employing older workers while simultaneously underestimating the benefits.

*B. Older Worker Demonstration Description*

Under the HGJTI, ETA is funding an Older Worker Demonstration with the objectives of: (1) Developing models for talent development in regional economies that recognize older workers as a valuable labor pool and include employment and training strategies to retain and/or connect older workers to jobs in high-growth, high-demand industries critical to the regional economy; and (2) building the capacity of the public workforce investment system to serve older individuals and identify innovative talent development models for an aging worker population.

The framework for the Older Worker Demonstration is based on three ETA initiatives—the Taskforce on the Aging of the American Workforce, the HGJTI, and the Workforce Innovation in Regional Economic Development (WIRED) Initiative.

The Taskforce on the Aging of the American Workforce is a federal interagency effort launched by ETA in 2006 to address the aging and retirement of the Baby Boomer generation and its impact on the workforce. The Taskforce brought together senior representatives from nine key federal agencies that affect the lives of older Americans and they elected to focus on three main areas: (1) Employer response to the aging workforce, focusing on the opportunities and needs of employers when recruiting, hiring, training and retaining older workers; (2) individual opportunities for employment, addressing the challenges and identifying the opportunities for older workers to increase their workforce participation; and (3) legal and regulatory issues regarding work and retirement, examining laws and regulations that may function as impediments and disincentives to continued employment.

The Taskforce worked for several months to identify and examine the most significant issues related to the aging of the American workforce, particularly workforce challenges facing older individuals, as well as working to develop strategies to address those issues. The Taskforce released its findings and recommendations in a report issued in February 2008 (available at *http://www.doleta.gov/reports/dpld_older_worker.cfm*). The Older Worker Demonstration is designed to address issues that limit the participation of older adults in the labor market, as identified by the Taskforce.

The HGJTI is a strategic effort to prepare workers for new and increasing job opportunities in high-growth, high-demand industries and economically vital industries and sectors of the American economy. Through the initiative, ETA identifies high-growth, high-demand industries; evaluates their skill needs; and funds local and national partnership-based demonstration projects that: (1) Address industry-specific workforce challenges, and (2) prepare workers for jobs with career pathways in rapidly expanding or transforming industries. Because of the aging workforce and potential shortages of skilled workers for high-growth, high-demand industries, it is important to find ways to better utilize older workers to meet the skill needs of these industries.

Through the WIRED Initiative, ETA supports broad regional partnerships as they expand employment and advancement opportunities for American workers and catalyze the creation of high-skill, high-wage opportunities in regional economies. WIRED supports innovative approaches to workforce and economic development that go beyond traditional strategies that prepare workers to compete and succeed. The Initiative helps regions transform their workforce investment, economic development, and education systems to support talent development and overall regional economic growth. Each regional partnership undertakes strategies customized to the particular economic challenges and opportunities of their regions and is focused on the high growth industries in that area. Although the impact of the aging workforce varies from region to region, the potential labor market impacts of the aging workforce suggest that addressing the challenges of older individuals, and fully utilizing their skills and expertise, should be a key component of regional talent development strategies.

Grants awarded under the Older Worker Demonstration should focus on providing training and related activities that result in employment and advancement opportunities in high-growth industries and economic sectors as part of a regional talent development strategy focused on economic growth. Examples of activities related to training include career awareness and outreach, strategies to promote career pathways, and activities to enhance the capacity of education and training providers. Because the grants under this solicitation are being funded by H–1B visa fees (as authorized under Sec. 414(c) of the American Competitiveness and Workforce Improvement Act of 1998), funds may only be used for projects that provide training in the occupations and industries for which employers pay H–1B visa application fees that generate these funds. (See Attachment: H–1B Industry Sectors and Occupations.) Also, the activities related to training must be limited to those necessary to support training in such occupations and industries.

In alignment with the goal of building the workforce system's capacity to serve older individuals, the preferred applicant for the Older Worker Demonstration is a legal entity that represents the local workforce investment system as follows: (1) A Local Workforce Investment Board (LWIB), as established under Section 117 of the Workforce Investment Act of 1998 (WIA) (Pub. L. 105–220), that has been incorporated; or (2) in areas where the LWIB is not incorporated, the legal entity that serves as the fiscal agent for the local workforce investment area. Other applicants for this solicitation may include: (1) A non-LWIB entity with the concurrence from the LWIB (this would require evidence of the board's support and involvement in the project along with a letter of concurrence); or (2) all other applicants without a letter of concurrence from the LWIB (such applicants must demonstrate how the proposed activities will be connected to the region's talent and economic development strategies, including improvement of services to older workers through the LWIB).

Applicants are required to have established partnerships to carry out the proposed project that could include, but are not limited to: The public workforce investment system; national, state, or local aging organizations, including Senior Community Service Employment Program (SCSEP) grantees; employers, industry associations, and business intermediaries, such as chambers of commerce; educational institutions and training providers; apprenticeship programs; economic development entities; local, regional, and state

government; Indian and Native American tribes or organizations; the philanthropic community; and community and faith-based organizations.

To provide additional support to the Older Worker Demonstration, ETA will make technical assistance available to grantees after the grant awards have been made. This assistance is further described in Part I(E) of this solicitation.

*C. Critical Elements of the Older Worker Demonstration*

1. Strategic Partnerships

ETA is using the Older Worker Demonstration as an opportunity to fund strategies focused on mature workers which will help prepare them for employment and advancement in high-demand, high-growth industries, as well as support the talent development needs of regional economies. While there are a range of approaches that cultivate and develop this critical labor pool, strategic partnerships must serve as the foundation of these solutions. Experience shows that workforce development strategies are most robust when developed in the context of a strategic partnership of regional leaders who have access to a range of resources. Thus, to maximize the impact of the proposed talent development activities, the applicant for the solicitation must partner with a strong team composed of individuals and organizations necessary to transform the regional economy.

Required partners for this solicitation include the public workforce investment system; employers, industry associations, or business intermediaries, such as chambers of commerce; and educational institutions and training providers. The strategic partnership should engage each required entity in its area of strength. For example, in the 21st century global economy, it is becoming increasingly important that the workforce system act as a strategic partner in regional economic development. The workforce system can align resources with regional economic growth goals by focusing on workforce and lifelong learning strategies that are demanded by employers and based on an understanding of future job growth in emerging, high-growth and economically vital industries and sectors in the regional economy. Through this strategic alignment, the workforce system can help to ward off and respond to economic shocks, creating more stable and rewarding employment opportunities for the workforce. Educators at all levels are also important to a strategic partnership. Education and training providers can assist in developing competency models and curricula and train new and incumbent workers. Finally, employers and industry representatives can define workforce challenges facing a specific industry and identify the competencies and skills required for that industry's workforce.

In addition to the required entities, applicants should think beyond geographical and physical boundaries to ensure that the full range of resources, knowledge, and leadership available to support workforce solutions for older workers are engaged in the project, and that the partnership includes entities that can act as levers of change to identify and address barriers to success. Other partners could include, but are not limited to, national, state, or local aging organizations, including SCSEP grantees; local, regional, and state government; economic development entities; apprenticeship programs; Indian and Native American tribes or organizations; the philanthropic community; and community and faith-based organizations.

Within the context of the strategic partnership, each partner should have clearly defined roles. The exact roles of partners may vary depending on the specific issue areas being addressed and the nature and the scope of the strategies undertaken. However, ETA expects that each partner will, at a minimum, significantly contribute to one or more aspects of the project. For example:

- The workforce system may play a number of roles, including identifying and assessing older workers for training; providing wrap-around support services and training funds for older workers, where appropriate; and connecting qualified training graduates to employers that have existing job openings.
- Employers, industry associations, and business intermediaries must be actively engaged in the project and should contribute to many aspects of grant activities such as helping to define the project's strategies and goals; identifying innovative and successful approaches to succession management and flexible work arrangements and sharing their experiences with other employers; identifying needed skills and competencies; and, where appropriate, hiring qualified training graduates.
- Educational institutions and training providers from the continuum of education (including community and technical colleges, four-year colleges and universities, apprenticeship, and other training entities) should assist in developing industry-driven workforce education strategies in partnership with employers including competency models, curricula, and new learning methodologies.
- Faith-based and community organizations may perform a variety of grant services such as case management, mentoring, and English language programs, among others. These organizations can leverage other resources to provide wrap-around holistic and comprehensive support services, where appropriate.
- State and area agencies on aging, SCSEP grantees, and other organizations with demonstrated expertise in serving older workers can play a key role in the proposed strategies in numerous ways, including lending their expertise to the planning and development of the project, providing specific education and services as part of the project, and offering access to key employer and other types of partners.

Applicants must provide evidence, including letters of commitment to carry out the activities described in the grant proposal, to demonstrate the existence of the required partnerships as well as additional partnerships that substantially support and strengthen the proposed activities, especially any existing relationships with required partners. Letters of support do not constitute partnership commitments.

The partnership's activities should focus on creating systemic solutions that address workforce challenges of older individuals while simultaneously contributing to long-term talent development and economic growth in the regional economy. The partnerships need to be substantial and sustained and not just a by-product of this specific grant opportunity. ETA encourages planning for the partnership's sustainability beyond the funding period to enable ongoing assessment of workforce needs and collaborative development of solutions on a continual basis.

2. High-Growth and High-Demand Industries and Economic Sectors

WIA emphasizes a public workforce investment system driven by the needs of local employers. In order for America to remain competitive in the global economy, it is essential that ETA target its investments to support employers in high-growth, high-demand industries. LWIBs and One-Stop Career Centers play a vital role in this effort by understanding the workforce needs of these industries and providing training and other services to address those needs.

High-growth, high-demand industries, from healthcare to construction to

biotechnology, are critical to the success of regional economies across the country. Regions are typically defined as geographically contiguous areas and can include multiple counties and cities and cross state lines. A range of factors contribute to the formation of a region, including economic interdependence (such as a common industry or industries) and shared assets (such as human capital, research and development entities, educational institutions, and airports and other types of infrastructure). ETA encourages applicants to define high-growth industries in the context of their regional economy by illustrating the industry's growth potential and how the industry can contribute to expansion of the regional economy. In an effort to help support the continued growth of these regional economies, while simultaneously addressing the workforce challenges facing older workers, this solicitation will support industry demand for training of older workers in regional high-growth, high-demand industries.

A high-growth, high-demand industry meets one or more of the following criteria: (1) Is projected to add substantial numbers of new jobs to the economy; (2) has a significant impact on the economy overall; (3) impacts the growth of other industries; (4) is being transformed by technology and innovation requiring new skill sets for workers; or (5) is a new and emerging business that is projected to grow. In the case of the fifth criterion relating to new or emerging businesses noted above, the applicant should address whether there might be potential demand for older workers to fill skill gaps in such businesses. The occupation or industry must be one for which employers use H–1B visas that generate the funds that are being used to support the training under this solicitation (see Attachment: H–1B Industry Sectors and Occupations).

The extent of the impact of the aging population will vary across industries. Thus, another factor to be considered in identifying high-growth, high-demand industries, in addition to the five criteria listed above, is whether there are (or could potentially be) retirements of a significant share of the workforce in the industry due to the aging of the Baby Boomer generation and whether there might be resulting skill shortages.

Grants funded under this solicitation should demonstrate how a demand-driven workforce system can help meet both the regional workforce needs of employers in high-growth, high-demand industry sectors, and at the same time help older workers obtain the skills to find quality jobs with promising career pathways. Proposed strategies should be focused and integrated, and should be driven by an accurate and comprehensive understanding of regional, industry-identified workforce challenges and the educational, workforce, and other assets available to support solutions.

3. Connections to Regional Economic and Talent Development Strategies

A regional approach to talent development incorporates demand-driven skills strategies into the region's larger economic development and education efforts to form a comprehensive system that is both flexible and responsive to the needs of business and workers. ETA has modeled a regional approach to talent development through the WIRED Initiative. Through WIRED, ETA supports broad regional partnerships as they expand employment and advancement opportunities for American workers and catalyze the creation of high-skill and high-wage opportunities in regional economies. The WIRED Initiative recognizes that, although global competition is often seen as a national challenge, it is actually at the regional level where solutions must be developed and the challenges met. It is in regional economies where companies, workers, researchers, entrepreneurs, government, and others come together to create competitive advantage and where new ideas and new knowledge are transformed into advanced, high-quality products or services. Therefore, WIRED focuses on labor market areas that are comprised of multiple jurisdictions within a state or across state borders. WIRED offers a strategic framework for regions to approach regional talent development. (More information and tools to help develop and implement your project using the WIRED strategic framework can be found at: *http://www.doleta.gov/WIRED.*)

One of the guiding principles of WIRED is that a region's ability to develop, attract, and retain a well educated and skilled workforce is a key factor in being competitive in the global economy. Older workers are an experienced and highly skilled pool of labor that can help regions meet their workforce needs and contribute to economic growth of the region's key industries. Therefore, fully utilizing the mature workforce should be a key component of regional talent development strategies.

Therefore, strategies proposed by applicants for the Older Worker Demonstration should not be developed in isolation. Rather, partnership activities and proposed strategies should be fully integrated into the region's broader talent development and economic development strategies. Applications will be evaluated on the extent to which such alignment and integration is demonstrated. Applicants must demonstrate in their proposal how the strategic partnership, working to design and implement the proposed strategies, is connected to the broader regional strategic talent and economic growth agenda for the region.

4. Clear and Specific Outcomes

HGJTI grants are results-oriented and grantees are expected to demonstrate clear and specific outcomes that indicate progress towards addressing the identified workforce challenges, are appropriate to the nature of the proposed strategies and the size and scope of the project, are achievable during the life of the grant, and can be effectively reported to ETA on a quarterly basis. Since HGJTI grants result in customized strategies addressing regional workforce challenges and skill shortages, ETA recognizes that specific outcomes will vary from project to project based on the specific activities proposed by applicants. Standard data collected from all grantees provides only part of the information necessary to measure the successes of HGJTI grants effectively, so grant recipients may also define additional outcome categories appropriate to their project. Applicants must demonstrate the effectiveness of proposed activities by establishing appropriate outcome projections for the project, which will be considered baseline performance measures for the project if awarded. Applicants should note that HGJTI grantees must report to ETA, on a quarterly basis, their progress towards meeting the projected training and capacity building outcomes listed in their applications.

ETA has received Office of Management and Budget (OMB) approval to implement a report format for grantees under the HGJTI, as well as the Community-Based Job Training Grants, entitled: ''High Growth and Community-Based Job Training Grants: General Quarterly Reporting Forms & Instructions.'' The required format and associated instructions are available at *http://www.doleta.gov/Performance/Guidance/wia.cfm#HGBIT,* and provide grantees with information on all of the training and capacity building outcome categories described below, as well as specific instructions regarding how grantees report their performance in these categories on a quarterly basis.

ETA strongly encourages applicants to review the required report format for detailed information on the program reporting requirements and to ensure they will be able to track and report the information required under the grant.

*Training Outcomes.* Training outcomes tracked and reported by grantees must include those tracked by the Common Measures, which are uniform evaluation metrics for job training and employment programs. The Common Measures are an integral part of ETA's performance accountability system. The Common Measures for adults are entered employment rate, employment retention rate, and average earnings. Applicants must include projected outcomes to be achieved during the life of the grant for the entered employment rate Adult Common Measure. Grantees will be required to report quarterly on their outcomes for all three Adult *Common Measures.* Please note that ETA recognizes that the reporting of certain data is contingent on the timing of the availability of data. Data must be reported when it is available. Additionally, tracking Common Measures requires either the collection of four data elements (social security number, employment status at participation, date of exit, and reason for exit) or use of supplemental data. A detailed description of ETA's policy on the Common Measures can be found in the Training and Employment Guidance Letter (TEGL) No. 17–05 (*http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=2195*). Applicants may find it useful to review this document prior to submitting applications under this solicitation.

The Common Measures provide only part of the information necessary to assess the success of HGJTI grants effectively. In addition to Common Measures, applicants are required to provide projections and track and report outcomes for each of the following outcome categories: total number of participants served; total number of participants beginning education/training activities; total number of participants completing education/training activities; total number of participants that complete education/training activities that receive a degree/certificate; total number of participants that complete education/training activities that enter employment; and the total number of participants that complete education/training activities that enter training-related employment. Grantees will be required, on a quarterly basis, to report on their outcomes for each of these outcome categories, as well as additional information, such as total exiters. (The definition of ''exiter'' is provided in the General Quarterly Reporting Forms & Instructions available at *http://www.doleta.gov/Performance/Guidance/wia.cfm#HGBIT*).

*Capacity Building Outcomes.* Grantees are required to report, on a quarterly basis, the outcomes of capacity building activities, which include impacts and other verifiable measures of participation where appropriate. An example is grantees that engage in train-the-trainer activities; in this example, a grant may train 25 individuals to be ''instructors'' who then each provide instruction to 20 older workers. The impact of these train-the-trainer activities would then be a total of 500 individuals. In their quarterly reports, grantees will be required to track and report the following three categories: (1) The number of instructors who participated in grant-funded capacity-building activities; (2) the number of people subsequently trained by those instructors; and (3) the number of other people participating and/or benefiting from capacity building activities.

Please note that capacity building outcomes and impacts of the proposed project should satisfactorily address the industry-identified workforce need and capacity constraints identified by the applicant.

Applicants should also note that proposals will be evaluated based on outcomes, per the Performance Measures and Outcomes evaluation criterion in Part V(A)(5). It is imperative that applicants include projections for the above-mentioned required outcome categories in their grant proposals. Applicants that fail to include projections for required outcome categories in their proposals will lose points during the review process.

All outcome categories and projected outcomes in the application will become part of the project's statement of work as the goals for the grant, should the application be funded. It is not ETA's intent to renegotiate performance outcomes after grant awards are made, though it reserves the right to do so if necessary.

5. Shared and Leveraged Resources

HGJTI investments leverage funds and resources from key entities in the strategic partnership. Leveraging resources in the context of strategic partnerships accomplishes three goals: (1) Allowing for the pursuit of resources driven by the strategy; (2) increasing stakeholder investment in the project at all levels, including the design and implementation phases; and (3) broadening the impact of the project itself. Leveraged resources will be taken into consideration during application review as one element of the ''Strength of Regional Partnership'' evaluation criterion.

Leveraged resources include both federal and non-federal funds and may come from many sources. Businesses, faith-based and community organizations, economic development entities, educational institutions, and philanthropic foundations often invest resources to support workforce development. In addition, state and area agencies on aging, SCSEP grantees, and other organizations serving older workers; One-Stop partner programs; and other federal, state, and local government programs may have resources available that can be integrated into the proposed project. ETA encourages grantees and their partners to be entrepreneurial as they seek out, utilize, and sustain these resources when creating effective solutions to the workforce challenges faced by older individuals.

Applicants are encouraged to submit projects that leverage existing investments. These investments may be active within the region, such as those from ETA funding sources, including WIRED Initiative grants, Community-Based Job Training Grants, HGJTI funds, or WIA formula funds, or may come from other government, private sector, or philanthropic sources. Applicants are also encouraged to leverage existing investments in products, models, or tools that may be of use in the project.

*D. Focus Areas of Older Worker Demonstration Grants*

While a range of strategies and approaches will be considered for funding, ETA encourages applicants to address one or more of the following focus areas: Innovative Training Techniques and Service Delivery Strategies, Facilitating Self-Employment for Older Workers, Career Pathways, Career Awareness and Outreach, Building Education and Training Capacity, and Disadvantaged Older Worker Populations. In addition, strategies proposed by the applicants should be well-developed, address regional workforce challenges, and include training to prepare or adapt the skills of unemployed or incumbent older workers so they can be utilized in the targeted industries or economic sectors.

1. Innovative Training Techniques and Service Delivery Strategies

Applicants are encouraged to submit proposals that include innovative

training techniques and service delivery strategies.

*Training Techniques.* Based on older workers' existing expertise, learning styles, and other factors, specific training techniques may be particularly effective in helping prepare older individuals for employment opportunities. Different training techniques may be more effective for older individuals than for their younger counterparts. Applicants are encouraged to focus on the development and distribution of training that is targeted at mature audiences. Examples would include, but are not limited to, contextualized learning; methods for upgrading specific occupational skills; techniques for delivering training in computer and technological skills; and comprehensive training models that include wraparound services, such as assessment and follow-up, and appropriate supportive services (provided through leveraged resources). Applicants are also encouraged to utilize technology-based learning (TBL) models in their training programs. TBL can be defined as the learning of content via all electronic technology, including the Internet, intranets, satellite broadcasts, audio and video tape, video and audio conference, Internet conferencing, chat rooms, bulletin boards, Web casts, computer-based instruction and CD-ROM. It encompasses related terms, such as online learning, Web-based learning, computer-based learning and e-learning. TBL may be particularly appropriate for those older workers who already possess considerable work experience and job skills, but need to update specific skills or adapt them to new industries or occupations. TBL also allows incumbent workers to brush up their skills during non-work hours, at their own convenience.

*Service Strategies.* Applicants are encouraged to include innovative strategies for delivering training and related services to older workers. Such strategies might entail ways to enhance the capacity of the One-Stop Career Center system to serve older workers, creating partnerships that would be particularly effective in serving an older population, and/or bundling services that would be particularly valuable to support older worker training and employment. Examples in this focus area would include, but are not limited to:

- Affiliate One-Stop Career Centers associated with senior centers or community and faith-based organizations that specialize in training and placing older workers.
- Models undertaken by some community colleges to develop training and placement opportunities for older workers to meet current local labor market needs. These colleges have created educational and vocational training programs tailored to older peoples' learning styles, and offer student advisor and supportive services (which could be provided through leveraged resources) to older students. Workforce Investment Boards often collaborate with community colleges on these efforts to provide funding, labor market information, connections with employers, and referrals.
- Training workforce professionals within One-Stop Career Centers on how to effectively provide employment and training services to older individuals.

2. Facilitating Self-Employment for Older Workers

Applicants are encouraged to submit proposals that focus on entrepreneurial training for older individuals. Americans ages 55 to 64 form small businesses at the highest rate of any age group—28 percent higher than the average for all adults. Yet, many self-employed older individuals still face risks and challenges such as inadequate access to capital and/or lack of information and training on developing an effective business plan. For many older individuals who have been laid off from their jobs, their most viable option may be starting their own business. Applicants are encouraged to include strategies to help older workers acquire the skills they need to successfully launch their own enterprises. Applicants could consider collaborative efforts with Small Business Administration programs, such as Small Business Development Centers and Women's Business Centers, or other appropriate partners that would provide assistance in facilitating self-employment for older workers.

3. Career Pathways

Applicants are encouraged to include strategies that focus on creating career pathways for older workers. Although career pathways can take many forms, they are generally a sequence of employment opportunities for workers who gain new skills to advance in their careers, by either moving vertically to a more advanced position within their occupation or industry or laterally across occupations or industries to a position that relates to the worker's original career. For older workers, career pathways offer opportunities to adapt their skills and experience through lateral moves in their current organization and industry, or to new occupations or industries. Sometimes, such moves require minimal training to adapt skills to a new industry or occupation (such as learning new terminology). Other times, it may require learning new skills or retooling old skills. In either case, the worker's years of past on-the-job experience will benefit both the worker and his or her new employer.

Career pathways are of value to many older workers who wish to pursue new challenges, develop new skills, seek opportunities to move up, or transfer their skills to a different, but related, occupation. They may also be appropriate for older individuals with disabilities or health problems. For example, a nurse who can no longer work in that occupation because of back injuries, may be trained for and move to a position in medical records using knowledge of medical terminology as a transferable skill.

4. Career Awareness and Outreach

Applicants are encouraged to submit projects that integrate career awareness and outreach into education and training programs for older workers, including job-readiness opportunities, job shadowing and information sessions, and the provision of information on career opportunities in targeted industries and economic sectors. Career awareness and outreach components should leverage existing industry marketing and campaign efforts, if applicable, including the development of Web sites, videos, podcasts, print and multimedia materials, televisions ads, and other promotional materials.

5. Building Education and Training Capacity

Applicants are encouraged to submit projects that enhance the capacity of community colleges, proprietary training providers, labor-management organizations, and/or other education and training providers to provide training to older workers to upgrade their skills and facilitate career transitions into employment in high-growth, high-demand industries. Examples of capacity building activities include, but are not limited to: (1) The development or adaptation of competency models and curricula to support training of older workers; (2) the development of innovative curricula, teaching methods, and instructional design to maximize the impact of the initiative in meeting the skills needs of employers; (3) innovative strategies to ensure availability of qualified and certified instructors for older worker training; and (4) support

for clinical experiences required for certification or licensure.

Capacity building activities should be directly linked to the specific training for older workers supported under the grant. To the greatest extent possible, applicants should leverage existing curricula and training or certification programs that have demonstrated results for an older worker population, or could be effectively adapted for this population. If existing curricula or other capacity building products and activities are not sufficient, applicants should clearly explain why.

6. Disadvantaged Older Workers

Applicants are encouraged to include strategies in their project that focus on the training and placement of particularly disadvantaged and underutilized groups among the older worker population. Examples of disadvantaged and underutilized groups include older persons ages 65 and older, older dislocated workers, older individuals with disabilities, displaced homemakers and women re-entering the labor force, retired veterans, older military spouses, older ex-offenders, older minority populations, and older new Americans. Strategies focused on these worker groups might include both outreach and preparation strategies, partnerships with community or faith-based organizations or other experienced providers with expertise in working with non-traditional labor pools, and training services combined with mentorships and supportive services (which could be provided through leveraged resources).

*E. Technical Assistance*

Fund recipients under this solicitation will be provided with the opportunity to receive technical assistance after grant awards have been made. This may include, but is not limited to, the provision of data profiles of their regions and tools to use the data in planning and project implementation and participation in grantee meetings to facilitate sharing information across demonstration projects. Participation in any technical assistance activities by grant recipients under this solicitation is voluntary and is not a condition for receiving funding.

*F. Use of Funds/Allowable Activities*

Grants selected under this solicitation will be funded by H–1B visa fees as authorized under Sec. 414(c) of the American Competitiveness and Workforce Improvement Act of 1998 (Pub. L. 105–277, title IV) as amended by Public Law 108–447 (codified at 29 U.S.C. 2916a). These funds are focused on the development of the workforce and may be used to provide training and related activities to workers to assist them in gaining the skills and competencies needed to obtain and upgrade career ladder employment in industries and economic sectors projected to experience significant growth. Examples of activities related to training include career awareness and outreach, strategies to promote career pathways, and activities to enhance the capacity of education and training providers. Funds available under this solicitation may only be used for projects that provide training in the occupations and industries for which employers pay H–1B visa application fees that generate these funds and the related activities limited to those necessary to support training in such occupations and industries. (See Attachment: H–1B Industry Sectors and Occupations). Funds may also be used to enhance the provision of job training services and information as authorized in 29 U.S.C. 2916(a)(2)(B).

**Part II. Award Information**

*A. Award Amount*

ETA intends to fund 10 to13 grants ranging from $750,000 to $1,000,000 through this solicitation. However, this does not preclude ETA from funding grants at either a lower or higher amount, or funding a smaller or larger number of projects, based on the type and the number of quality submissions. Applicants should recognize that the funds available through this solicitation are designed to complement additional leveraged resources rather than be the sole source of funds for the proposal.

Applicants should note that selection of an organization as a grantee does not constitute approval of the grant application as submitted. Before the actual grant is awarded, ETA may enter into negotiations about such items as program components, allowable activities, staffing and funding levels, and administrative systems in place to support grant implementation. If the negotiations do not result in a mutually acceptable submission, the Grant Officer reserves the right to terminate the negotiation and decline to fund the application.

*B. Period of Performance*

The period of grant performance will be 36 months from the date of execution of the grant documents. This performance period will include all necessary implementation and start-up activities, participant follow-up for outcomes, and grant close-out activities. A timeline clearly detailing these required grant activities and their expected completion dates must be included in the grant application. If applied for, and with significant justification, ETA may elect to exercise its option to award no-cost extensions to these grants for an additional period at its own discretion, based on the success of the project and other relevant factors.

**Part III. Eligibility Information and Other Grant Specifications**

*A. Eligible Applicants*

Given that the focus of this solicitation is to address the workforce challenges facing older individuals by developing models for talent development in regional economies that recognize older workers as a valuable labor pool and include employment and training strategies to retain and/or connect older workers to jobs in high growth, high demand industries critical to the regional economy, the preferred applicants are Local Workforce Investment Boards. Others may apply as described below.

The preferred applicant for this solicitation is a legal entity that represents the local workforce investment system as follows:

- A Local Workforce Investment Board (LWIB), as established under Section 117 of the Workforce Investment Act of 1998 (WIA) (Pub. L. 105–220), that has been incorporated; or
- In areas where the LWIB is not incorporated, the legal entity that serves as the fiscal agent for the local workforce investment area.

Other applicants for this solicitation may include:

- A non-LWIB entity with the concurrence from the LWIB (this would require evidence of the board's support and involvement in the project along with a letter of concurrence).
- All other applicants without a letter of concurrence from the LWIB (such applicants must demonstrate how the proposed activities will be connected to the region's talent and economic development strategies, including improvement of services to older workers through the LWIB).

If the eligible applicant will not be the fiscal agent for the grant, then the applicant must identify the designated entity that will serve as the fiscal agent for the grant by clearly providing the legal name and EIN of the fiscal agent in the abstract and on the Standard Form (SF) 424.

*B. Eligible Participants*

Individuals ages 55 and older, from any income bracket (including at or below the poverty line), including

unemployed individuals or incumbent workers, are eligible to participate in the activities funded by the grants awarded under this solicitation.

*C. Cost Sharing or Matching*

Cost sharing, matching, or cost participation is not required for eligibility. However, applicants are strongly encouraged to leverage resources from key entities in the strategic partnership in order to maximize the impact of the project in the region. Applicants should describe what resources, new and existing, may support the goals of the project. Other federal funds that are leveraged should be explicitly identified. While the failure to offer leveraged resources as part of an application will not preclude consideration, leveraged resources will be taken into consideration during application review as one element of the ''Strength of Regional Partnership'' evaluation criterion.

*D. Replication and Dissemination*

ETA is currently pursuing an aggressive national dissemination strategy that focuses on widely and publicly distributing grantee products through a network of stakeholders including education and industry partners and the public workforce investment system. The products developed through the HGJTI include but are not limited to curriculum, competency models and career ladders, distance learning tools, career awareness and outreach materials, case studies, program management and implementation tools, reports and databases, creation of industry skill centers for older workers, and Web sites. HGJTI grantees are required to submit to ETA products developed with grant funding; these products will be included in ETA's dissemination strategy. In addition, grantees must provide evidence of an independent review by subject matter experts of the deliverables produced through the grant activity. (Applicants should allot funds in their grant applications for the independent review of their deliverables by subject matter experts). Subject matter experts are individuals with demonstrated experience in developing and/or implementing similar deliverables. These experts could include grantees' peers, such as representatives from neighboring education and training providers. Grantees must provide ETA with the results of the review and the qualifications of the reviewer(s) at the time the deliverable is provided to ETA.

All of these deliverables and their independent reviews will be made available online at *http://www.workforce3one.org.* Workforce3One offers the workforce system, employers, economic development professionals, and education professionals an innovative knowledge network designed to create and support demand-driven communities—that responds directly to business needs and prepares workers for good jobs in the fastest growing careers. By supporting replicable projects that can be implemented in multiple areas and industries, ETA is able to maximize its investment by expanding the grant's impact beyond the initial grant site and helping additional businesses and workers in other regions.

*E. Veterans Priority*

The Jobs for Veterans Act (Pub. L. 107–288) provides priority of service to veterans and spouses of certain veterans for the receipt of employment, training, and placement services in any job training program directly funded, in whole or in part, by the Department of Labor. In circumstances where a grant recipient must choose between two equally qualified candidates for training, one of whom is a veteran, the Jobs for Veterans Act requires that grant recipients give the veteran priority of service by admitting him or her into the program. Please note that to obtain priority of service a veteran must meet the program's eligibility requirements. ETA Training and Employment Guidance Letter (TEGL) No. 5–03 (September 16, 2003) provides general guidance on the scope of the Job for Veterans Act and its effect on current employment and training programs. TEGL No. 5–03, along with additional guidance, is available at the ''Jobs for Veterans Priority of Service'' Web site: *http://www.doleta.gov/programs/vets.*

**Part IV. Application and Submission Information**

*A. Address to Request Application Package*

This section provides the application submission and receipt instructions for ETA program applications. Please read the following instructions carefully and completely. This solicitation contains all of the information and Web site links to forms needed to apply for grant funding.

*B. Content and Form of Application Submission*

The proposal must consist of two separate and distinct parts—Part I, the Cost Proposal, and Part II, the Technical Proposal. Applications that fail to adhere to the instructions in this section may be considered non-responsive and may not be given further consideration. Please note that it is the applicant's responsibility to ensure that the funding amount requested is consistent across all parts and sub-parts of the application.

Part I of the proposal is the Cost Proposal and must include the following:

- SF 424, ''Application for Federal Assistance'', available at: *http://www07.grants.gov/agencies/forms_repository_information.jsp.* Upon confirmation of an award, the individual signing the SF 424 on behalf of the applicant shall be considered the Authorized Representative of the applicant.
- All applicants for federal grant and funding opportunities are required to have a Dun and Bradstreet (DUNS) number. For more information about the DUNS number, see OMB Notice of Final Policy Issuance, 68 FR 38402 (June 27, 2003). Applicants must supply their DUNS number on the SF 424. The DUNS number is a nine-digit identification number that uniquely identifies business entities. Obtaining a DUNS number is easy and there is no charge. To obtain a DUNS number, access this Web site: *http://www.dunandbradstreet.com* or call 1–866–705–5711.
- The SF 424A Budget Information Form, available at *http://www07.grants.gov/agencies/forms_repository_information.jsp.* In preparing the Budget Information Form, the applicant must provide a concise narrative explanation to support the request. The budget narrative should break down the budget and corresponding leveraged resources by deliverable, making clear distinctions between training and (if any) capacity building costs, and should discuss precisely how the administrative costs support the project goals. All applicants should indicate training costs-per participant by dividing the total amount of the budget designated for training by the number of participants trained.

Please note that applicants that fail to provide an SF 424, SF 424A and a budget narrative will be removed from consideration prior to the technical review process. If the proposal calls for integrating WIA or other federal funds or includes other leveraged resources, these funds should not be listed on the SF 424 or SF 424A Budget Information Form, but should be described in the budget narrative. The amount of federal grant funding (H–1B) requested for the entire period of performance (36 months) should be shown together on the SF 424 and SF 424A Budget

Information Form. Applicants are also encouraged, but not required, to submit the OMB Survey No. 1890–0014: Survey on Ensuring Equal Opportunity for Applicants, which can be found at: *http://www07.grants.gov/agencies/forms_repository_information.jsp*.

Part II of the application is the Technical Proposal, which demonstrates the applicant's capabilities to plan and implement the grant in accordance with the provisions of this solicitation, and includes a project description as described in the Evaluation Criteria section of this solicitation. The project description is limited to 20 double-spaced, single-sided, 8.5 inch x 11 inch pages with 12 point text font and one-inch margins. Any pages over the 20-page limit will not be reviewed. The applicant may provide additional information, such as resumes, a staffing pattern, statistical information, general letters of support and related material in attachments, which may not exceed 15 pages. Any additional information in attachments beyond the 15-page limit will not be reviewed.

The required letters of commitment from partners that help demonstrate a firm commitment to the project through the provision of expertise and/or resources must be submitted as attachments. These letters of commitment will not count against the allowable maximum 35-page total. A letter of concurrence from a LWIB that demonstrates the board's support and involvement in the project also does not count against the allowable maximum page totals.

Please note that applicants should not send letters of commitment or support separately to ETA because letters are tracked through a separate system and will not be attached to the application for review. The applicant must clearly reference any partners in the text of the Technical Proposal. Except for the discussion of any leveraged resources to address the evaluation criteria, no cost data or reference to prices should be included in the Technical Proposal. The following information is required:

a. A table of contents listing the application sections.

b. A one-to-two page abstract summarizing the proposed project and applicant profile information including: applicant name; industry focus; brief description of the workforce challenges addressed; brief description of the proposed strategies; key partners; funding amount requested; amount of leveraged resources; and number of people trained and other key grant outcomes.

c. A one-to-two page timeline outlining project activities, including expected start-up, implementation, participant follow-up for outcomes, grant close-out and other activities.

d. A summary of up to three pages listing all projected outcomes for the project that includes the following:

1. For training-related outcomes, for participants served with grant funds list the projected numbers for all training-related activities provided through the grant, including but not limited to:

i. Entered Employment Rate (common measure);

ii. Total participants served;

iii. Total participants beginning education/training activities;

iv. Total participants completing education/training activities;

v. Total participants that complete education/training activities that receive a degree/certificate;

vi. Total participants that complete education/training activities that enter employment; and

vii. Total participants that complete education/training activities that enter training-related employment.

2. For capacity building outcomes (for activities funded by grant funds) include:

i. All products to be developed during the grant period.

ii. List the capacity building product (including, but not limited to, curriculum and course materials, competency models and career ladders, outreach materials, reports and databases, and program management and implementation tools); and

iii. The projected date the product(s) will be completed;

A. The number of instructors projected to participate in capacity building activities;

B. The number of students projected to be trained by these instructors; and

C. The estimated number of other individuals (besides these students and instructors) projected to participate and/or benefit from capacity building activities.

Please note that the abstract, table of contents, timeline, and listing of outcomes are not included in either of the page limits mentioned above. Applicants that do not provide Part II of the application will be removed from consideration prior to the technical review process.

Applications may be submitted electronically on Grants.gov or in hardcopy via mail or hand delivery. These processes are described in further detail in Part IV(C). Applicants submitting proposals in hard-copy must submit an original signed application (including the SF 424) and one ''copy-ready'' version free of bindings, staples or protruding tabs to ease in the reproduction of the proposal by ETA. Applicants submitting proposals in hard-copy are also requested, though not required, to provide an identical electronic copy of the proposal on CD–ROM.

*C. Submission Date, Times, and Addresses*

The closing date for receipt of applications under this announcement is February 19, 2009. Applications must be received at the address below no later than 4 p.m. (Eastern Time) if submitted by hard-copy. Applications submitted through *http://www.grants.gov* must be successfully submitted by February 19, 2009, 11:59:59 pm (Eastern Time).

Applications sent by e-mail, telegram, or facsimile (FAX) will not be accepted. If an application is submitted by both hard-copy and through *http://www.grants.gov* a letter must accompany the hard-copy application stating why two applications were submitted and the differences between the two submissions. If no letter accompanies the hard-copy we will review the copy submitted through *http://www.grants.gov*. For multiple applications submitted through *http://www.grants.gov* we will review the latest submittal.

Applications that do not meet the conditions set forth in this notice will not be honored. No exceptions to the mailing and delivery requirements set forth in this notice will be granted.

Mailed applications must be addressed to the U.S. Department of Labor, Employment and Training Administration, Division of Federal Assistance, Attention: Melissa Abdullah, Reference SGA/DFA PY–08–06, 200 Constitution Avenue, NW., Room N4716, Washington, DC 20210. Applicants are advised that mail delivery in the Washington area may be delayed due to mail decontamination procedures. Hand-delivered proposals will be received at the above address. All overnight mail will be considered to be hand-delivered and must be received at the designated place by the specified closing date and time.

1. *Electronic Delivery*. ETA is participating in the Grants.gov Initiative that provides the grant community a single site to find and apply for grant funding opportunities. ETA encourages applicants to submit their applications electronically through *http://www.grants.gov/Apply*.

2. The following describes what to expect when applying on line using Grants.gov/Apply:

a. *Instructions*. On the site, you will find step-by-step instructions which enable you to apply for the ETA funds.

*Grants.gov* features a simple, unified application process that makes it possible for applicants to apply for grants online. The first thing to do if you're thinking about applying through Grants.gov is to register with the site. There are six steps to complete the registration process at Grants.gov. The information applicants need to understand and execute the steps can be found at *http://www.grants.gov/GetStarted*. Applicants should read these steps carefully. The site also contains a registration checklist at *http://www.grants.gov/assets/Organization_Steps_Complete_Registration.pdf* to help you walk through the process. ETA recommends that you download the checklist and prepare the information requested before beginning the registration process. Reviewing and assembling required information before beginning the registration process will make the process fast and smooth and save time.

b. *DUNS Requirement*. All applicants applying for funding, including renewal funding, must have a Dun and Bradstreet Universal Data Numbering System (DUNS) number. The DUNS number must be included in the data entry field labeled ''Organizational Duns'' on the form SF–424. Instructions for obtaining a DUNS number can be found in the instructions for registration.

c. *Central Contractor Registry and Credential Provider Registration*. In addition to having a DUNS number, applicants applying electronically through Grants.gov must register with the Federal Central Contractor Registry and with a Credential Provider. Instructions for registering in the Central Contractor Registry and for registering with a credential provider can be found at *http://www.grants.gov/GetStarted*. All applicants filing electronically must register with the Central Contractor Registry and receive credentials from the Grants.gov credential provider in order to apply on line. Failure to register with the Central Contractor Registry and credential provider will result in your application being rejected by the Grants.gov portal. The registration process is a separate process from submitting an application. Applicants are, therefore, encouraged to register early. The registration process can take approximately two weeks to be completed. Therefore, registration should be done in sufficient time to ensure it does not impact your ability to meet required submission deadlines. You will be able to submit your application online anytime after you receive your e-authentication credentials.

d. *Electronic Signature*. Applications submitted through Grants.gov constitute submission as electronically signed applications. The registration and e-authentication process establishes the Authorized Organization Representative (AOR). When you submit the application through Grants.gov, the name of your AOR on file will be inserted into the signature line of the application. Applicants must register the individual who is able to make legally binding commitments for the applicant organization as the AOR.

3. *Instructions on how to submit an electronic application to ETA via Grants.gov/Apply*. Grants.gov has a full set of instructions on how to apply for funds on its Web site at *http://www.grants.gov/CompleteApplication*. The following provides simple guidance on what you will find on the Grants.gov/Apply site. Applicants are encouraged to read through the page entitled, ''Apply For Grants'' before getting started. Grants.gov allows applicants to download the application package, instructions and forms that are incorporated in the instructions, and work off line. In addition to forms that are part of the application instructions, there will be a series of electronic forms that are provided utilizing an Adobe reader.

a. *Adobe Reader*. The Adobe Reader is available free for download at *http://www.grants.gov/help/download_software.jsp*. The Adobe Reader allows applicants to read the electronic files in a form format so that they will look like any other Standard or The Employment and Training Administration form. The Adobe forms have content sensitive help. This engages the content sensitive help for each field you will need to complete on the electronic form. The Adobe forms can be downloaded and saved on your hard drive, network drive(s), or CDs. To test if your version of Adobe Reader is compatible with Grants.gov please go to *http://www.grants.gov/applicants/AdobeVersioningTestOnly.jsp* (**Note:** For the Adobe Reader, Grants.gov is compatible with versions 8.1.1 and later versions. Please do not use lower versions of the Adobe reader).

b. *Mandatory Fields in Adobe Forms*. In the Adobe forms you will note fields that will appear with a background color on the data fields to be completed. These fields are mandatory fields and they must be completed to successfully submit your application.

c. *Completion of SF–424 Fields First*. The Adobe forms are designed to fill in common required fields such as the applicant name and address, DUNS number, etc., on all Adobe electronic forms. To trigger this feature, an applicant must complete the SF–424 information first. Once it is completed the information will transfer to the other forms.

d. *Customer Support*. The Grants.gov Web site provides customer support via (800) 518–GRANTS (this is a toll-free number) or through e-mail at *support@grants.gov*. The customer support center is open from 7 a.m. to 9 p.m. Eastern time, Monday through Friday, except federal holidays, to address Grants.gov technology issues. For technical assistance to program related questions for this solicitation please contact the number listed in Part VII. Agency Contacts.

4. Timely Receipt Requirements and Proof of Timely Submission

a. *Electronic Submission*. All applications must be received by *http://www.grants.gov/Apply* by February 19, 2009, 11:59:59 pm (Eastern Time). Proof of timely submission is automatically recorded by Grants.gov. An electronic time stamp is generated within the system when the application is successfully received by Grants.gov. Within two business days of application submission, Grants.gov will send the applicant two e-mail messages to provide the status of application progress through the system. Grants.gov will provide either an error or a successfully received transmission message. The first e-mail, almost immediate, will confirm receipt of the application by Grants.gov. The second e-mail (within 48 hours of submission) will indicate the application has either been successfully validated, and therefore successfully submitted, or has been rejected due to errors. It is the sole responsibility of the applicant to ensure a timely submission, therefore sufficient time should be allotted for submission (two business days). It is important to note that if sufficient time is not allotted and a rejection notice is received after the due date and time, the application will not be considered successfully submitted. Proof of Timely submission shall be the date and time that Grants.gov receives your successfully submitted application. Applications received by Grants.gov, after the established due date for the program will be considered late and will not be considered for funding by ETA. ETA suggests that applicants submit their applications during the operating hours of the Grants.gov Support Desk, so that if there are questions concerning transmission, operators will be available to walk you through the process. Submitting your application during the Support Desk hours will also ensure

that you have sufficient time for the application to complete its transmission prior to the application deadline. Applicants using dial-up connections should be aware that transmission should take some time before Grants.gov receives it. The Grants.gov Support desk reports that some applicants abort the transmission because they think that nothing is occurring during the transmission process. Please be patient and give the system time to process the application. Uploading and transmitting many files, particularly electronic forms with associated XML schemas, will take some time to be processed.

**Note:** It is highly recommended that online submissions be completed at least two business days prior to the date specified for receipt of applications to ensure that the applicant still has the option to submit by overnight delivery service in the event of any electronic submission problems. Applicants take a significant risk by waiting to the last day to submit by grants.gov.

''Postmarked'' means a printed, stamped or otherwise placed impression (exclusive of a postage meter machine impression) that is readily identifiable, without further action, as having been supplied or affixed on the date of mailing by an employee of the U.S. Postal Service. Therefore, applicants should request the postal clerk to place a legible hand cancellation ''bull's eye'' postmark on both the receipt and the package. Evidence of timely submission by a professional overnight delivery service must be demonstrated by equally reliable evidence created by the delivery service provider indicating the time and place of receipt. Failure to adhere to the above instructions will be a basis for a determination of nonresponsiveness.

*D. Intergovernmental Review*

This funding opportunity is not subject to Executive Order 12372, ''Intergovernmental Review of Federal Programs.''

*E. Funding Restrictions*

Determinations of allowable costs will be made in accordance with the applicable federal cost principles. Disallowed costs are those charges to a grant that the grantor agency or its representative determines not to be allowed in accordance with the applicable federal cost principles or other conditions contained in the grant. Successful and unsuccessful applicants will not be entitled to reimbursement of pre-award costs.

1. Indirect Costs

As specified in OMB circular Cost Principles, indirect costs are those that have been incurred for common or joint objectives and cannot be readily identified with a particular final cost objective. In order to utilize grant funds for indirect costs incurred, the applicant must obtain an Indirect Cost Rate Agreement with its federal cognizant agency either before or shortly after grant award.

2. Administrative Costs

Under the HGJTI, an entity that receives a grant to carry out a project or program may not use more than 10 percent of the amount of the grant to pay administrative costs associated with the program or project. Administrative costs could be direct or indirect costs, and are defined at 20 CFR 667.220. Administrative costs do not need to be identified separately from program costs on the SF 424A Budget Information Form. They should be discussed in the budget narrative and tracked through the grantee's accounting system. To claim any administrative costs that are also indirect costs, the applicant must obtain an indirect cost rate agreement from its federal cognizant agency.

3. *ETA Intellectual Property Rights.* The Federal Government reserves a paid-up, nonexclusive and irrevocable license to reproduce, publish, or otherwise use, and to authorize others to use for federal purposes: (i) The copyright in all products developed under the grant, including a subgrant or contract under the grant or subgrant; and (ii) any rights of copyright to which the grantee, subgrantee or a contractor purchases ownership under an award (including but not limited to curricula, training models, technical assistance products, and any related materials). Such uses include, but are not limited to, the right to modify and distribute such products worldwide by any means, electronically or otherwise. Federal funds may not be used to pay any royalty or licensing fee associated with such copyrighted material, although they may be used to pay costs for obtaining a copy which are limited to the developer/seller costs of copying and shipping. If revenues are generated through selling products developed with grant funds, including intellectual property, these revenues are program income. Program income is added to the grant and must be expended for allowable grant activities.

4. *Legal Rules Pertaining to Inherently Religious Activities by Organizations that Receive Federal Financial Assistance.* Direct Federal grants, sub-awards, or contracts under this program shall not be used to support inherently religious activities such as religious instruction, worship, or proselytization. Therefore, organizations must take steps to separate, in time or location, their inherently religious activities from the services supported with DOL financial assistance under this program. Neutral, secular criteria that neither favor nor disfavor religion must be employed in the selection of grant and sub-grant recipients. In addition, under the Workforce Investment Act of 1998 and DOL regulations implementing the Workforce Investment Act, a recipient may not use direct Federal assistance to train a participant in religious activities, or employ participants to construct, operate, or maintain any part of a facility that is used or to be used for religious instruction or worship. See 29 CFR 37.6(f). Under WIA, ''no individual shall be excluded from participation in, denied the benefits of, subjected to discrimination under, or denied employment in the administration of or in connection with, any such program or activity because of race, color, religion, sex (except as otherwise permitted under Title IX of the Education Amendments of 1972 and the Religious Freedom Restoration Act of 1993), national origin, age, disability, or political affiliation or belief.'' Regulations pertaining to the Equal Treatment for Faith-Based Organizations, which includes the prohibition against supporting inherently religious activities with direct DOL financial assistance, can be found at 29 CFR part 2, Subpart D. Provisions relating to the use of indirect support (such as vouchers) are at 29 CFR 2.33(c) and 20 CFR 667.266.

A faith-based organization receiving federal financial assistance retains its independence from Federal, State, and local governments, and may continue to carry out its mission, including the definition, practice, and expression of its religious beliefs. For example, a faith-based organization may use space in its facilities to provide secular programs or services supported with Federal financial assistance without removing religious art, icons, scriptures, or other religious symbols. In addition, a faith-based organization that receives Federal financial assistance retains its authority over its internal governance, and it may retain religious terms in its organization's name, select its board members on a religious basis, and include religious references in its organization's mission statements and other governing documents in accordance with all program requirements, statutes, and other applicable requirements governing the conduct of DOL-funded activities.

The Department notes that the Religious Freedom Restoration Act

(RFRA), 42 U.S.C. sec 2000bb, applies to all Federal law and its implementation. If your organization is a faith-based organization that makes hiring decisions on the basis of religious belief, it may be entitled to receive Federal financial assistance under Title I of the Workforce Investment Act and maintain that hiring practice even though Section 188 of the Workforce Investment Act contains a general ban on religious discrimination in employment. If you are awarded a grant, you will be provided with the information on how to request such an exemption.

Faith-based and community organizations may reference ''Transforming Partnerships: How to Apply the U.S. Department of Labor's Equal Treatment and Religion-Related Regulations to Public-Private Partnerships'' at: *http://www.workforce3one.org/public/_shared/detail.cfm?id=5566&simple=false*.

5. Use of Funds for Supportive Services

Use of grant funds for supportive services, such as transportation and childcare, is not an allowable cost under this solicitation, including funds provided through stipends for such purposes.

*F. Withdrawal of Applications*

Applications may be withdrawn by written notice at any time before an award is made.

**Part V. Application Review Information**

*A. Evaluation Criteria*

This section identifies and describes the criteria that will be used to evaluate Older Worker Demonstration proposals. These criteria and point values are:

| Criterion | Points |
|---|---|
| 1. Statement of Need | 10 |
| 2. Strength of Strategic Partnerships | 20 |
| 3. Strategies for Older Worker Demonstration Projects | 25 |
| 4. Integration with Regional Economic and Talent Development Strategies | 10 |
| 5. Outcomes | 15 |
| 6. Program Management and Organizational Capacity | 10 |
| 7. Dissemination, Sustainability and Replicability | 10 |
| Total Possible Points | 100 |

1. Statement of Need (10 Points)

Applicants must demonstrate a clear and specific need for federal investment in their proposed project. This should be accomplished by identifying the industry, or multiple industries, of focus and establishing that it satisfies ETA's criteria for high-growth, high-demand industries in the regional economy (as described in Part I(C) of this solicitation). Applicants should also identify how their project will address workforce challenges specific to older workers. Finally, applicants should explain how they will meet specific needs in their regional economy. Applicants are encouraged to work collaboratively with their state's labor market information directors to identify and analyze economic and workforce data that characterize the regional economy, provide an understanding of the high-growth industries in the region, and provide an understanding of the available labor pool, including data on older workers in the region. Scoring for this criterion will be based on the following factors:

• *Regional and industry workforce challenges (4 points).* Applicants must describe the employment and training needs of the regional economy and industries in that regional economy by: (1) Identifying the specific region of focus for the proposal; (2) identifying specific industries and occupations that are critical to the economy in the proposed area; (3) describing the specific hiring, retention, training and/or other workforce challenges facing employers in the region; and (4) describing the current approaches of employers in the region to utilizing older workers, and why a broader, regional approach is necessary. Examples of regional and industry workforce challenges include shortages of workers in specific occupations, unmet demand for workers in specific occupations, and difficulty recruiting individuals in disadvantaged or underutilized labor pools such as low-income older workers. Applicants must discuss how these workforce challenges affect the specific employer partners contained in their proposal.

• *Challenges facing older workers (4 points).* Applicants must clearly articulate the specific workforce challenges facing older workers to be addressed by their proposal. Applicants should specify whether they will be addressing one or more of the challenges discussed in Part I(A) of this solicitation or different challenges that are not listed. Applicants must demonstrate the existence of such challenges for the older individuals in their region and identify the scope of these challenges. Additionally, applicants should provide evidence demonstrating that existing models and approaches are not sufficient to address these challenges and that there is a need for federal investment in the proposed activities.

• *Resource mapping (2 points).* Applicants must describe the resource mapping that has been conducted that demonstrates that current resources are not sufficient to address the workforce challenges. Resource mapping entails identifying all the assets in a region that can be used in support of workforce and economic development efforts. Applicants may draw from a variety of resources for supporting data, including: Traditional labor market information, such as projections; industry data from trade or industry associations, Chambers of Commerce, census.gov, state agencies on aging, or direct information from the local employers or industry; information on the regional economy from economic development agencies; and other transactional data, such as job vacancies. If capacity building activities are proposed as part of the project, applicants must demonstrate the existence of a capacity constraint in addressing the workforce challenges, in the area in which the grant activity will take place.

2. Strength of Strategic Partnerships (20 Points)

The applicant must clearly describe how the proposed project will be implemented by a strategic partnership comprised of a strong team of regional leaders. The proposed partnership must include at least one entity from each of the following three categories: The public workforce investment system; employers, industry associations, and business intermediaries, such as chambers of commerce; and educational institutions and training providers. Applicants must also demonstrate that

additional partners have been brought to the table to ensure that the full range of assets, resources, knowledge, and leadership are engaged in the project, and that the partnership includes entities that can act as levers of change to identify and address barriers to success. Additional partners could include, but are not limited to, national, state, or local aging organizations, including SCSEP grantees; economic development entities; apprenticeship programs; local, regional, and state government; Indian and Native American tribes or organizations; the philanthropic community; and community and faith-based organizations.

The applicant must identify the partners by organizational name and category, explain their role in the project, and document the resources leveraged from each partner. Partners must verify their involvement in the project through a letter of commitment detailing the roles, responsibilities, and resources the partner will commit to the project. The letters of commitment must be attached to the proposal, as an appendix.

ETA encourages, and will be looking for, applications that go beyond the minimum level of partnership and demonstrate broader, substantive and sustainable partnerships. Scoring on this criterion will be based on the following factors:

*Evidence of partnerships and comprehensiveness of partnerships (10 points).* The applicant must provide a comprehensive list of strategic partners that will be included in the project and the articulation of each partner's role in the project. Points for this factor will be awarded based on:

- The degree to which each partner (including all required partners) plays a committed role (either financial or non-financial) in the proposed project.
- The breadth and depth of each partner's contribution, including the specific services and activities of each, their knowledge and experience concerning grant activities, and their ability to impact the success of the project.
- Evidence that key partners have expressed a clear dedication to the project and understand their area of responsibility, in the form of letters of commitment from required partners.
- Evidence that the partnership includes the key regional assets and institutions necessary to address the identified workforce challenges. If key regional assets and institutions are not currently engaged in the partnership, then the applicant must clearly identify how appropriate organizations or individuals will be brought into the partnership quickly.

*The role of the public workforce system (5 points).* Applicants must demonstrate a substantive and comprehensive role of the public workforce system in the project. Points for this factor will be awarded based on the following:

- The level of LWIB commitment and involvement in the project.
- The degree to which the role of each partner will support the objective of building the capacity of the workforce system to serve older individuals.
- The level of coordination that already exists between the project's partners and the workforce system.

*Partnership engagement and leveraged resources (5 points).* The applicant must demonstrate meaningful engagement of partners in project activities. Points for this factor will be awarded based on the following:

- A high level of coordination already exists among partners. If a high level of coordination does not exist, then the applicant must demonstrate that it has the capacity to quickly establish these links and discuss strategies for strengthening the partnership.
- The extent to which the applicant integrates partners' strengths and assets into project design and implementation.
- A plan for interaction and communication among partners at each stage of the project, from planning to execution.
- A full description of which partners have contributed leveraged resources, the specific contributions (cash and/or in-kind), the amount and nature of the contributions, and how they will contribute to the achievement of the goals of the project including any specific outcomes that will result from any leveraged resources the partners contribute to the project. Applicants must provide evidence (through letters of commitment) that their partners have expressed a clear commitment to provide the contribution.

3. Strategies for Older Worker Demonstration Project (25 Points)

The applicant must describe the proposed project in full, including each of the strategies, and how the strategies address the challenges described in the statement of need. Scoring for this criterion will be based on the following factors:

*Overview of the proposed project (8 points).* Points for this factor will be awarded based on how the applicant has addressed the following:

- A complete and detailed description of the specific strategies that will be implemented through the proposed project.
- A thorough description of the specific services and activities that the workforce system will provide as part of these strategies.
- The specific skills and competencies that are targeted through the training activities of the project and an explanation of how they will support career pathway growth for participants. Applicants should also note if and how the strategies will lead to industry-recognized credentials.
- Specific existing tools and approaches which the project will utilize should be identified, or an explanation of why existing tools and approaches are not sufficient to address the challenges.
- If applicable, applicants should indicate the special target populations of older workers to be served.
- How the individual strategies proposed for the project relate to each other and, together, represent an integrated, coherent approach.

*Addressing the needs of older workers and businesses (8 points).* Applicants should demonstrate that the proposed project addresses specific challenges facing older workers, including those facing older workers in the region identified in the statement of need, and outline specific methods that will be used to recruit program participants. Applicants should also detail how the project will address the specific workforce challenges facing employers in the region in which the project will operate.

*Evidence that the applicant has a clear understanding of the tasks required to successfully meet the objectives of the grant (9 points).* When assessing a proposal, weight will be given to the feasibility of a combined work plan and timeline, as well as the soundness of the budget justification. Points for this factor will be awarded based on how the applicant has addressed the following:

- An integrated work plan and timeline. This combined work plan/timeline should break the project down into its multiple steps and estimate how long each is likely to take (e.g., start-up and implementation activities, training and related activities, participant follow-up for outcomes, and grant closeout activities). The work plan/timeline should be highly detailed and include specific goals, objectives and activities.
- The budget line items are consistent with and tied to the workplan/timeline.
- The extent to which the budget is justified with respect to the adequacy

and reasonableness of the resources requested.

- Brief explanation of the cost-per-participant for the proposed training activities.

4. Integration With Regional Economic and Talent Development Strategies (10 Points)

A primary focus of this solicitation is demonstrating the connection of workforce strategies for older workers to broader talent development strategies driving economic growth in regional economies. Therefore, applicants must provide strong evidence of the connection of the grant activities to the region's economic and talent development strategies.

Scoring on this criterion will be based on the applicant's ability to demonstrate that their project is fully integrated into the region's economic and talent development strategy by:

- Summarizing the region's strategic vision for economic and workforce development efforts that will support regional talent development and economic growth.
- Describing how the strategies will support the regional economy by utilizing the mature workforce in a regional talent development strategy.
- Either describing: (1) How the proposed strategies for older workers are part of or complement existing approaches under regional talent development and economic development plans and initiatives; or (2) describing how their project is a catalyst for bringing partners together to begin the analysis and strategic planning in their region.
- Describing any regional partnerships that are part of their project and detail how the partnerships are broader and deeper in scope than the local partnerships in place to implement the proposed strategies.
- Describing the applicant's capability, either directly or through agreements with other entities, to implement the project on a region-wide basis.

5. Outcomes (15 Points)

The applicant must demonstrate a results-oriented approach to managing and operating the proposed project by fully describing the outcome categories and projected outcomes relevant to determining the success of the project. Scoring on this criterion will be based on the following factors:

*Description of Outcomes (8 points):* Applicants may earn up to 8 points for demonstrating that the outcome categories and projected outcomes for those categories have been identified. Applicants must address the two categories of outcomes described below—training and capacity building. In addition, applicants should include additional outcome categories, and projected outcomes for those categories, that would be appropriate for the project and/or individual strategies and are not covered by these two categories, if necessary. Applicants must include: (1) A description of the outcome category; and (2) a projected outcome.

- *Training Outcomes.* Applicants must provide projected outcomes for the entered employment rate, Adult Common Measure, for participants served with grant funds. Grantees must track outcomes for all three of ETA's Adult Common Measures (entered employment rate, employment retention rate, and average earnings) for these participants as well. In addition, applicants must also provide projections and track outcomes for each of the following categories for participants served with grant funds: total participants served; total number of participants beginning education/training activities; total number of participants completing education/training activities; total number of participants that complete education/training activities that receive a degree/certificate; total number of participants that complete education/training activities that enter employment; and total number of participants that complete education/training activities that enter training-related employment. Please note that applications that do not contain projections for all these categories cannot receive full points for this section. The required format and associated instructions that grantees will use to report their outcomes for these measures are available at *http://www.doleta.gov/Performance/Guidance/wia.cfm#HGBIT,* and provide grantees with additional information on all of the above referenced outcome categories. Applicants are strongly encouraged to review these instructions. Applicants must also identify the credential that participants will earn as a result of the proposed training, and the employer-, industry-, or state-defined standards associated with the credential. If the credential targeted by the training project is a certificate or performance-based certification, applicants should either (a) demonstrate employer engagement in the curriculum development process, or (b) indicate that the certification will translate into concrete job opportunities with an employer.
- *Capacity Building Outcomes.* Applicants must clearly describe all products, models, curricula, etc. that will be developed or acquired with grant funds. When applicants propose to use grant funds to develop curricula, instructional and course materials, and other types of deliverables, applicants must demonstrate that substantial research has been conducted to ensure that the proposed workforce solutions are not duplicative of existing materials. Applicants must conduct a thorough review of existing curricula, instructional and course materials, and other types of products that are available through and contained on ETA's Workforce$^3$One Web site. (A copy of the Workforce Solutions Catalogue may be downloaded from Workforce$^3$One at: *http://www.workforce3one.org/wfsolutions/).* In addition, applicants should also examine other sources that may have the types of materials that the applicant would like to use grant funds to develop. For example, if the grantee is interested in developing curricula there are a growing number of resources that house curricula in addition to ETA's Workforce$^3$One Web site such as: the U.S. Department of Education's Web site at *http://www.free.ed.gov;* Curriki, a compendium of open source curricula and other learning objects at *http://www.curriki.org;* and OpenCourseWare Consortium at *http://www.opencoursewareconsortium.org.* Industry association Web sites may also be a source of training materials. In their proposal, applicants should describe their research process for ensuring that the proposed workforce solutions are not duplicative of existing materials, including the specific sources that they researched, and indicate how the deliverables that they propose to develop differ from those materials that already exist. Finally, applicants should outline plans for having deliverables reviewed by an independent expert.

  Applicants must also indicate the impact of capacity building activities (i.e., the number of participants or entities who will benefit from proposed activities) provided with grant funds, where appropriate. All applicants must include projections and track outcomes (as applicable) for the number of instructors who will participate in capacity building activities; the number of students trained by those instructors; and the number of other people participating and/or benefitting from capacity building activities. Applicants must also describe the methodology for determining the impact of their capacity building activities.
- *Additional Outcomes.* Beyond the training and capacity building outcome categories described above, applicants should also identify outcome categories

and projected outcomes for any strategies to be undertaken through the project if their impact cannot be fully reported through the outcome categories above. These additional categories should reflect the unique attributes of the applicant's strategies. For example, applicants including entrepreneurial training for older individuals in their project could identify a projected outcome for the number of those individuals who start their own businesses. As another example, applicants planning to implement career awareness activities could identify projected outcomes for the number of people who participate in these activities. This could include the number of individuals attending a recruitment seminar, the number of user sessions on a Web site, or the number of individuals who were provided career awareness materials at an industry-related career awareness program.

*Appropriateness of outcomes (7 points):* Applicants may earn up to 7 points based on three factors: (1) The extent to which the projected outcomes are clearly identified and measurable, realistic and consistent with the objectives of the project; (2) the ability of the applicant to achieve the stated outcomes within the timeframe of the grant; and (3) the appropriateness of the outcomes with respect to both the extent of the workforce challenge described in the statement of need and the requested level of funding.

6. Program Management and Organizational Capacity (10 Points)

To satisfy this criterion, applicants must describe their proposed project management structure and organizational capacity including: (1) Clear identification of key personnel, their qualifications, an overall staffing pattern (with estimated time commitments for each key staff); and (2) justification that the applicant organization has significant capacity to accomplish the goals and outcomes of the project. Scoring for this criterion will be based on the following factors:

*Project Staff (4 points).* Applicants should identify key personnel, their roles in the proposed project, and their qualifications to accomplish the tasks associated with their assigned role(s). This should include the identification of a proposed project manager and a staffing pattern. The roles of staff and consultants, if applicable, should be clearly defined and linked to specific tasks. Applicants should also identify the percentage of time each person will commit to the project and ensure that it is sufficient to provide proper direction, management and timely completion of the project. An organizational chart may be included.

*Organizational Capacity (6 points).* Applicants should illustrate their organization's capacity to accomplish the goals and outcomes of the proposed project. This includes:

- A discussion of the applicant's capacity to accomplish the goals and outcomes of the project.
- A discussion of applicant's demonstrated fiscal and administrative capacity.
- A discussion of the applicant's ability to successfully lead and manage the partners and ensure there will be integration among the individual project components.
- A description of the applicant's ability to collect, manage, and report data in a way that allows consistent, accurate, and expedient reporting. Applicants should be aware that ETA has modified an existing software system to help grantees collect and report the performance data that is required by this grant, and expects to make this system available to grantees at no cost. Applicants' response to this section of the evaluation criteria could reference the use of this software system.
- A detailed description of the applicant's experience in implementing projects similar to the one being proposed and/or related activities of the primary partners.

7. Dissemination, Sustainability and Replicability (10 Points)

The applicant must describe how the project's models, findings, and products will be disseminated to and through the workforce system, as well as other entities; what aspects of the project will be sustained beyond the life of the grant through the workforce system; and how the project can be replicated and adapted to address the employment and training needs of older workers and their employers across multiple regions and industries. Scoring for this criterion will be based on the following factors:

*Dissemination strategies (3 points).* Applicants should identify specific dissemination strategies they will employ and indicate how they will foster replication of the project. These dissemination strategies would be in addition to those undertaken by ETA, as described in Part III(D). This could include innovative approaches, as well as more traditional modes such as conference presentations, Webinars and other events, technical assistance guides, peer-reviewed or trade publication articles, and other documents. Applicants should include a list of specific dissemination mechanisms available to them which are appropriate for this project.

*Sustainability plan (4 points).* Specific plans illustrating how the project will be sustained through the workforce system after the grant period has ended should be provided. Applicants should explain how partners will continue to contribute to the project, how leveraged resources will be maintained, and how other potential resources may be used to sustain the project on a region-wide basis.

*Replicability (3 points).* Applicants should identify the specific aspects of their project which allow it to be replicated across multiple industries and regions. They should explicitly discuss whether or not the challenges addressed by their project are common to other industries and regions, if the participant skills developed by the project are based on general standards, and what products will be created that can be used broadly by other organizations.

*B. Review and Selection Process*

Applications for the grants under this solicitation will be accepted after the publication of this announcement until the closing date. A technical review panel will conduct a careful evaluation of applications against the criteria. These criteria are based on the policy goals, priorities, and emphases set forth in this solicitation. Up to 100 points may be awarded to an application, based on the required information described in Part V(A). The ranked scores will serve as the primary basis for selection of applications for funding, in conjunction with other factors such as urban, rural, and geographic balance; balance across industries and economic sectors; the availability of funds; and which proposals are most advantageous to the government. The panel results are advisory in nature and not binding on the Grant Officer, and the Grant Officer may consider any information that comes to his/her attention. The government may elect to award the grant(s) with or without discussions with the applicants. Should a grant be awarded without discussions, the award will be based on the applicant's signature on the SF 424, which constitutes a binding offer by the applicant including electronic signature via E-Authentication on *http://www.grants.gov.*

**Part VI. Award Administration Information**

*A. Award Notices*

All award notifications will be posted on the ETA Web site *(http://www.doleta.gov).* Applicants selected for award will be contacted directly before the grant's execution. Applicants not selected for award will be notified by mail.

**Note:** Selection of an organization as a grantee does not constitute approval of the grant application as submitted. Before the actual grant is awarded, ETA may enter into negotiations about such items as program components, allowable activities, staffing and funding levels, and administrative systems in place to support grant implementation. If the negotiations do not result in a mutually acceptable submission, the Grant Officer reserves the right to terminate the negotiation and decline to fund the application.

*B. Administrative and National Policy Requirements*

1. Administrative Program Requirements

All grantees will be subject to all applicable Federal laws, regulations, and the applicable OMB Circulars. The grant(s) awarded under this solicitation will be subject to the following administrative standards and provisions:

a. Non-Profit Organizations—OMB Circulars A–122 (Cost Principles) and 29 CFR Part 95 (Administrative Requirements).

b. Educational Institutions—OMB Circulars A–21 (Cost Principles) and 29 CFR Part 95 (Administrative Requirements).

c. State and Local Governments—OMB Circulars A–87 (Cost Principles) and 29 CFR Part 97 (Administrative Requirements).

d. Profit Making Commercial Firms—Federal Acquisition Regulation (FAR)—48 CFR Part 31 (Cost Principles), and 29 CFR Part 95 (Administrative Requirements).

e. All entities must comply with 29 CFR Parts 93 and 98, and, where applicable, 29 CFR Parts 96 and 99.

f. 29 CFR part 2, subpart D—Equal Treatment in Department of Labor Programs for Religious Organizations, Protection of Religious Liberty of Department of Labor Social Service Providers and Beneficiaries.

g. 29 CFR part 31—Nondiscrimination in Federally Assisted Programs of the Department of Labor—Effectuation of Title VI of the Civil Rights Act of 1964.

h. 29 CFR part 32—Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance.

i. 29 CFR part 33—Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the Department of Labor.

j. 29 CFR part 35—Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance from the Department of Labor.

k. 29 CFR part 36—Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.

The following administrative standards and provisions may be applicable:

a. Workforce Investment Act—20 Code of Federal Regulations (CFR) Part 667 (General Fiscal and Administrative Rules).

b. 29 CFR part 30—Equal Employment Opportunity in Apprenticeship and Training; and

c. 29 CFR part 37—Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Investment Act of 1998.

In accordance with Section 18 of the Lobbying Disclosure Act of 1995 (Pub. L. 104–65) (2 U.S.C. 1611) non-profit entities incorporated under Internal Revenue Service Code section 501(c)(4) that engage in lobbying activities are not eligible to receive federal funds and grants.

**Note:** Except as specifically provided in this solicitation, ETA's acceptance of a proposal and an award of federal funds to sponsor any program(s) does not provide a waiver of any grant requirements and/or procedures. For example, OMB Circulars require that an entity's procurement procedures must ensure that all procurement transactions are conducted, as much as practical, to provide open and free competition. If a proposal identifies a specific entity to provide services, ETA's award does not provide the justification or basis to sole source the procurement, i.e., avoid competition, unless the activity is regarded as the primary work of an official partner to the application.

*C. Evaluation*

ETA requires that the project participate in an evaluation of overall performance. To measure the impact of the Older Worker Demonstration, ETA will arrange for or conduct an independent evaluation of the outcomes and benefits of the projects. Grantees must make records and data on participants, employers and funding available, and provide access to project operating personnel and participants, as specified by the evaluator(s) under the direction of ETA, including after the expiration date of the grant. Further information regarding the evaluation requirements will be detailed in the grant agreements.

*D. Reporting*

The grantee is required to provide the reports and documents listed below:

1. Quarterly Financial Reports

A Quarterly Financial Status Report (SF 9130) is required until such time as all funds have been expended or the grant period has expired. Quarterly reports are due 45 days after the end of each calendar year quarter, including the last calendar quarter of the grant period. Grantees must use ETA's On-Line Electronic Reporting System. A Closeout Financial Status Report is due 90 days after the end of the grant period.

2. Quarterly Progress Reports

Grantees must submit a Quarterly Performance Report to ETA no later than 45 days after the end of each calendar year quarter. The Quarterly Performance Report is explained in further detail in a standard set of reporting requirements issued by ETA for HGJTI grants, which can be accessed at: *http://www.doleta.gov/performance/reporting.*

3. Final Report

A final report must be submitted no later than 60 days after the expiration date of the grant. This report must summarize project activities, provide project outcomes, and thoroughly document the training and related strategies and approaches of the project. The final report should also include copies of any deliverables developed with grant funds, such as curricula and competency models. Three copies of the final report must be submitted to ETA and grantees must agree to use a designated format specified by ETA for preparing the final report.

*E. Record Retention*

Applicants should be aware of Federal guidelines on record retention, which require grantees to maintain all records pertaining to grant activities for a period of not less than three years from the time of final grant close-out.

**Part VII. Agency Contacts**

For further information regarding this solicitation, please contact Melissa Abdullah, Grants Management Specialist, at (202) 693–3346 (this is not a toll free number). Applicants should fax all technical questions to (202) 693–2705 and must specifically address the fax to the attention of Melissa Abdullah and should reference SGA/DFA PY 08–06 and include a contact name and fax

and phone numbers. This announcement is also being made available on the ETA Web site at *http://www.doleta.gov/grants/find_grants.cfm* and at *http://www.grants.gov.*

**Part VIII. Resources and Other Information**

*A. Resources for the Applicant*

DOL/ETA maintains a number of Web-based resources that may be of assistance to applicants.

- The ETA Web site is a valuable source for background information on the HGJTI and WIRED Initiative. (*http://www.doleta.gov*)
- The Workforce$^3$One Web site is a valuable resource for information about demand-driven projects of the workforce investment system, educators, employers, and economic development representatives. Additionally, current HGJTI grantees are posting their deliverables on this Web site. (*http://www.workforce3one.org*)
- America's Service Locator provides a directory of the nation's One-Stop Career Centers. (*http://www.servicelocator.org*)
- Applicants are encouraged to review ''Help with Solicitation for Grant Applications.'' (*http://www.dol.gov/cfbci/sgabrochure.htm*)
- For a basic understanding of the grants process and basic responsibilities of receiving federal grant support, please see ''Guidance for Faith-Based and Community Organizations on Partnering with the Federal Government.'' (*http://www.whitehouse.gov/government/fbci/guidance/index.html*)

*B. Other Information*

OMB Information Collection No. 1225–0086. Expires September 30, 2009.

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless such collection displays a valid OMB control number. Public reporting burden for this collection of information is estimated to average 20 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimated or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Information and Regulatory Affairs, OMB Desk Officer for ETA, Office of Management and Budget, Room 10235, Washington, DC 20503. Please do not return the completed application to the OMB. Send it to the sponsoring agency as specified in this solicitation.

This information is being collected for the purpose of awarding a grant. The information collected through this solicitation will be used by DOL to ensure that grants are awarded to the applicant best suited to perform the functions of the grant. Submission of this information is required in order for the applicant to be considered for award of this grant. Unless otherwise specifically noted in this announcement, information submitted in the respondent's application is not considered to be confidential.

The Grant Officer for this procurement will be Marsha G. Daniels; if you need additional information contact the Grants Management Specialist, Melissa Abdullah, at (202) 693–3346 (this is not a toll free number).

Signed at Washington, DC, this 12th day of December 2008.

**James Stockton,**

*Grant Officer.*

**Attachment: H–1B Industry Sectors and Occupations**

*A. Industry Sectors*

1. Information Technology:
- Computer Systems Design and Related Services.
- Software Development/Software Publishers.
- Data Processing Services.
- Information Services.

2. Telecommunications.

3. Scientific Research and Development Services (including biotechnology).

4. Scientific and Technical Consulting (including biotechnology).

5. Architecture, Engineering, Surveying.

6. Specialized Design Services.

7. Construction/Skilled Trades.

8. Finance, Insurance and Real Estate and Administrative Support Services:
- Accounting, Tax Preparation, Bookkeeping and Payroll Services.
- Financial Investment.
- Securities and Commodity Brokerage/Contracts.
- Business Support Services.
- Insurance Carriers, Agencies, Brokerages, and Insurance and Employee Benefit Funds.
- Credit Intermediation.

9. Advanced Manufacturing:
- Semiconductor and Other Electronic Component Manufacturing.
- Computer, Electronic Product, and Peripheral Equipment Manufacturing.
- Pharmaceutical and Medicine Manufacturing.
- Communications Equipment Manufacturing.
- Navigational, Measuring, Electromedical, and Control Instruments Manufacturing.
- Industrial Machinery Manufacturing.
- Aerospace Manufacturing.
- Chemical and Petrochemical Manufacturing.
- Motor Vehicle and Parts Manufacturing.
- Medical Equipment and Supplies Manufacturing.
- Metalworking Manufacturing.
- Food Manufacturing.
- Other Miscellaneous Manufacturing.

10. Automotive Repair/Maintenance.

11. Health Care:
- General Medical and Surgical Hospitals and Other Hospitals.
- Offices of Physicians.
- Offices of Dentists.
- Offices of Other Health Practitioners.
- Medical and Diagnostic Laboratories.
- Nursing and Residential Care Facilities.
- Home Health Care Services.

12. Energy:
- Electric Power Generation, Transmission, and Distribution.
- Oil and Gas Extraction, Refining, and Production.
- Mining and Support Activities for Mining.
- Pipeline Transportation.

13. Transportation:
- Air Transportation.
- Freight and Truck Transportation.
- Water Transportation.
- Transportation Support.

*B. Cross-Cutting Occupations*

1. Computer Related Occupations:
- Systems Analysis and Programming.
- Data Communications and Networks.
- Computer Systems Technical Support.
- Computer Systems User Support.

2. Engineering and Related Technical Occupations:
- Aeronautical.
- Electrical.
- Civil.
- Ceramic.
- Mechanical.
- Chemical.
- Mining and Petroleum.
- Metallurgy and Metallurgical.
- Industrial.
- Agricultural.
- Marine.
- Nuclear.
- Drafters.

- Surveying/Cartographic.
- Architectural.

3. Occupations in Mathematics and Physical Sciences:
- Mathematics.
- Astronomy.
- Chemistry.
- Physics.
- Geology.
- Meteorology.

4. Occupations in Life Sciences:
- Agricultural Sciences.
- Biological Sciences.

5. Occupations in Medicine and Health:
- Physicians/Surgeons.
- Osteopaths.
- Dentists.
- Veterinarians.
- Pharmacists.
- Registered Nurses.
- Therapists.
- Dieticians.
- Medical and Dental Technology.
- Other Health Care Practitioners.

6. Occupations in Financial and Administrative Fields:
- Accountants/Auditors.
- Bookkeepers/Payroll Services.
- Budget and Management Systems Analysis.
- Finance, Insurance, and Real Estate Management.
- Purchasing Managers.
- Agents/Appraisers.

7. Technology Related Occupations:
- Process Technicians.
- Mechanics/Mechanical Engineering Technicians.

[FR Doc. E8–30116 Filed 12–18–08; 8:45 am]

**BILLING CODE 4510–FN–P**

## NATIONAL CREDIT UNION ADMINISTRATION

### Sunshine Act; Notice of Agency Meeting

**TIME AND DATE:** 11:15 a.m., Thursday, December 18, 2008.

**PLACE:** Board Room, 7th Floor, Room 7047, 1775 Duke Street, Alexandria, VA 22314–3428.

**STATUS:** Closed.

**MATTERS TO BE CONSIDERED:** 1. *Consideration of supervisory activities.* Closed pursuant to Exemptions (8) and (9)(A)(ii).

2. *Personnel Matter.* Closed pursuant to Exemptions (2) and (6).

**FOR FURTHER INFORMATION CONTACT:** Mary Rupp, Secretary of the Board, Telephone: 703–518–6304.

**Mary Rupp,**

*Board Secretary.*

[FR Doc. E8–30331 Filed 12–17–08; 11:15 am]

**BILLING CODE 7535–01–P**

## NATIONAL SCIENCE FOUNDATION

### Proposal Review Panel for Materials Research; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463 as amended), the National Science Foundation announces the following meeting:

*Name:* Site Visit review of the Materials Research Science and Engineering Center (MRSEC) at University of Washington, Proposal Review Panel for Materials Research #1203.

*Dates & Times:* Thursday, February 5, 2009, 2008; 7:45 a.m.—9 p.m. Friday, February 6, 2009; 8 a.m.—3:30 p.m.

*Place:* University of Washington, Seattle, WA.

*Type of Meeting:* Part-open.

*Contact Person:* : Dr. Rama Bansil, Program Director, Materials Research Science and Engineering Centers Program, Division of Materials Research, Room 1065, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230, Telephone (703) 292–8562.

*Purpose of Meeting:* To provide advice and recommendations concerning further support of the MRSEC at University of Washington, Seattle, WA

*Agenda:*

**Thursday, February 5, 2009**

7:45 a.m.–9 a.m.—Closed—Executive Session.
9 a.m.–4:30 p.m.—Open—Review of the U Washington MRSEC.
4:30 p.m.–6 p.m.—Closed—Executive Session.
6 p.m.–9 p.m.—Open—Poster Session and Dinner.

**Friday February 6, 2009**

8 a.m.–9 a.m.—Closed—Executive session.
9 a.m.–10:15 a.m.—Open—Review of the U Washington MRSEC.
10:15 a.m.–3:30 p.m.—Closed—Executive Session, Draft and Review Report.

*Reason for Closing:* The work being reviewed may include information of a proprietary or confidential nature, including technical information; financial data, such as salaries and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552 b(c), (4) and (6) of the Government in the Sunshine Act.

Dated: December 16, 2008.

**Susanne Bolton,**

*Committee Management Officer.*

[FR Doc. E8–30175 Filed 12–18–08; 8:45 am]

**BILLING CODE 7555–01–P**

## NUCLEAR REGULATORY COMMISSION

### Advisory Committee on Reactor Safeguards; Renewal

**AGENCY:** U.S. Nuclear Regulatory Commission.

**ACTION:** Notice of renewal of the Charter of the Advisory Committee on Reactor Safeguards (ACRS).

**SUMMARY:** The Advisory Committee on Reactor Safeguards was established by Section 29 of the Atomic Energy Act (AEA) of 1954, as amended. Its purpose is to provide advice to the Commission with regard to the hazards of proposed or existing reactor facilities, to review each application for a construction permit or operating license for certain facilities specified in the AEA, and such other duties as the Commission may request. The AEA as amended by Public Law 100–456 also specifies that the Defense Nuclear Safety Board may obtain the advice and recommendations of the ACRS.

Membership on the Committee includes individuals experienced in reactor operations, management; probabilistic risk assessment; analysis of reactor accident phenomena; design of nuclear power plant structures, systems and components; materials science; and mechanical, civil, and electrical engineering.

The Nuclear Regulatory Commission has determined that renewal of the charter for the ACRS until December 11, 2010, is in the public interest in connection with the statutory responsibilities assigned to the ACRS. This action is being taken in accordance with the Federal Advisory Committee Act.

**FOR FURTHER INFORMATION CONTACT:** Andrew L. Bates, Office of the Secretary, NRC, Washington, DC 20555; telephone: (301) 415–1963 or at *ALB@nrc.gov*.

Dated: December 15, 2008.

**Andrew L. Bates,**

*Advisory Committee Management Officer.*

[FR Doc. E8–30232 Filed 12–18–08; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket No. 52–038]**

### Nine Mile Point 3 Nuclear Project, LLC and Unistar Nuclear Operating Services, LLC (Unistar); Acceptance for Docketing of an Application for Combined License for Nine Mile Point 3 Nuclear Power Plant

By letter dated September 30, 2008, as supplemented by letter dated November 18, 2008, Nine Mile Point 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC (UniStar), submitted an application to the U.S. Nuclear Regulatory Commission (NRC) for a combined license (COL) for a

single unit of the U.S. Evolutionary Power Reactor (U.S. EPR) in accordance with the requirements contained in 10 CFR Part 52, ''Licenses, Certifications and Approvals for Nuclear Power Plants.'' This reactor will be identified as Nine Mile Point 3 Nuclear Power Plant and is to be located adjacent to the current Nine Mile Point Nuclear Station, Unit 1 and Unit 2, in Oswego County, New York. A notice of receipt and availability of this application was previously published in the **Federal Register** (73 FR 63998) on October 28, 2008.

The NRC staff has determined that Nine Mile Point 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC (UniStar) have submitted information in accordance with 10 CFR Part 2, ''Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders,'' and 10 CFR Part 52 that is acceptable for docketing. The Docket Number established for Unit 3 is 52–038.

The NRC staff will perform a detailed technical review of the application. Docketing of the application does not preclude the NRC from requesting additional information from the applicant as the review proceeds, nor does it predict whether the Commission will grant or deny the application. The Commission will conduct a hearing in accordance with Subpart L, ''Informal Hearing Procedures for NRC Adjudications,'' of 10 CFR Part 2 and will receive a report on the COL application from the Advisory Committee on Reactor Safeguards in accordance with 10 CFR 52.87, ''Referral to the Advisory Committee on Reactor Safeguards (ACRS).'' If the Commission finds that the COL application meets the applicable standards of the Atomic Energy Act and the Commission's regulations, and that required notifications to other agencies and bodies have been made, the Commission will issue a COL, in the form and containing conditions and limitations that the Commission finds appropriate and necessary.

In accordance with 10 CFR Part 51, the Commission will also prepare an environmental impact statement for the proposed action. Pursuant to 10 CFR 51.26, and as part of the environmental scoping process, the staff intends to hold a public scoping meeting. Detailed information regarding this meeting will be included in a future **Federal Register** notice.

Finally, the Commission will announce in a future **Federal Register** notice the opportunity to petition for leave to intervene in the hearing required for this application by 10 CFR 52.85.

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.* The application is also available at *http://www.nrc.gov/reactors/new-reactors/col.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@nrc.gov.*

Dated at Rockville, Maryland this 12th day of December 2008.

For the Nuclear Regulatory Commission.

**Prosanta Chowdhury,**

*Project Manager, U.S. EPR Projects Branch, Division of New Reactor Licensing, Office of New Reactors.*

[FR Doc. E8–30219 Filed 12–18–08; 8:45 am]

**BILLING CODE 7590–01–P**

## POSTAL SERVICE

### International Product Change—Global Direct Negotiated Service Agreements

**AGENCY:** Postal Service.™

**ACTION:** Notice.

**SUMMARY:** Postal Service notice of filing a request with the Postal Regulatory Commission to add Global Direct Negotiated Service Agreements to the Competitive Products List pursuant to 39 U.S.C. 3642.

**DATES:** December 19, 2008.

**FOR FURTHER INFORMATION CONTACT:** Margaret M. Falwell, 703–292–3576.

**SUPPLEMENTARY INFORMATION:** The United States Postal Service ® hereby gives notice that it has filed with the Postal Regulatory Commission a *Request of United States Postal Service to Add Global Direct Negotiated Service Agreements to the Competitive Product List, and Notice of Filing (Under Seal) the Enabling Governor's Decision and Two Functionally Equivalent Agreements.* Documents are available at *http://www.prc.gov*, Docket Nos. MC2009–9, CP2009–10, and CP2009–11.

**Neva R. Watson,**

*Attorney, Legislative.*

[FR Doc. E8–30138 Filed 12–18–08; 8:45 am]

**BILLING CODE 7710–12–P**

## POSTAL SERVICE

### International Product Change—Inbound Express Mail International (EMS) From Foreign Posts

**AGENCY:** Postal Service.™

**ACTION:** Notice.

**SUMMARY:** Postal Service notice of filing a request with the Postal Regulatory Commission to add Inbound Express Mail International (EMS) from Foreign Postal Administrations to the Competitive Products List pursuant to 39 U.S.C. § 3642 and 39 CFR 3020.30.

**DATES:** December 19, 2008.

**FOR FURTHER INFORMATION CONTACT:** Margaret M. Falwell, 703–292–3576.

**SUPPLEMENTARY INFORMATION:** The United States Postal Service® hereby gives notice that it has filed with the Postal Regulatory Commission a *Request of United States Postal Service Regarding Inbound Express Mail International (EMS) From Foreign Posts to add Inbound International Expedited Services 2 to the Competitive Product List, and Notice of Filing (Under Seal) the Enabling Governor's Decision and Establishment of Rates and Classifications Not of General Applicability.* Documents are available at *http://www.prc.gov*, Docket Nos. MC2009–10 and CP2009–12.

**Neva R. Watson,**

*Attorney, Legislative.*

[FR Doc. E8–30153 Filed 12–18–08; 8:45 am]

**BILLING CODE 7710–12–P**

## SECURITIES AND EXCHANGE COMMISSION

**[500–1]**

### In the Matter of Yatinoo, Inc.; Corrected Order of Suspension of Trading

December 17, 2008.

It appears to the Securities and Exchange Commission that the public interest and the protection of investors require a suspension of trading in the securities of Yatinoo, Inc. (''Yatinoo''). Questions have arisen concerning the accuracy and adequacy of publicly-available information about Yatinoo securities, including information in the market place concerning the number of Yatinoo's issued and outstanding shares and market capitalization, and Yatinoo's operations. Questions have also arisen about trading activity in the market for Yatinoo securities. Yatinoo securities are quoted on the Over-the-Counter Bulletin Board under the trading symbol YTNO.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of Yatinoo is suspended for the period from 9:30 a.m. EST on December 17, 2008, through 11:59 p.m. EST on December 31, 2008.

By the Commission.

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8–30345 Filed 12–17–08; 4:15 pm]

**BILLING CODE 8011–01–P**

## 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 Monday, December 15, 2008, at 2:30 p.m.

Commissioners and certain staff members who have an interest in the matter will attend the Closed Meeting.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions as set forth in 5 U.S.C. 552b(c)(3), (5), (7), (8), and (10) and 17 CFR 200.402(a)(3), (5), (7), (8) and (10), permit consideration of the scheduled matter at the Closed Meeting.

Commissioner Aguilar, as duty officer, voted to consider the item listed for the closed meeting in closed session and determined that no earlier notice thereof was possible.

The subject matter of the Closed Meeting scheduled for Monday, December 15, 2008, will be:

A matter 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 15, 2008.

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8–30088 Filed 12–18–08; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94–409, that the Securities and Exchange Commission will hold a Closed Meeting on Tuesday, December 16, 2008, at 11:30 a.m.

Commissioners and certain staff members who have an interest in the matter will attend the Closed Meeting.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions as set forth in 5 U.S.C. 552b(c)(3), (5), (7), (8), and (10) and 17 CFR 200.402(a)(3), (5), (7), (8), and (10) permit consideration of the scheduled matter at the Closed Meeting.

Commissioner Aguilar, as duty officer, voted to consider the item listed for the closed meeting in closed session and determined that no earlier notice thereof was possible.

The subject matter of the Closed Meeting scheduled for Tuesday, December 16, 2008, will be:

A Matter 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 16, 2008.

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8–30181 Filed 12–18–08; 8:45 am]

**BILLING CODE 8011–01–P**

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #11489 and #11559]**

### Louisiana Disaster Number LA–00024

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Amendment 2.

**SUMMARY:** This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of Louisiana (FEMA–1792–DR), dated 09/13/2008.

*Incident:* Hurricane Ike.

*Incident Period:* 09/11/2008 and continuing through 11/07/2008.

*Effective Date:* 12/08/2008.

*Physical Loan Application Deadline Date:* 11/12/2008.

*Economic Injury (EIDL) Loan Application Deadline Date:* 06/15/2009.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

**SUPPLEMENTARY INFORMATION:** The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of Louisiana, dated 09/13/2008, is hereby amended to establish the incident period as beginning 09/11/2008 and continuing through 11/07/2008. The notice is also amended to include the following areas as adversely affected by the disaster.

*Primary Parishes:* Saint Martin, Livingston.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

**Herbert L. Mitchell,**

*Associate Administrator for Disaster Assistance.*

[FR Doc. E8–30252 Filed 12–18–08; 8:45 am]

**BILLING CODE 8025–01–P**

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #11593 and #11594]**

### South Dakota Disaster #SD–00020

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Notice.

**SUMMARY:** This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of South Dakota (FEMA–1811–DR), dated 12/12/2008.

*Incident:* Severe Winter Storm and Record and Near Record Snow.

*Incident Period:* 11/05/2008 through 11/07/2008.

**EFFECTIVE DATE:** 12/12/2008.

*Physical Loan Application Deadline Date:* 02/10/2009.

*Economic Injury (EIDL) Loan Application Deadline Date:* 09/14/2009.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration,

409 3rd Street, SW., Suite 6050, Washington, DC 20416.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that as a result of the President's major disaster declaration on 12/12/2008, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties:

Bennett, Butte, Corson, Dewey, Haakon, Harding, Jackson, Meade, Mellette, Perkins, Shannon, Todd, Ziebach.

And the portions of the Pine Ridge Reservation, Rosebud Reservation, Cheyenne River Reservation, and Standing Rock Reservation that lie within the designated counties.

The Interest Rates are:

| | Percent |
|---|---|
| Other (Including Non-Profit Organizations) With Credit Available Elsewhere | 4.500 |
| Businesses and Non-Profit Organizations Without Credit Available Elsewhere | 4.000 |

The number assigned to this disaster for physical damage is 11593B and for economic injury is 11594B.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

**Herbert L. Mitchell,**

*Associate Administrator for Disaster Assistance.*

[FR Doc. E8–30250 Filed 12–18–08; 8:45 am]

**BILLING CODE 8025–01–P**

## DEPARTMENT OF STATE

**[Public Notice: 6460]**

### Bureau of Consular Affairs; Changes in Completion of the DS 3035, J–1 Visa Waiver Recommendation Application Form

**ACTION:** Notice.

**SUMMARY:** This Public Notice pertains to J–1 Visa Waiver Recommendation Application form DS 3035, used by exchange visitors to start the J–1 visa waiver process and to pay the processing fee for the waiver application. Certain exchange visitors are subject to Section 212(e) of the Immigration and Nationality Act, as amended, and are required to return to their home country for a period of two years or receive a waiver of the requirement. Such exchange visitors are not eligible to receive H, K, or L nonimmigrant visas nor are they eligible for immigrant visas or permanent resident status until they have complied with or received a waiver of the foreign residence requirement. An exchange visitor who wishes to apply for a waiver of the two-year foreign residence requirement starts the waiver process by filling out the DS 3035, J–1 Visa Waiver Recommendation Application which is available on the State Department Bureau of Consular Affairs Web site (*http://travel.state.gov*), and submits it along with the processing fee to the lock-box address for processing. Currently J–1 visa waiver applicants may type the form online or download the form and complete it manually. When the form is completed online the applicant receives a bar-code page which he/she prints and sends to the lock-box with the processing fee and other required documents.

The data from the bar-code page is scanned into Waiver Review System (WRS) when it is received from the lock-box and automatically opens up a case file for the applicant. Without the bar-code, the Waiver Review Division (VO/L/W) must manually enter the data from the two-page form into its WRS which is time-consuming and lengthens the processing time for waiver applications. Since completing the form online allows VO/L/W to quickly and efficiently scan the data from the bar-code into its database system, the Department will adjust the manner in which exchange visitors are allowed to complete the DS 3035 form. Therefore, effective February 1, 2009, applicants will be required to type and complete the DS 3035 form online. We believe that online only completion of the DS 3035 form will further enhance the waiver process and maintain established processing timelines for waiver applications which ultimately benefit the applicants.

**DATES:** *Effective Date:* This Notice will be effective February 1, 2009.

**FOR FURTHER INFORMATION CONTACT:** Marcia Pryce, Waiver Review Division, U.S. Department of State, 2401 E. St. NW., L–603, Washington, DC 20522, who may be reached at (202) 663–2800.

Dated: December 8, 2008.

**Janice L. Jacobs,**

*Assistant Secretary for Consular Affairs, Department of State.*

[FR Doc. E8–30251 Filed 12–18–08; 8:45 am]

**BILLING CODE 4710–06–P**

## DEPARTMENT OF STATE

**[Public Notice 6438]**

### Request for Nominations for the General Advisory Committee and the Scientific Advisory Subcommittee to the United States Section to the Inter-American Tropical Tuna Commission

**SUMMARY:** The Department of State is seeking applications and nominations for the renewal of the General Advisory Committee to the Inter-American Tropical Tuna Commission (IATTC) as well as to a Scientific Advisory Subcommittee of the General Advisory Committee. The purpose of the General Advisory Committee and the Scientific Advisory Subcommittee is to provide public input and advice to the United States Section to the IATTC in the formulation of U.S. policy and positions at meetings of the IATTC and its subsidiary bodies. The Scientific Advisory Subcommittee shall also function as the National Scientific Advisory Committee (NATSAC) provided for in the Agreement on the International Dolphin Conservation Program (AIDCP). The United States Section to the IATTC is composed of the Commissioners to the IATTC, appointed by the President, and the Deputy Assistant Secretary of State for Oceans and Fisheries or his or her designated representative. Authority to establish the General Advisory Committee and Scientific Advisory Subcommittee is provided under the Tuna Conventions Act of 1950, as amended by the International Dolphin Conservation Program Act (IDCPA) of 1997.

**DATES:** Nominations must be submitted on or before March 31, 2009.

**ADDRESSES:** Nominations should be submitted to David Balton, Deputy Assistant Secretary for Oceans and Fisheries, Bureau of Oceans and International Environmental and Scientific Affairs, Room 3880, Department of State, Washington, DC, 20520–7818; or by fax to 202–736–7350.

**FOR FURTHER INFORMATION CONTACT:** David Hogan, Office of Marine Conservation, Department of State: 202–647–2335.

**SUPPLEMENTARY INFORMATION:**

#### General Advisory Committee

The Tuna Conventions Act (16 U.S.C. 951 *et seq.* ), as amended by the IDCPA (Pub. L. 105–42), provides that the Secretary of State, in consultation with the U.S. Commissioners to the IATTC, shall appoint a General Advisory Committee (the Committee) to the U.S. Section to the IATTC (U.S. Section). The Committee shall be composed of not

less than five nor more than 15 persons, with balanced representation from the various groups participating in the fisheries included under the IATTC Convention, and from non-governmental conservation organizations. Members of the Committee shall be invited to attend or have representatives attend all non-executive meetings of the U.S. Section, and shall be given full opportunity to examine and to be heard on all proposed programs of investigations, reports, recommendations, and regulations adopted by the Commission. Members of the Committee may attend meetings of the IATTC and the AIDCP as members of the U.S. delegation or otherwise in accordance with the rules of those bodies governing such participation. Participation as a member of the U.S. delegation shall be subject to such conditions as may be placed on the size or composition of the delegation.

**Scientific Advisory Subcommittee**

The Act, as amended, also provides that the Secretary of State, in consultation with the U.S. Commissioners to the IATTC, shall appoint a Scientific Advisory Subcommittee (the Subcommittee) of the General Advisory Committee. The Subcommittee shall be composed of not less than five and not more than 15 qualified scientists with balanced representation from the public and private sectors, including non-governmental conservation organizations. The Subcommittee shall advise the Committee and the U.S. Section on matters including: The conservation of ecosystems; the sustainable uses of living marine resources related to the tuna fishery in the eastern Pacific Ocean; and the long-term conservation and management of stocks of living marine resources in the eastern Pacific Ocean.

In addition, at the request of the Committee, the U.S. Commissioners, or the Secretary of State, the Subcommittee shall perform such functions and provide such assistance as may be required by formal agreements entered into by the United States for the eastern Pacific tuna fishery, including the AIDCP. The functions may include: The review of data from the International Dolphin Conservation Program (IDCP), including data received from the IATTC staff; recommendations on research needs and the coordination and facilitation of such research; recommendations on scientific reviews and assessments required under the IDCP; recommendations with respect to measures to assure the regular and timely full exchange of data among the Parties to the AIDCP and each nation's (NATSAC) (or its equivalent); and consulting with other experts as needed.

The Subcommittee shall be invited to attend or have representatives attend all non-executive meetings of the U.S. Section and the General Advisory Committee and shall be given full opportunity to examine and to be heard on all proposed programs of scientific investigation, scientific reports, and scientific recommendations of the Commission. Representatives of the Subcommittee may attend meetings of the IATTC and the AIDCP as members of the U.S. delegation or otherwise in accordance with the rules of those bodies governing such participation. Participation as a member of the U.S. delegation shall be subject to such limits as may be placed on the size of the delegation.

**National Scientific Advisory Committee**

The Scientific Advisory Subcommittee shall also function as the NATSAC established pursuant to Article IX of the AIDCP. In this regard, the Subcommittee shall perform the functions of the NATSAC as specified in Annex VI of the AIDCP including, but not limited to: receiving and reviewing relevant data, including data provided to the National Marine Fisheries Service (NMFS) by the IATTC Staff; advising and recommending to the U.S. Government measures and actions that should be undertaken to conserve and manage stocks of living marine resources in the AIDCP Area; making recommendations to the U.S. Government regarding research needs related to the eastern Pacific Ocean tuna purse seine fishery; promoting the regular and timely full exchange of data among the Parties on a variety of matters related to the implementation of the AIDCP; and consulting with other experts as necessary in order to achieve the objectives of the Agreement.

**General Provisions**

Each appointed member of the Committee and the Subcommittee/NATSAC shall be appointed for a term of 3 years and may be reappointed.

Logistical and administrative support for the operation of the Committee and the Subcommittee will be provided by the Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, and by the Department of Commerce, National Marine Fisheries Service. Members shall receive no compensation for their service on either the Committee or the Subcommittee/NATSAC, nor will members be compensated for travel or other expenses associated with their participation.

*Procedures for Submitting Applications/Nominations*

Applications/nominations for the General Advisory Committee and the Scientific Advisory Subcommittee/NATSAC should be submitted to the Department of State (See **ADDRESSES**).

Such applications/nominations should include the following information:

(1) Full name/address/phone/fax and e-mail of applicant/nominee;

(2) Whether applying/nominating for the General Advisory Committee or the Scientific Advisory Committee/NATSAC (applicants may specify both);

(3) Applicant/nominee's organization or professional affiliation serving as the basis for the application/nomination;

(4) Background statement describing the applicant/nominee's qualifications and experience, especially as related to the tuna purse seine fishery in the eastern Pacific Ocean or other factors relevant to the implementation of the Convention Establishing the IATTC or the Agreement on the International Dolphin Conservation Program;

(5) A written statement from the applicant/nominee of intent to participate actively and in good faith in the meetings and activities of the General Advisory Committee and/or the Scientific Advisory Subcommittee/NATSAC.

Applicants/nominees who submitted material in response to the Federal Register Notices published by the Department of State on January 23, 2006 (Public Notice 5279, FR Doc. E6–714, Vol. 71, No. 14, pg. 3602) or prior, should resubmit their applications pursuant to this notice.

Dated: December 12, 2008.

**David A. Balton,**

*Deputy Assistant Secretary for Oceans and Fisheries, Department of State.*

[FR Doc. E8–30253 Filed 12–18–08; 8:45 am]

**BILLING CODE 4710–09–P**

## DEPARTMENT OF TRANSPORTATION

**[Docket No. OST–2007–27407]**

### National Surface Transportation Infrastructure Financing Commission

**AGENCY:** Department of Transportation (DOT).

**ACTION:** Notice of meeting location and time.

**SUMMARY:** This notice lists the location and time of the eighteenth meeting of the National Surface Transportation Infrastructure Financing Commission.

**FOR FURTHER INFORMATION CONTACT:** John V. Wells, Chief Economist, U.S. Department of Transportation, (202) 366–9224, *jack.wells@dot.gov.*

**SUPPLEMENTARY INFORMATION:** By **Federal Register** Notice dated March 12, 2007, and in accordance with the requirements of the Federal Advisory Committee Act (''FACA'') (5 U.S.C. App. 2) and the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (''SAFETEA-LU'') (Pub. L. 109–59, 119 Stat. 1144), the U.S. Department of Transportation (the ''Department'') issued a notice of intent to form the National Surface Transportation Infrastructure Financing Commission (the ''Financing Commission''). Section 11142(a) of SAFETEA-LU established the National Surface Transportation Infrastructure Financing Commission and charged it with analyzing future highway and transit needs and the finances of the Highway Trust Fund and with making recommendations regarding alternative approaches to financing surface transportation infrastructure.

**Notice of Meeting Location and Time**

The Commissioners have agreed to hold their eighteenth meeting from 8:30 a.m. to 4 p.m. on Thursday, January 8, 2008, at the office of the Information Technology and Innovation Foundation (ITIF), 1250 I (''Eye'') Street, NW., Suite 200, Washington, DC 20005. The meeting will be open to the public.

If you need accommodations because of a disability or require additional information to attend the meeting, please contact John V. Wells, Chief Economist, U.S. Department of Transportation, (202) 366–9224, *jack.wells@dot.gov.*

Issued on this 15th day of December 2008.

**John V. Wells,**

*Chief Economist, U.S. Department of Transportation, Designated Federal Official.*

[FR Doc. E8–30161 Filed 12–18–08; 8:45 am]

**BILLING CODE 4910–9X–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Proposed Modification of the Chicago, IL, Class B Airspace Area; Public Meetings

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

**ACTION:** Notice of meetings.

**SUMMARY:** This notice announces two fact-finding informal airspace meetings, in addition to three meetings held previously (73 FR 44311), to solicit information from airspace users and others concerning a proposal to revise the Class B airspace area at Chicago, IL. The purpose of these meetings is to ensure all interested parties were provided an opportunity to present views, recommendations, and comments on the proposal. All comments received during these meetings will be considered prior to any revision or issuance of a notice of proposed rulemaking.

*Times and Dates:* The informal airspace meetings will be held on Monday, February 23, 2009, at 1 p.m., and Thursday, February 26, 2009, at 5 p.m. Comments must be received on or before March 30, 2009.

**ADDRESSES:** (1) The meeting on Monday, February 23, 2009, will be held at Lewis University, Harold E. White Aviation Center, 1 University Parkway, Romeoville, IL 60446. (2) The meeting on Thursday, February 26, 2009, will be held at DuPage Flight Center, Chicago DuPage Airport, 2700 International Drive, West Chicago, IL 60185.

*Comments:* Send comments on the proposal to: Don Smith, Manager, Operations Support Group, Air Traffic Organization Central Service Center, Federal Aviation Administration, 2601 Meacham Boulevard, Fort Worth, Texas, 76137, or by fax to (817) 222–5547.

**FOR FURTHER INFORMATION CONTACT:** Anne Hulsey, FAA ChicagoTRACON, 1100 Bowes Road, Elgin, IL 60123; Telephone (847) 608–5524.

**SUPPLEMENTARY INFORMATION:**

**Meeting Procedures**

(a) The meetings will be informal in nature and will be conducted by one or more representatives of the FAA Central Service Center. A representative from the FAA will present a briefing on the planned modification to the Class B airspace at Chicago, IL. Each participant will be given an opportunity to deliver comments or make a presentation, although a time limit may be imposed. Only comments concerning the plan to modify the Class B airspace area at Chicago, IL, will be accepted.

(b) The meetings will be open to all persons on a space-available basis. There will be no admission fee or other charge to attend and participate.

(c) Any person wishing to make a presentation to the FAA panel will be asked to sign in and estimate the amount of time needed for such presentation. This will permit the panel to allocate an appropriate amount of time for each presenter. These meetings will not be adjourned until everyone on the list has had an opportunity to address the panel.

(d) Position papers or other handout material relating to the substance of these meetings will be accepted. Participants wishing to submit handout material should present an original and two copies (3 copies total) to the presiding officer. There should be additional copies of each handout available for other attendees.

(e) These meetings will not be formally recorded.

**Agenda for the Meetings**

—Sign-in.
—Presentation of Meeting Procedures.
—FAA explanation of the planned Class B modifications.
—Solicitation of Public Comments.
—Closing Comments.

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

Issued in Washington, DC, on December 12, 2008.

**Edith V. Parish,**

*Manager, Airspace and Rules Group.*

[FR Doc. E8–30152 Filed 12–18–08; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

**[Summary Notice No. PE–2008–47]**

### Petition for Exemption; Summary of Petition Received

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

**ACTION:** Notice of petition for exemption received.

**SUMMARY:** This notice contains a summary of a petition seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

**DATES:** Comments on this petition must identify the petition docket number involved and must be received on or before January 8, 2009.

**ADDRESSES:** You may send comments identified by Docket Number FAA–2008–1283 using any of the following methods:

• *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.

• *Mail:* Send comments 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.

• *Fax:* Fax comments to the Docket Management Facility at 202–493–2251.

• *Hand Delivery:* Bring comments to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

*Privacy:* We post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, 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).

*Docket:* To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Mark Forseth, Transport Airplane Directorate, ANM–113, Federal Aviation Administration, 1601 Lind Avenue SW., Renton, WA 98057–3356, fax 425–227–1320, telephone 425–227–2796. This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on December 16, 2008.

**Pamela Hamilton-Powell,**

*Director, Office of Rulemaking.*

### Petition for Exemption

*Docket No.:* FAA–2008–1283.

*Petitioner:* Alenia Aeronautica, S.p.A.

*Section of 14 CFR Affected:* 14 CFR 26.37 (b).

*Description of Relief Sought:* Alenia seeks exemption, for airplane model C–27J, from 26.37 (b) to permit relief from the ignition-source-prevention requirements included in § 25.981(a)(d) at Amendment 25–125, and to show compliance with SFAR 88 requirements. Alenia proposes to comply with SFAR 88 within 18 months after type certification (TC) to address the ignition-prevention requirements, with confirmation that the C–27J meets flammability-reduction requirements at TC date.

[FR Doc. E8–30217 Filed 12–18–08; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

**[Summary Notice No. PE–2008–48]**

### Petition for Exemption; Summary of Petition Received

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

**ACTION:** Notice of petition for exemption received.

**SUMMARY:** This notice contains a summary of a petition seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

**DATES:** Comments on this petition must identify the petition docket number involved and must be received on or before January 8, 2009.

**ADDRESSES:** You may send comments identified by Docket Number FAA–2008–1209 using any of the following methods:

• *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.

• *Mail:* Send comments 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.

• *Fax:* Fax comments to the Docket Management Facility at 202–493–2251.

• *Hand Delivery:* Bring comments to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

*Privacy:* We post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, 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).

*Docket:* To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Mark Forseth, Transport Airplane Directorate, ANM–113, Federal Aviation Administration, 1601 Lind Avenue, SW., Renton, WA 98057–3356, fax 425–227–1320, telephone 425–227–2796. This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on December 16, 2008.

**Pamela Hamilton-Powell,**

*Director, Office of Rulemaking.*

### Petition for Exemption

*Docket No.:* FAA–2008–1209.

*Petitioner:* JetCorp Technical Services.

*Section of 14 CFR Affected:* 14 CFR 25.813(e).

*Description of Relief Sought:* Relief from 14 CFR 25.81(e) is requested for JetCorp Technical Services modifications to Bombardier Aerospace, Inc., model CL–600–2B19–TC A21EA airplanes. Altered planes are designed for 19 or fewer passengers and are intended to be private, not-for-hire airplanes. The modification is a partition, containing a frangible access door, installed in the passenger-compartment area of the airplane.

[FR Doc. E8–30218 Filed 12–18–08; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Random Drug and Alcohol Testing Percentage Rates of Covered Aviation Employees for the Period of January 1, 2009, through December 31, 2009

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

**ACTION:** Notice.

**SUMMARY:** The FAA has determined that the minimum random drug and alcohol testing percentage rates for the period January 1, 2009, through December 31, 2009, will remain at 25 percent of safety-sensitive employees for random drug testing and 10 percent of safety-sensitive employees for random alcohol testing.

**FOR FURTHER INFORMATION CONTACT:** Mr. Jeff Stookey, Office of Aerospace Medicine, Drug Abatement Division, Program Administration Branch (AAM–810), Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267–8442.

*Discussion:* Pursuant to 14 CFR part 121, appendix I, section V.C, the FAA Administrator's decision on whether to change the minimum annual random drug testing rate is based on the reported random drug test positive rate for the entire aviation industry. If the reported random drug test positive rate is less than 1.00%, the Administrator may continue the minimum random drug testing rate at 25%. In 2007, the random drug test positive rate was 0.60%. Therefore, the minimum random drug testing rate will remain at 25% for calendar year 2009.

Similarly, 14 CFR part 121, appendix J, section III.C, requires the decision on the minimum annual random alcohol testing rate to be based on the random alcohol test violation rate. If the violation rate remains less than 0.50%, the Administrator may continue the minimum random alcohol testing rate at 10%. In 2007, the random alcohol test violation rate was 0.13%. Therefore, the minimum random alcohol testing rate will remain at 10% for calendar year 2009.

**SUPPLEMENTARY INFORMATION:** If you have questions about how the annual random testing percentage rates are determined please refer to the Code of Federal Regulations Title 14: part 121, appendix I, section V.C (for drug testing), and appendix J, section III.C (for alcohol testing).

Issued in Washington, DC on December 15, 2008.

**James R. Fraser,**

*Deputy Federal Air Surgeon.*

[FR Doc. E8–30191 Filed 12–18–08; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

### Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) received a request for a waiver of compliance with certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favour of relief.

**Port Authority Trans-Hudson Corporation**

[Docket Number FRA–2008–0135]

The Port Authority Trans-Hudson Corporation (PATH) seek a permanent waiver of compliance with the *Locomotive Safety Standards,* 49 CFR 229.123, which requires that each lead locomotive be equipped with an end plate that extends across both rails, a pilot or a snowplow. The petition is being made for PATH's new fleet of passenger MU locomotives designated as PA–5 cars. Prior to receiving this new fleet of cars, PATH had been granted a waiver, Docket Number LI–81–9, from the pilot end plate requirement. PATH operated under this waiver over the past 26 years. PATH operates a closed system with no public highway-rail crossings over 13.8 miles between New York, and New Jersey. PATH states that the addition of a pilot would interfere with space allocated for Communication Based Train Control Equipment to be mounted under the cars.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (e.g., Waiver Petition Docket Number FRA–2008–0135) and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications and 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).

Issued in Washington, DC on December 15, 2008.

**Grady C. Cothen, Jr.,**

*Deputy Associate Administrator for Safety Standards and Program Development.*

[FR Doc. E8–30157 Filed 12–18–08; 8:45 am]

**BILLING CODE 4910–06–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

### Petition for Waiver of Compliance

In accordance with section 238.21 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) received a request for a waiver of compliance with certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

**Northen Indiana Commuter Transportation District**

[Waiver Petition Docket Number FRA–2008–0139]

The Northen Indiana Commuter Transportation District (NICTD), further identified herein as the railroad, seeks approval for a waiver of compliance with the requirements of the *Passenger Equipment Safety Standards* contained in 49 CFR 238.105(d)(1), train electronic hardware and software safety. Section 49 CFR 238.105(d)(1) states that:

''Hardware and software that controls or monitors a train's primary braking system shall either: (i) Fail safely by initiating a full service brake application in the event of a hardware or software failure that could impair the ability of the engineer to apply or release the brakes; or (ii) Access to direct manual control of the primary braking system (both service and emergency braking) shall be provided to the engineer.''

The railroad is purchasing 14 new bi-level electric passenger MU's and the braking software being provided by the manufacturer only partly meets the above requirements. The railroad requests that an application of only emergency brakes in the event of a loss of power, or failure (hardware and software), of the friction brake control unit be allowed in lieu of either the requirement for a full service brake application or restoration of direct manual control of the primary braking system to the operator.

The 14 new electric MU locomotives are being built by Sumitomo Corporation of America/Nippon Sharyo and the air brake system is provided by Knorr Brake Corporation, Westminster, Maryland. The railroad explains in their petition that the full service brake application is transmitted electronically to each MU's Friction Brake Control Unit (FBCU). The FBCU then provides the requested brake application without drawing down brake pipe pressure. An Emergency Magnetic Valve (EMV) is provided on each MU for an electronic emergency brake application. During normal operations, the EMVs are energized in the closed position and any loss of power or software malfunction causes the EMVs to open and vent to atmosphere causing the brakes over the entire consist to apply at an emergency rate.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (e.g., Waiver Petition Docket Number FRA–2008–0139) and may be submitted by any of the following methods:

- Web site: *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- Fax: 202–493–2251.
- Mail: Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- Hand Delivery: 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications and 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).

Issued in Washington, DC on December 15, 2008.

**Grady C. Cothen, Jr.,**

*Deputy Associate Administrator for Safety Standards and Program Development.*

[FR Doc. E8–30158 Filed 12–18–08; 8:45 am]

**BILLING CODE 4910–06–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

### Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) received a request for a waiver of compliance with certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

**Burlington Junction Railway**

[Waiver Petition Docket Number FRA–2008–0133]

The Burlington Junction Railway (BJRY) located in Burlington, Iowa, has petitioned FRA to grant a waiver of compliance from 49 CFR part 223, *Railroad Locomotive Safety Glazing Standards,* for one locomotive, specifically locomotive number BJRY 8711. BJRY 8711 is used primarily in switch service for an industrial park next to the city of Rochelle, Illinois, which has a population of approximately 8,000 people. They operate over three (3) miles of track and the surrounding area is composed of warehousing and underdeveloped rural agriculture fields. There are also three (3) grade crossings within the industrial park and BJRY operates at a speed not exceeding ten (10) miles per hour. The cost of replacing the existing glazing with FRA Type I or Type II safety glazing would impose an extreme financial burden.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (e.g., Waiver Petition Docket Number 2008–0133) and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications and 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).

Issued in Washington, DC on December 15, 2008.

**Grady C. Cothen, Jr.,**

*Deputy Associate Administrator for Safety Standards and Program Development.*

[FR Doc. E8–30159 Filed 12–18–08; 8:45 am]

**BILLING CODE 4910–06–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Transit Administration

**[FTA Docket No. FTA–2008–0055 ]**

### Notice of Request for the Approval of a New Information Collection

**AGENCY:** Federal Transit Administration, DOT.

**ACTION:** Notice of request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice announces the intention of the Federal Transit Administration (FTA) to request the Office of Management and Budget (OMB) to approve the following new information collection: Grant Accrual Surveys of FTA Grantees.

**DATES:** Comments must be submitted before February 17, 2009.

**ADDRESSES:** To ensure that your comments are not entered more than once into the docket, submit comments identified by the docket number by only one of the following methods:

1. *Web site: www.regulations.gov.* Follow the instructions for submitting comments on the U.S. Government electronic docket site. (Note: The U.S. Department of Transportation's (DOT's) electronic docket is no longer accepting electronic comments.) All electronic submissions must be made to the U.S. Government electronic docket site at *www.regulations.gov.* Commenters should follow the directions below for mailed and hand-delivered comments.

2. *Fax:* 202–366–7951.

3. *Mail:* U.S. Department of Transportation, 1200 New Jersey Avenue SE., Docket Operations, M–30, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.

4. *Hand Delivery:* U.S. Department of Transportation, 1200 New Jersey Avenue SE., Docket Operations, M–30, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001 between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays.

*Instructions:* You must include the agency name and docket number for this notice at the beginning of your comments. Submit two copies of your comments if you submit them by mail. For confirmation that FTA has received your comments, include a self-addressed stamped postcard. Note that all comments received, including any personal information, will be posted and will be available to Internet users, without change, to *www.regulations.gov.* You may review DOT's complete Privacy Act Statement in the **Federal Register** published April 11, 2000, (65 FR 19477), or you may visit *www.regulations.gov.* Docket: For access to the docket to read background documents and comments received, go to *www.regulations.gov* at any time. Background documents and comments received may also be viewed at the U.S. Department of Transportation, 1200 New Jersey Avenue SE., Docket Operations, M–30, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001 between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Mr. Godwin Nwosu, FTA Office of Budget and Policy, (202) 366–9748, or e-mail: *Godwin.Nwosu@dot.gov.*

**SUPPLEMENTARY INFORMATION:** Interested parties are invited to send comments regarding any aspect of this information collection, including: (1) The necessity and utility of the information collection for the proper performance of the functions of the FTA; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the collected information; and (4) ways to minimize the collection burden without reducing the quality of the collected information. Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection.

*Title:* Grant Accrual Surveys of FTA Grantees.

(OMB Number: 2132–NEW).

*Background:* FTA administers over 40 programs which include Formula Grants, New Starts, Fixed Guideway Modernization and the Bus and Bus Facilities Program. FTA is required to estimate and record accrued liability and expenses in its financial statements for grant expenses incurred but not yet submitted to FTA for reimbursement by grantees. This is required by the Department of Transportation, Office of the Secretary, and the Federal Accounting Standards Advisory Board guidelines. The surveys covered in this request will provide FTA with a means to gather data directly from its grantees. The information obtained from the surveys will be used to assess how FTA estimates the amount owed its grantees at the end of each accounting period. FTA needs the survey information to meet the Chief Financial Officer's Act financial statement audit requirements. The surveys will be limited to data collections that solicit voluntary opinions and will not involve information that is required by regulations.

*Respondents:* FTA grantees.

*Estimated Annual Burden on Respondents:* 15 hours for each of the 50 respondents.

*Estimated Total Annual Burden:* 750 hours.

*Frequency:* Annual.

Issued: December 15, 2008.

**Ann M. Linnertz,**

*Associate Administrator for Administration.*

[FR Doc. E8–30165 Filed 12–18–08; 8:45 am]

**BILLING CODE 4910–57–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Transit Administration

### Public Transportation on Indian Reservations Program; Tribal Transit Program

**AGENCY:** Federal Transit Administration (FTA), DOT.

**ACTION:** Notice of award.

**SUMMARY:** The Federal Transit Administration (FTA) announces the selection of projects to be funded under Fiscal Year (FY) 2008 appropriations for the Public Transportation on Indian Reservations Program; Tribal Transit Program (TTP), a program authorized by the Safe, Accountable, Flexible, and Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU).

**FOR FURTHER INFORMATION CONTACT:** Contact the appropriate FTA regional Tribal Liaison, (Appendix A) for application-specific information and issues. For general program information, contact Lorna R. Wilson, Office of Transit Programs, at (202) 366–2053, e-mail: *Lorna.Wilson@dot.gov.* A TDD is available at 1–800–877–8339 (TDD/FIRS).

**SUPPLEMENTARY INFORMATION:** The Tribal Transit Program (TTP) established by Section 3013(c)(1) SAFETEA–LU, Pub. L. 109–59 (August 10, 2005), under 49 U.S.C. 5311(c) makes funds available to federally recognized Indian tribes or Alaska Native villages, groups, or communities as identified by the Bureau of Indian Affairs (BIA) in the U.S. Department of the Interior for public transportation capital projects, operating costs and planning activities that are eligible costs under the Nonurbanized Area Formula Program (Section 5311).

A total of $12 million was made available for the program in FY 2008. In response to the FY 2008 NOFA, 89

applicants requested $24 million for new transit services, enhancement or expansion of existing transit services and planning studies including operational planning. Projects were selected through a competitive process based on each applicant's response to the program evaluation criteria outlined in FTA's May 21, 2008, **Federal Register** Notice: Notice of Funding Availability and Solicitation for FY 2008 TTP (73 FR 29569). FTA also took into consideration the current status of the FY 2006 and FY 2007 grants for tribes requesting continuation funding.

Because of the high demand, many applicants selected for funding will receive less funding than they requested to enable FTA to support an increased number of meritorious applications. Funds were only awarded to fund one year of the project. Tribes that sought funding for a multi-year project in response to the FY 2008 solicitation must submit a new application in response to the FY 2009 Notice of Funding Availability (NOFA) in order to be considered for FY 2009 funding.

The selected projects provide $620,000 for transit planning studies and/or operational planning; $557,500 for startup projects for new transit service; and, $10,822,500 for enhancements or expansion of existing transit services. Each of the 71 awardees, as well as the applicants not selected for funding, will receive a letter detailing the funding decision. The successful applicants for FY 2008 are listed in Table I.

Following the publication of this notice, FTA's regional tribal liaison will contact each applicant selected for funding to discuss technical assistance needs. In the event the contact information provided in a tribe's FY 2008 application has changed, the tribe should contact the regional transit tribal liaison (listed in Appendix A) with the current information in order to expedite the grant award process.

Issued in Washington, DC, this 8th day of December, 2008.

**Sherry Little,**

*Acting Administrator.*

## Appendix A—FTA Regional Offices and Tribal Transit Liaisons

Region I—Massachusetts, Rhode Island, Connecticut, New Hampshire, Vermont and Maine—Richard H. Doyle, FTA Regional Administrator, Volpe National Transportation Systems Center, Kendall Square, 55 Broadway, Suite 920, Cambridge, MA 02142–1093, Phone: (617) 494–2055, Fax: (617) 494–2865, Regional Tribal Liaison (s): Laurie Ansaldi and Judi Molloy.

Region II—New York, New Jersey—Brigid Hynes-Cherin, FTA Regional Administrator, One Bowling Green, Room 429, New York, NY 10004–1415, Phone: (212) 668–2170, Fax: (212) 668–2136, Regional Tribal Liaison: Darin Allan.

Region III—Pennsylvania, Maryland, Virginia, West Virginia, Delaware, Washington, DC, Letitia Thompson, FTA Regional Administrator, 1760 Market Street, Suite 500, Philadelphia, PA 19103–4124, Phone: (215) 656–7100, Fax: (215) 656–7260.

Region IV—Georgia, North Carolina, South Carolina, Florida, Mississippi, Tennessee, Kentucky, Alabama, Puerto Rico, Virgin Islands—Yvette G. Taylor, FTA Regional Administrator, 230 Peachtree St., N.W., Suite 800, Atlanta, GA 30303, Tel.: 404–865–5600, Fax: 404–865–5605, Regional Tribal Liaisons: Jamie Pfister and James Garland.

Region V—Illinois, Indiana, Ohio, Wisconsin, Minnesota, Michigan—Marisol R. Simon, FTA Regional Administrator, 200 West Adams Street, Suite 320, Chicago, IL 60606–5232, Phone: (312) 353–2789, Fax: (312) 886–0351, Regional Tribal Liaisons: Joyce Taylor and Angelica Salgado.

Region VI—Texas, New Mexico, Louisiana, Arkansas, Oklahoma—Robert Patrick, FTA Regional Administrator, 819 Taylor Street, Room 8A36, Ft. Worth, TX 76102, Phone: (817) 978–0550, Fax: (817) 978–0575, Regional Tribal Liaison: Lynn Hayes.

Region VII—Iowa, Nebraska, Kansas, Missouri—Mokhtee Ahmad, FTA Regional Administrator, 901 Locust Street, Suite 404, Kansas City, MO 64106, Phone: (816) 329–3920, Fax: (816) 329–3921, Regional Tribal Liaisons: Joni Roeseler and Cathy Monroe.

Region VIII—Colorado, North Dakota, South Dakota, Montana, Wyoming, Utah—Terry Rosapep, FTA Regional Administrator, 12300 West Dakota Avenue, Suite 310, Lakewood, CO 80228–2583, Phone: (720) 963–3300, Fax: (720) 963–3333, Regional Tribal Liaisons: Jennifer Stewart and David Beckhouse.

Region IX—California, Arizona, Nevada, Hawaii, American Samoa, Guam—Leslie Rogers, FTA Regional Administrator, 201 Mission Street, Suite 1650, San Francisco, CA 94105–1926, Phone: (415) 744–3133, Fax: (415) 744–2726, Regional Tribal Liaison: Eric Eidlin.

Region X—Washington, Oregon, Idaho, Alaska—Richard Krochalis, FTA Regional Administrator, Jackson Federal Building, 915 Second Avenue, Suite 3142, Seattle, WA 98174–1002, Phone: (206) 220–7954, Fax: (206) 220–7959, Regional Tribal Liaison: Bill Ramos.

TABLE 1—FTA FY 2008 ALLOCATION OF TRIBAL TRANSIT PROGRAM

| Tribe | State | Award | ID Number |
|---|---|---|---|
| Alabama-Quassarte Tribal Town | WI | 25,000 | D2008–TRTR–9001 |
| Blue Lake Rancheria | CA | 120,000 | D2008–TRTR–9002 |
| Bois Forte Band of Minnesota Chippewa | MN | 20,000 | D2008–TRTR–9003 |
| Central Council Tlingit and Haida Tribes of Alaska | AK | 250,000 | D2008–TRTR–9004 |
| Cher-Ae heights Indian Community of the Trinidad Rancheria | CA | 25,000 | D2008–TRTR–9005 |
| Cherokee Nation | OK | 250,000 | D2008–TRTR–9006 |
| Cheyenne and Arapaho Tribes | OK | 25,000 | D2008–TRTR–9007 |
| Cheyenne River Sioux Tribe | SD | 157,500 | D2008–TRTR–9008 |
| Chippewa Cree Tribe of the Rocky Boy's Reservation | MT | 200,000 | D2008–TRTR–9009 |
| Choctaw Nation of Oklahoma | OK | 158,000 | D2008–TRTR–9010 |
| Coeur D' Alene Tribe | ID | 225,000 | D2008–TRTR–9011 |
| Comanche Nation | OK | 160,000 | D2008–TRTR–9012 |
| Confederated Salish and Kootenai Tribes | MT | 250,000 | D2008–TRTR–9013 |
| Confederated Tribes and Bands of the Yakama Nation | WA | 442,373 | D2008–TRTR–9014 |
| Confederated Tribes of the Colville Indian Reservation | WA | 155,000 | D2008–TRTR–9015 |
| Confederated Tribes of the Grand Ronde | OR | 198,110 | D2008–TRTR–9016 |
| Confederated Tribes of the Umatilla Indian Reservation | OR | 200,000 | D2008–TRTR–9017 |
| Cowlitz Indian Tribal Housing | WA | 200,000 | D2008–TRTR–9018 |
| Eastern Band of Cherokee Nation | NC | 172,900 | D2008–TRTR–9019 |
| Eastern Shawnee Tribe of Oklahoma | MO | 25,000 | D2008–TRTR–9020 |
| Fond du Lac Bank of Lake Superior Chippewa | MN | 225,000 | D2008–TRTR–9021 |
| Fort Belknap Indian Community | MT | 218,000 | D2008–TRTR–9022 |
| Georgetown Tribal Council | AK | 25,000 | D2008–TRTR–9023 |
| Gulkana Village Council | AK | 200,000 | D2008–TRTR–9024 |
| Kalispell Tribe of Indians | WA | 208,296 | D2008–TRTR–9025 |
| Keweena Bay Indian Community | MI | 25,000 | D2008–TRTR–9026 |

TABLE 1—FTA FY 2008 ALLOCATION OF TRIBAL TRANSIT PROGRAM—Continued

| Tribe | State | Award | ID Number |
|---|---|---|---|
| Kiowa Tribe | OK | 262,000 | D2008–TRTR–9027 |
| Klamath Tribe | OR | 150,000 | D2008–TRTR–9028 |
| Lac Courte Oreilles (LCO) | WI | 109,068 | D2008–TRTR–9029 |
| Lower Brule Sioux Tribe | SD | 150,000 | D2008–TRTR–9030 |
| Lower Elwha Klallam Tribe | WA | 25,000 | D2008–TRTR–9031 |
| Lower Sioux Indian Community | MN | 25,000 | D2008–TRTR–9032 |
| Lummi Nation | WA | 200,000 | D2008–TRTR–9033 |
| Menominee Indian Tribe of Wisconsin | WI | 25,000 | D2008–TRTR–9034 |
| Mississippi Band of Choctaw Indians | MS | 192,000 | D2008–TRTR–9035 |
| Muscogee (Creek) Nation | OK | 225,000 | D2008–TRTR–9036 |
| Nez Perce Tribe | ID | 250,000 | D2008–TRTR–9037 |
| Northern Cheyenne Reservation | MT | 157,500 | D2008–TRTR–9038 |
| Oglala Sioux Tribe | SD | 300,000 | D2008–TRTR–9039 |
| Ohkay Owingeh | NM | 155,000 | D2008–TRTR–9040 |
| Orutsararmiut Native Council | AK | 175,000 | D2008–TRTR–9041 |
| Ponca Tribe of Nebraska | NE | 216,500 | D2008–TRTR–9042 |
| Ponca Tribe of Oklahoma | OK | 208,000 | D2008–TRTR–9043 |
| Prairie Band Potawatomi Nation | KS | 225,000 | D2008–TRTR–9044 |
| Pueblo of San Idefonso | NM | 25,000 | D2008–TRTR–9045 |
| Pueblo of Santa Ana | NM | 150,000 | D2008–TRTR–9046 |
| Pueblos of Tesuque-North Central Regional Transit District | NM | 250,000 | D2008–TRTR–9047 |
| Quechan Indian Tribe | AZ | 25,000 | D2008–TRTR–9048 |
| Quinalut Indian Nation | WA | 200,000 | D2008–TRTR–9049 |
| Reservation Transportation Authority | CA | 400,000 | D2008–TRTR–9050 |
| Rosebud Sioux Tribe | SD | 100,000 | D2008–TRTR–9051 |
| Santa Clara pueblo | NM | 125,000 | D2008–TRTR–9052 |
| Santee Sioux Nation | NE | 195,800 | D2008–TRTR–9053 |
| Sault St. Marie Tribe of Chippewa Indians | MI | 25,000 | D2008–TRTR–9054 |
| Seminole Nation | OK | 220,000 | D2008–TRTR–9055 |
| Sitka Tribe of Alaska | AK | 172,900 | D2008–TRTR–9056 |
| Southern Ute Indian Tribe | CO | 157,000 | D2008–TRTR–9057 |
| Spirit Lake Tribe | ND | 250,000 | D2008–TRTR–9058 |
| Spokane Tribe of Indians | WA | 25,000 | D2008–TRTR–9059 |
| Squaxin Island Tribe | WA | 146,564 | D2008–TRTR–9060 |
| Standing Rock Sioux Tribe | ND | 225,000 | D2008–TRTR–9061 |
| Stillaguamish Tribe of Indians | WA | 150,000 | D2008–TRTR–9062 |
| Swinomish Indian Tribal Community | WA | 225,000 | D2008–TRTR–9063 |
| Tetlin Village Council | AK | 225,000 | D2008–TRTR–9064 |
| The Chickasaw Nation | OK | 300,000 | D2008–TRTR–9065 |
| The Citizen Potawatomi Nation | OK | 276,000 | D2008–TRTR–9066 |
| The Kickapoo Tribe in Kansas | KS | 25,000 | D2008–TRTR–9067 |
| Turtle Mountain Band of Chippewa | ND | 225,000 | D2008–TRTR–9068 |
| United Keetoowah Band of Cherokee Indians | OK | 216,000 | D2008–TRTR–9069 |
| Winnebago Tribe of Nebraska | NE | 200,000 | D2008–TRTR–9070 |
| Yurok Tribe | CA | 255,489 | D2008–TRTR–9071 |
| Total Awarded | | $12,000,000 | $12,000,000 |

[FR Doc. E8–30163 Filed 12–18–08; 8:45 am]
BILLING CODE 4910–57–P

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

**[Docket No. NHTSA–2008–0185; Notice 1]**

### China Manufacturers Alliance, LLC, Receipt of Petition for Decision of Inconsequential Noncompliance

China Manufacturers Alliance, LLC (CMA), as importer of record for Dynacargo brand truck and bus radial tires manufactured by Shandong Jinyu Tyre Company Limited (Jinyu) has determined that certain tires manufactured during the period May 2007 through June 2008 do not fully comply with paragraph S6.5(d) of 49 CFR 571.119 (Federal Motor Vehicle Safety Standard (FMVSS) No. 119 *New Pneumatic Tires for Motor Vehicles With a GVWR of More than 4,536 Kilograms (10,000 pounds) and Motorcycles*. The affected tires were imported by CMA and sold to American Tire Distributors (ATD). CMA has filed an appropriate report pursuant to 49 CFR Part 573, *Defect and Noncompliance Responsibility and Reports*.

Pursuant to 49 U.S.C. 30118(d) and 30120(h) (see implementing rule at 49 CFR part 556), CMA has petitioned for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential to motor vehicle safety.

This notice of receipt of CMA's petition is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or other exercise of judgment concerning the merits of the petition.

Affected are approximately 2,537 size 235/75R17.5/16 Dynacargo brand load range H truck and bus tires manufactured during the period May 2007 through June 2008 with DOT date codes in the range 1407 through 2608. 1,153 [1] of these tires are currently under

[1] CMA's petition, which was filed under 49 CFR Part 556, requests an agency decision to exempt CMA as importer from the notification and recall responsibilities of 49 CFR Part 573 for all 2,537 of the affected tires. However, the agency cannot

Continued

the control of ATD and 1,384 have been sold to consumers.

Paragraph S6.5(d) of 49 CFR 571.119 requires in pertinent part:

S6.5 Tire markings. Except as specified in this paragraph, each tire shall be marked on each sidewall with the information specified in paragraphs (a) through (j) of this section. The markings shall be placed between the maximum section width (exclusive of sidewall decorations or curb ribs) and the bead on at least one sidewall, unless the maximum section width of the tire is located in an area which is not more than one-fourth of the distance from the bead to the shoulder of the tire. If the maximum section width falls within that area, the markings shall appear between the bead and a point one-half the distance from the bead to the shoulder of the tire, on at least one sidewall. The markings shall be in letters and numerals not less than 2 mm (0.078 inch) high and raised above or sunk below the tire surface not less that 0.4 mm (0.015 inch), except that the marking depth shall be not less than 0.25mm (0.010 inch) in the case of motorcycle tires. The tire identification and the DOT symbol labeling shall comply with part 574 of this chapter. Markings may appear on only one sidewall and the entire sidewall area may be used in the case of motorcycle tires and recreational, boat, baggage, and special trailer tires* * *

(d) The maximum load rating and corresponding inflation pressure of the tire, shown as follows:

(Mark on tires rated for single and dual load): Max load single ____ kg (____ lb) at ____ kPa (____ psi) cold. Max load dual ____ kg (____ lb) at ____ kPa (____ psi) cold.

(Mark on tires rated only for single load): Max load ____ kg (__ lb) at ____ kPa (____ psi) cold.

CMA explained that the subject tires are marketed with the correct maximum load rating and corresponding inflation pressure in both English and Metric units. The affected tires have English units on one sidewall and Metric units on the other sidewall. The noncompliance being that both English and Metric units do not both appear on each sidewall.

CMA stated that it believes the noncompliance is inconsequential to motor vehicle safety because correct maximum load rating and corresponding inflation pressure information is marked on each tire in both English and Metric units. Therefore, that information is readily available to anyone who uses the tires.

CMA requested that NHTSA consider its petition and grant an exemption from the recall requirements of the National Traffic and Motor Vehicle Safety Act on the basis that the noncompliance described above is inconsequential as it relates to motor vehicle safety.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance.

Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited at the beginning of this notice and be submitted by any of the following methods:

a. By mail addressed to: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

b. By hand delivery to U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except Federal Holidays.

c. Electronically: By logging onto the Federal Docket Management System (FDMS) Web site at *http://www.regulations.gov/*. Follow the online instructions for submitting comments. Comments may also be faxed to 1–202–493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that your comments were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.

Documents submitted to a docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the Internet at *http://www.regulations.gov* by following the online instructions for accessing the dockets. DOT's complete Privacy Act Statement is available for review in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

The petition, supporting materials, and all comments received before the close of business on the closing date indicated below will be filed and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the extent possible. When the petition is granted or denied, notice of the decision will be published in the **Federal Register** pursuant to the authority indicated below.

*Comment closing date:* January 20, 2009.

**Authority:** 49 U.S.C. 30118, 30120: delegations of authority at CFR 1.50 and 501.8.

Issued on: December 15, 2008.

**Claude H. Harris,**

*Director, Office of Vehicle Safety Compliance.*

[FR Doc. E8–30136 Filed 12–18–08; 8:45 am]

**BILLING CODE 4910–59–P**

relieve ATD as distributer of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant tires currently under its control. Those tires must be brought into conformance, exported, or destroyed.

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

**[Docket No. NHTSA–2008–0183; Notice 1]**

### Ford Motor Company, Receipt of Petition for Decision of Inconsequential Noncompliance

Ford Motor Company (Ford) has determined that certain complete model year 2007–2008 Ford Expedition and Lincoln Navigator multipurpose passenger vehicles (MPV) built with the Limousine Builders Package and certain complete 2008 model year Ford Crown Victoria Police Interceptor (CVPI) passenger cars built with two front bucket seats did not fully comply with paragraph S4.3(b) of 49 CFR 571.110, Federal Motor Vehicle Safety Standard (FMVSS) No. 110 *Tire Selection and Rims for Motor Vehicles With a GVWR of 4,536 Kilograms (10,000 pounds) or Less.* Ford has filed an appropriate report pursuant to 49 CFR Part 573, *Defect and Noncompliance Responsibility and Reports.*

Pursuant to 49 U.S.C. 30118(d) and 30120(h) (see implementing rule at 49 CFR part 556), Ford has petitioned for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential to motor vehicle safety.

This notice of receipt of Ford's, petition is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or other exercise of judgment concerning the merits of the petition.

Affected are approximately 233 model year 2007–2008 Ford Expedition and Lincoln Navigator MPVs with the

Limousine Builders Package (built from September 6, 2006 through March 12, 2008 at Ford's Michigan Truck Plant) and approximately 34,682 model year 2008 Ford Crown Victoria Police Interceptor passenger cars equipped with two front bucket seats (built from June 27, 2007 through May 7, 2008 at Ford's St. Thomas Assembly Plant).

Paragraph S4.3 of FMVSS No. 110 requires in pertinent part:

S4.3 Placard. Each vehicle, except for a trailer or incomplete vehicle, shall show the information specified in S4.3 (a) through (g), and may show, at the manufacturer's option, the information specified in S4.3 (h) and (i), on a placard permanently affixed to the driver's side B-pillar. In each vehicle without a driver's side B-pillar and with two doors on the driver's side of the vehicle opening in opposite directions, the placard shall be affixed on the forward edge of the rear side door. If the above locations do not permit the affixing of a placard that is legible, visible and prominent, the placard shall be permanently affixed to the rear edge of the driver's side door. If this location does not permit the affixing of a placard that is legible, visible and prominent, the placard shall be affixed to the inward facing surface of the vehicle next to the driver's seating position. This information shall be in the English language and conform in color and format, not including the border surrounding the entire placard, as shown in the example set forth in Figure 1 in this standard. At the manufacturer's option, the information specified in S4.3 (c), (d), and, as appropriate, (h) and (i) may be shown, alternatively to being shown on the placard, on a tire inflation pressure label which must conform in color and format, not including the border surrounding the entire label, as shown in the example set forth in Figure 2 in this standard. The label shall be permanently affixed and proximate to the placard required by this paragraph. The information specified in S4.3 (e) shall be shown on both the vehicle placard and on the tire inflation pressure label (if such a label is affixed to provide the information specified in S4.3 (c), (d), and, as appropriate, (h) and (i)) may be shown in the format and color scheme set forth in Figures 1 and 2 * * *

(b) Designated seated capacity (expressed in terms of total number of occupants and number of occupants for each front and rear seat location) * * *

In its petition, Ford explained that the noncompliances with FMVSS No. 110 exist due to errors on the tire and loading information placards that it affixed to the vehicles. Ford described the noncompliances as incorrect listing of designated seating positions on the tire and loading information placard. Specifically:

1. Expedition and Navigator vehicles with the Limo Builders Package are built with only two front seats. No rear seats are installed. The tire information placard identifies the seating capacity as five total (two front; three rear) or seven total (two front; five rear), instead of two total (two front; zero rear).

2. CVPI passenger cars with two front bucket seats—the designated seating capacity was incorrectly identified as six total (three front; three rear) instead of five total (two front; three rear).

Ford also explained its belief that in each of these cases the number of seats and the number of safety belts installed in the vehicle will clearly indicate to the customers the actual seating capacity. Ford also declared its belief that NHTSA has reached a similar conclusion that the presence of seat belts will alert the operators to the number of seating positions in any row of seating. Ford specifically details its reasoning as follows:

In the case of the Expedition and Navigator vehicles built with the Limo Builders Package are equipped with only two front seats and two sets of safety belts when delivered to the Qualified Vehicle Modifier (QVM). When the QVM completes the modifications to the vehicles, the final number of seating positions will be specified on the label required to be affixed by the QVM.

In the case of the CVPI vehicles that are equipped with front bucket seats, the seats are separated by approximately 11 inches and Ford believes that nearly all of these vehicles will have a center console (typically used to mount police equipment such as lap top computers, communications radios, siren and lighting controls, etc.) installed by the aftermarket upfitters who perform police vehicle conversions.

Ford stated that in all cases, the weight capacity, the tire size designation and the cold tire inflation pressure data listed on the tire and loading information placard is correct for the vehicles on which they are installed. Ford additionally stated that because the weight capacity is accurate, it believes that there is no potential for vehicle overloading due to the incorrect value in the designated seating capacity.

Ford also stated that it was not aware of any field or owner complaints of misunderstanding of the actual number of seats in these vehicles.

Ford also has informed NHTSA that it has corrected the problem that caused these errors so that they will not be repeated in future production.

In summation, Ford states that it believes that the noncompliances are inconsequential to motor vehicle safety and that no corrective action is warranted.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance.

Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited at the beginning of this notice and be submitted by any of the following methods:

a. By mail addressed to: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

b. By hand delivery to U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except Federal Holidays.

c. Electronically: by logging onto the Federal Docket Management System (FDMS) Web site at *http://www.regulations.gov/*. Follow the online instructions for submitting comments. Comments may also be faxed to 1–202–493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that your comments were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.

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.). DOT's complete Privacy Act Statement is in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

You may view documents submitted to a docket at the address and times given above. You may also view the documents on the Internet at *http://www.regulations.gov* by following the online instructions for accessing the dockets available at that Web site.

The petition, supporting materials, and all comments received before the close of business on the closing date indicated below will be filed and will be considered. All comments and

supporting materials received after the closing date will also be filed and will be considered to the extent possible. When the petition is granted or denied, notice of the decision will be published in the **Federal Register** pursuant to the authority indicated below.

*Comment closing date:* January 20, 2009.

**Authority:** 49 U.S.C. 30118, 30120: delegations of authority at CFR 1.50 and 501.8.

Issued on: December 15, 2008.

**Claude H. Harris,**

*Director, Office of Vehicle Safety Compliance.*

[FR Doc. E8–30132 Filed 12–18–08; 8:45 am]

**BILLING CODE 4910–59–P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

**[Docket No. NHTSA–2008–0210; Notice 1]**

### Newell Coach Corporation, Receipt of Petition for Decision of Inconsequential Noncompliance

Newell Coach Corporation (Newell), has determined that certain motor homes that it manufactured between June 17, 1996 and August 26, 2008 do not fully comply with paragraph S5.3 of Federal Motor Vehicle Safety Standard (FMVSS) No. 120 *Tire Selection and Rims for Motor Vehicles with a GVWR of More than 4,536 Kilograms (10,000 pounds).* Newell has filed an appropriate report pursuant to 49 CFR Part 573, *Defect and Noncompliance Responsibility and Reports.*

Pursuant to 49 U.S.C. 30118(d) and 30120(h) (see implementing rule at 49 CFR part 556), Newell has petitioned for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential to motor vehicle safety.

This notice of receipt of Newell's petition is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or other exercise of judgment concerning the merits of the petition.

Affected are approximately 456 motor homes manufactured by Newell between June 17, 1996 and August 26, 2008.

*Paragraphs S5.3 of FMVSS No. 120 requires in pertinent part:*

S5.3 Each vehicle shall show the information specified in S5.3.1 and S5.3.2 and, in the case of a vehicle equipped with a non-pneumatic spare tire, the information specified in S5.3.3, in the English language, lettered in block capitals and numerals not less than 2.4 millimeters high and in the format set forth following this paragraph. This information shall appear either—

(a) After each GAWR listed on the certification label required by Sec. 567.4 or Sec. 567.5 of this chapter; or at the option of the manufacturer,

(b) On the tire information label affixed to the vehicle in the manner, location, and form described in Sec. 567.4 (b) through (f) of this chapter as appropriate of each GVWR–GAWR combination listed on the certification label.

S5.3.1 Tires. The size designation (not necessarily for the tires on the vehicle) and the recommended cold inflation pressure for those tires such that the sum of the load ratings of the tires on each axle (when the tires' load carrying capacity at the specified pressure is reduced by dividing by 1.10, in the case of a tire subject to FMVSS No. 109) is appropriate for the GAWR as calculated in accordance with S5.1.2.

S5.3.2. Rims. The size designation and, if applicable, the type designation of Rims (not necessarily those on the vehicle) appropriate for those tires.

Truck Example—Suitable Tire-Rim Choice

GVWR: 7,840 KG (17,289 LB)
GAWR: FRONT—2,850 KG (6,280 LB) WITH 7.50–20(D) TIRES, 20x6.00 RIMS AT 520 KPA (75 PSI) COLD SINGLE
GAWR: REAR—4,990 KG (11,000 LB) WITH 7.50–20(D) TIRES, 20x6.00 RIMS, AT 450 KPA (65 PSI) COLD DUAL
GVWR: 13,280 KG (29,279 LB)
GAWR: FRONT—4,826 KG (10,640 LB) WITH 10.00–20(F) TIRES, 20x7.50 RIMS, AT 620 KPA (90 PSI) COLD SINGLE
GAWR: REAR—8,454 KG (18,639 LB) WITH 10.00–20(F) TIRES, 20x2.70 RIMS, AT 550 KPA (80 PSI) COLD DUAL* * *

Newell explains that the noncompliance is that the tire and rim information lettering on the vehicles' certification labeling is only 1.8 millimeters high, as opposed to the 2.4 millimeter height required under paragraph S5.3 of FMVSS No. 120.

Newell stated that it discovered the noncompliance after investigating an inquiry from National Highway Traffic Safety Administration (NHTSA) concerning readability of the tire and rim information on the vehicles' certification labels.

Newell argues that while the required tire and rim information lettering is only 0.6 mm (about 1/45 of an inch) shorter than the 2.4 mm height required by the standard that it creates no risk to motor vehicle safety. Newell believes that all of the relevant information is set forth on the certification label, and that it is easily readable.

Newell further states that for vehicles manufactured from 2002 through 2008, if an operator has difficulty reading the information on the label, the tire inflation information is available in the owner's manuals provided with the vehicles.

Newell additionally stated that it has provided tire inflation information in the Newell's News, a newsletter that Newell sends to its customers. Newell also points out that the rim size and type are marked on the wheels of the vehicle, and the tire designation is marked on the tires themselves, thus providing a further source for most of the information required by the standard.

Newell also believes that NHTSA has previously granted at least one petition for inconsequential noncompliance where the facts were almost identical to those stated in this petition. Moreover, Newell believes that on numerous occasions NHTSA has granted petitions for inconsequential noncompliance where there has been a complete omission of required tire and/or rim information on the certification label.

Finally, Newell notes that these vehicles have been on the road for up to 12 years, and the company has not received any consumer complaints regarding an inability to read the tire and rim information on the certification label.

Newell also stated that it has corrected the problem that caused these errors so that they will not be repeated in future production.

In summation, Newell states that it believes that because the noncompliances are inconsequential to motor vehicle safety that no corrective action is warranted.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, these provisions only apply to vehicles and equipment that have already passed from the manufacturer to an owner, purchaser, or dealer.

Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited at the beginning of this notice and be submitted by any of the following methods:

a. By mail addressed to: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

b. By hand delivery to U.S. Department of Transportation, Docket Operations, M–30, West Building

Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE, Washington, DC 20590. The Docket Section is open on weekdays from 10 am to 5 pm except Federal Holidays.

c. Electronically: by logging onto the Federal Docket Management System (FDMS) Web site at *http://www.regulations.gov/*. Follow the online instructions for submitting comments. Comments may also be faxed to 1–202–493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that your comments were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.

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.). DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

You may view documents submitted to a docket at the address and times given above. You may also view the documents on the Internet at *http://www.regulations.gov* by following the online instructions for accessing the dockets available at that Web site.

The petition, supporting materials, and all comments received before the close of business on the closing date indicated below will be filed and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the extent possible. When the petition is granted or denied, notice of the decision will be published in the **Federal Register** pursuant to the authority indicated below.

*Comment closing date:* January 20, 2009.

**Authority:** (49 U.S.C. 30118, 30120: Delegations of authority at CFR 1.50 and 501.8).

Issued on: December 15, 2008.

**Claude H. Harris,**

*Director, Office of Vehicle Safety Compliance.*

[FR Doc. E8–30137 Filed 12–18–08; 8:45 am]

**BILLING CODE 4910–59–P**

## DEPARTMENT OF THE TREASURY

### Submission for OMB Review; Comment Request

December 12, 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, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

**DATES:** Written comments should be received on or before January 20, 2009 to be assured of consideration.

**Internal Revenue Service (IRS)**

*OMB Number:* 1545–2106.

*Type of Review:* Extension.

*Title:* NOT–127516–08 (Notice 2008–58), Relief from Certain Low-Income Housing Credit Requirements Due to Severe Storms, Tornadoes, and Flooding in Iowa.

*Description:* The Internal Revenue Service is suspending certain requirements under § 42 of the Internal Revenue Code for low-income housing credit projects in the United States to provide emergency housing relief needed as a result of the devastation caused by severe storms, tornadoes, and flooding in Iowa beginning on May 25, 2008.

*Respondents:* Individuals or Households.

*Estimated Total Burden Hours:* 125 hours.

*OMB Number:* 1545–1950.

*Type of Review:* Extension.

*Form:* 8621–A.

*Title:* Return by a Shareholder Making Certain Late Elections To End Treatment as a Passive Foreign Investment Company.

*Description:* Form 8621–A is used by certain taxpayer/investors to request ending of their treatment as investing in a Passive Foreign Investment Company. New regulations are being written in support of the new products. The underlying law is in IRC sections 1297 and 1298.

*Respondents:* Individuals or Households.

*Estimated Total Burden Hours:* 43,622 hours.

*OMB Number:* 1545–1799.

*Type of Review:* Extension.

*Title:* Notice 2002–69, Interest Rates and Appropriate Foreign Loss Payment Patterns For Determining the Qualified Insurance Income of Certain Controlled Corporations under Section 954(f).

*Description:* This notice provides guidance on how to determine the foreign loss payment patterns of a foreign insurance company owned by U.S. shareholder for purposes of determining the amount of investment income earned by the insurance company that is not treated as Subpart F income under section 954(i).

*Respondents:* Businesses or other for-profits.

*Estimated Total Burden Hours:* 300 hours.

*OMB Number:* 1545–1657.

*Type of Review:* Extension.

*Title:* Revenue Procedure 99–32—Conforming Adjustments Subsequent to Section 482 Allocations.

*Description:* This revenue procedure prescribes the applicable procedures for the repatriation of cash by a United States taxpayer via an interest-bearing account receivable or payable in an amount corresponding to the amount allocated under section 482 from, or to a related person with respect to a controlled transaction.

*Respondents:* Businesses or other for-profits.

*Estimated Total Burden Hours:* 1,620 hours.

*OMB Number:* 1545–1487.

*Type of Review:* Extension.

*Title:* TD 8834 (final)—Treatment of Distributions to Foreign Persons Under Sections 367(e)(1) and 367(e)(2).

*Description:* Sections 367(e)(1) and 367(e)(2) provide for gain recognition on certain transfers to foreign persons under sections 355 and 332. Section 6038B(a) requires U.S. persons transferring property to foreign persons in exchanges described in sections 332 and 355 to furnish information regarding such transfers.

*Respondents:* Businesses or other for-profits.

*Estimated Total Burden Hours:* 2,471 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. E8–30204 Filed 12–18–08; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF THE TREASURY

### Open Meeting of the President's Advisory Council on Financial Literacy

**AGENCY:** Office of Financial Education, Treasury.

**ACTION:** Notice of meeting.

**SUMMARY:** The President's Advisory Council on Financial Literacy will convene its seventh meeting on Tuesday, January 6, 2009, beginning at 2 p.m. Eastern Time. The meeting will be open to the public.

**DATES:** The meeting will be held on Tuesday, January 6, 2009 at 2 p.m. Eastern Time.

*Submission of Writen Comments:* The public is invited to submit written statements to the President's Advisory Council on Financial Literacy by any one of the following methods:

**Electronic Statements**

E-mail *FinancialLiteracyCouncil@do.treas.gov*; or

**Paper Statements**

Send paper statements in triplicate to President's Advisory Council on Financial Literacy, Office of Financial Education, Room 1332, Department of the Treasury, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

In general, the Department will post all statements on its Web site (*http://www.treasury.gov/offices/domestic-finance/financial-institution/fin-education/council/index.shtml*) without change, including any business or personal information provided such as names, addresses, e-mail addresses, or telephone numbers.

The Department will make such statements available for public inspection and copying in the Department's library, Room 1428, Main Department Building, 1500 Pennsylvania Avenue, NW., Washington, DC 20220, on official business days between the hours of 10 a.m. and 5 p.m. You can make an appointment to inspect statements by telephoning (202) 622–0990. All statements, including attachments and other supporting materials, received are part of the public record and subject to public disclosure. You should submit only information that you wish to make available publicly.

**FOR FURTHER INFORMATION CONTACT:** Tom Kurek, Office of Financial Education, Department of the Treasury, Main Department Building, 1500 Pennsylvania Avenue, NW., Washington, DC 20220, at (202) 622–0204 or *Thomas.Kurek@do.treas.gov.*

**SUPPLEMENTARY INFORMATION:** In accordance with section 10(a) of the Federal Advisory Committee Act, 5 U.S.C. App. 2 and the regulations thereunder, Dubis Correal, Designated Federal Officer of the Advisory Council, has ordered publication of this notice that the President's Advisory Council on Financial Literacy will convene its seventh meeting on Tuesday, January 6, 2009, in the Media Room in the Main Department Building, 1500 Pennsylvania Avenue, NW., Washington, DC, beginning at 2 p.m. Eastern Time. The meeting will be open to the public. Because the meeting will be held in a secured facility, members of the public who plan to attend the meeting must contact the Office of Financial Education at 202–622–1783 or *FinancialLiteracyCouncil@do.treas.gov* by 5 p.m. Eastern Time on January 2, 2009, to inform the Department of their desire to attend the meeting and to provide the information that will be required to facilitate entry into the Main Department Building. To enter the building, attendees should e-mail the Department their full name, date of birth, social security number, organization, and country of citizenship. The primary purpose of this meeting is for the President's Advisory Council on Financial Literacy to discuss the draft of the President's Advisory Council on Financial Literacy's Annual Report to the President.

Dated: December 15, 2009.

**Lindsay Valdeon,**

*Deputy Executive Secretary.*

[FR Doc. E8–30282 Filed 12–18–08; 8:45 am]

**BILLING CODE 4810–25–P**

## DEPARTMENT OF THE TREASURY

### Office of the Comptroller of the Currency

### Agency Information Collection Activities: Submission for OMB Review; Comment Request

**AGENCY:** Office of the Comptroller of the Currency (OCC), Treasury.

**ACTION:** Notice and request for comment.

**SUMMARY:** The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a continuing information collection, as required by the Paperwork Reduction Act of 1995. An agency may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid OMB control number. The OCC is soliciting comment concerning its information collection titled, ''Fiduciary Activities of National Banks—12 CFR part 9.'' The OCC is also giving notice that it has submitted the collection to OMB for review.

**DATES:** You should submit written comments by January 20, 2009.

**ADDRESSES:** You should direct all written comments to: Communications Division, Office of the Comptroller of the Currency, Public Information Room, Mailstop 1–5, Attention: 1557–0140, 250 E Street, SW., Washington, DC 20219. In addition, comments may be sent by fax to (202) 874–4448, or by electronic mail to *regs.comments@occ.treas.gov.* You can inspect and photocopy the comments at the OCC's Public Information Room, 250 E Street, SW., Washington, DC 20219. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 874–5043. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect and photocopy comments.

Additionally, you should send a copy of your comments to OCC Desk Officer, 1557–0140, by mail to U.S. Office of Management and Budget, 725 17th Street, NW., #10235, Washington, DC 20503, or by fax to (202) 395–6974.

**FOR FURTHER INFORMATION CONTACT:** You can request additional information or a copy of the collection from Mary H. Gottlieb, OCC Clearance Officer, (202) 874–5090, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

**SUPPLEMENTARY INFORMATION:** The OCC is proposing to extend OMB approval of the following information collection:

*Title:* Fiduciary Activities of National Banks—12 CFR part 9.

*OMB Control No.:* 1557–0140.

*Form No.:* None.

*Description:* This submission covers an existing regulation and involves no change to the regulation or to the information collection. The OCC requests only that OMB approve its revised estimate of the burden and extend its approval of the information collection.

Under 12 U.S.C. 92a, the OCC regulates the fiduciary activities of national banks, including the administration of collective investment funds. The requirements in 12 CFR part 9 enable the OCC to perform its responsibilities relating to the fiduciary activities of national banks and collective investment funds. The

collections of information in part 9 are found in §§ 9.8, 9.9(a) and (b), 9.17(a), 9.18(b)(1), 9.18(b)(6)(ii), 9.18(b)(6)(iv), and 9.18(c)(5) as follows:

- Section 9.8 requires a national bank to maintain fiduciary records;
- Sections 9.9(a) and (b) require a national bank to note the results of a fiduciary audit in the minutes of the board of directors;
- Section 9.17(a) requires a national bank that wants to surrender its fiduciary powers to file with the OCC a certified copy of the resolution of its board of directors;
- Section 9.18(b)(1) requires a national bank to establish and maintain each collective investment fund in accordance with a written plan;
- Section 9.18(b)(1) also requires a national bank to make the plan available for public inspection and to provide a copy of the plan to any person who requests it;
- Section 9.18(b)(6)(ii) requires a national bank to prepare a financial report of the fund;
- Section 9.18(b)(6)(iv) requires a national bank to disclose the financial report to investors and other interested persons; and
- Section 9.18(c)(5) requires a national bank to request OCC approval of special exemption funds.

*Type of Review:* Regular.

*Affected Public:* Businesses or other for-profit.

*Estimated Number of Respondents:* 492.

*Estimated Total Annual Burden:* 126,403 hours.

On October 9, 2008, the OCC published a notice in the **Federal Register** soliciting comment for 60 days on this information collection (73 FR 59707). No comments were received. Comments continue to be invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility;

(b) The accuracy of the agency's estimate of the burden of the collection of information;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: December 15, 2008.

**Michele Meyer,**

*Assistant Director, Legislative and Regulatory Activities Division.*

[FR Doc. E8–30131 Filed 12–18–08; 8:45 am]

**BILLING CODE 4810–33–P**

## DEPARTMENT OF VETERANS AFFAIRS

**[OMB Control No. 2900–0548]**

### Agency Information Collection (Board of Veterans' Appeals Customer Satisfaction With Hearing Survey) Under OMB Review

**AGENCY:** Board of Veterans' Appeals, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Board of Veterans' Appeals (BVA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

**DATE:** Comments must be submitted on or before January 20, 2009.

**ADDRESSES:** Submit written comments on the collection of information through *http://www.Regulations.gov;* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0548'' in any correspondence.

**FOR FURTHER INFORMATION OR A COPY OF THE SUBMISSION CONTACT:** Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail: *denise.mclamb@mail.va.gov.* Please refer to ''OMB Control No. 2900–0548.''

**SUPPLEMENTARY INFORMATION:** Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, BVA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of BVA's functions, including whether the information will have practical utility; (2) the accuracy of BVA's estimate of the burden of the proposed 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, including through the use of automated collection techniques or the use of other forms of information technology.

*Title:* Board of Veterans' Appeals Customer Satisfaction with Hearing Survey, VA Form 0745.

*OMB Control Number:* 2900–0548.

*Type of Review:* Extension of a currently approved.

*Abstract:* VA Form 0745 is completed by appellants at the conclusion their hearing with the Board of Veterans' Appeals. The data collected will be used to assess the effectiveness of current hearing procedures used in conducting hearings and to develop better methods of serving veterans and their families.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on October 10, 2008, at pages 60406–60407.

*Affected Public:* Individuals or households.

*Estimated Annual Burden:* 110 hours.

*Estimated Average Burden Per Respondent:* 6 minutes.

*Frequency of Response:* On occasion.

*Estimated Number of Respondents:* 1,102.

Dated: December 10, 2008.

By direction of the Secretary.

**Denise McLamb,**

*Program Analyst, Enterprise Records Service.*

[FR Doc. E8–30236 Filed 12–18–08; 8:45 am]

**BILLING CODE 8320–01–P**

## DEPARTMENT OF VETERANS AFFAIRS

**[OMB Control No. 2900–New (VGLI Survey)]**

### Agency Information Collection Activities (Conversion From Servicemembers' Group Life Insurance to Veterans' Group Life Insurance) Under OMB Review

**AGENCY:** Veterans Benefits Administration, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (PRA) of 1995

(44 U.S.C. 3501–21), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and it includes the actual data collection instrument.

**DATES:** Comments must be submitted on or before January 20, 2009.

**ADDRESSES:** Submit written comments on the collection of information through *http://www.Regulations.gov*; or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–New (VGLI Survey)'' in any correspondence.

*For Further Information or a Copy of the Submission Contact:* Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail: *denise.mclamb@mail.va.gov*. Please refer to ''OMB Control No. 2900–New (VGLI Survey).''

**SUPPLEMENTARY INFORMATION:**

*Title*: Independent Evaluation of the Conversion Privilege from Servicemembers' Group Life Insurance (SGLI) to Veterans' Group Life Insurance (VGLI) for Disabled Service Members.

*OMB Control Number:* 2900–New (VGLI Survey).

*Type of Review:* New collection.

*Abstract:* The data collected will be used to determine the appropriate target rate to convert from SGLI to VGLI and to determine whether recently separated veterans with VA or Department of Defense disabilities with a disability rating of 50% or above made informed and rational decisions on their need for VGLI coverage.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on October 10, 2008, at page 60407.

*Affected Public:* Individuals or households.

*Estimated Annual Burden:* 413 hours.

*Estimated Average Burden Per Respondent:* 20 minutes.

*Frequency of Response:* On occasion.

*Estimated Number of Respondents:* 1,216.

Dated: December 10, 2008.

By direction of the Secretary.

**Denise McLamb,**

*Program Analyst, Enterprise Records Service.*

[FR Doc. E8–30233 Filed 12–18–08; 8:45 am]

**BILLING CODE 8320–01–P**

## DEPARTMENT OF VETERANS AFFAIRS

**[OMB Control No. 2900—New (NVS PILOT)]**

### Agency Information Collection (Pilot Study for the National Survey of Veterans, Active Duty Service Members, Activated National Guard and Reserve Members, Family Members and Survivors) Activities Under OMB Review

**AGENCY:** Office of Policy and Planning, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Office of Policy, Planning and Preparedness (OPP&P), Department of Veterans Affairs, has submitted the collection of information as abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

**DATES:** Comments must be submitted on or before January 20, 2009.

**ADDRESSES:** Submit written comments on the collection of information through *www.Regulations.gov;* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503, (202) 395–7316. Please refer to ''OMB Control No. 2900–New (NVS PILOT)'' in any correspondence.

**FOR FURTHER INFORMATION CONTACT:** Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail: *denise.mclamb@va.gov*. Please refer to ''OMB Control No. 2900–New (NVS PILOT)''.

**SUPPLEMENTARY INFORMATION:**

*Title:* Pilot Study for the National Survey of Veterans (NVS), Active Duty Service Members, Activated National Guard and Reserve Members, Family Members and Survivors.

*OMB Control Number:* 2900–New (NVS PILOT).

*Type of Review:* New collection.

*Abstract:* The pilot will collect information on awareness, demographics, and provide information needed to determine the best sampling scheme and data collection methodology for the NSV data collection effort. The pilot will also assess the response rates and coverage of the populations of interest for the sampling approach for the NSV. One of the VA's many goals is to monitor and improve veteran health and well-being. The scope of the NSV is being expanded to address the requirements of Public Law 108–454, section 805, to assess awareness of VA benefits and services among four populations: Veterans, active duty service members, National Guard and Reserve members activated under Title 10, and spouses and survivors of veterans. Because the NSV collects needed information that is not available in VA administrative files and because of the infrequent administration of the NSV, it is important that we minimize the total survey error associated with the study design. It is for these reasons that the VA has planned to conduct a pilot study to inform the design of the next NSV.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on October 10, 2008, at page 60406.

*Affected Public:* Individuals or households.

*Estimated Total Annual Burden:* 371 hours.

*Estimated Average Burden per Respondent:* 4.7 minutes.

*Frequency of Response:* One-time.

*Estimated Number of Respondents:* 4,726.

Dated: December 10, 2008.

By direction of the Secretary.

**Denise McLamb,**

*Program Analyst, Enterprise Records Service.*

[FR Doc. E8–30283 Filed 12–18–08; 8:45 am]

**BILLING CODE 8320–01–P**

Federal Register

Friday,
December 19, 2008

## Part II

# Environmental Protection Agency

**40 CFR Parts 51 and 52**

**Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Reconsideration of Inclusion of Fugitive Emissions; Final Rule**

## ENVIRONMENTAL PROTECTION AGENCY

**40 CFR Parts 51 and 52**

**[EPA–HQ–OAR–2004–0014, FRL–8752–4]**

**RIN 2060–AM91**

# Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Reconsideration of Inclusion of Fugitive Emissions

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

**ACTION:** Final rule.

**SUMMARY:** The EPA is finalizing revisions to the December 31, 2002 New Source Review (NSR) Improvement rules to change the requirements of the major NSR programs regarding the treatment of fugitive emissions. Specifically, this final rule requires that fugitive emissions be included in determining whether a physical or operational change results in a major modification only for sources in the source categories that have been designated through rulemaking pursuant to section 302(j) of the Clean Air Act (Act). Also, this action elaborates on guiding principles for determining fugitive emissions for purposes of NSR and title V permitting.

**DATES:** This final rule is effective January 20, 2009.

**FOR FURTHER INFORMATION CONTACT:** Mr. Joseph Mangino, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504–03), Environmental Protection Agency, Research Triangle Park, NC 27711, telephone number: (919) 541–9778; fax number: (919) 541–5509, e-mail address: *mangino.joseph@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

## I. General Information

### *A. Does this action apply to me?*

Entities potentially affected by this action include sources in all industry groups. The majority of sources potentially affected are expected to be in the following groups.

| Industry group | SIC [a] | NAICS [b] |
|---|---|---|
| Electric Services | 491 | 221111, 221112, 221113, 221119, 221121, 221122 |
| Petroleum Refining | 291 | 324110 |
| Industrial Inorganic Chemicals | 281 | 325181, 325120, 325131, 325182, 211112, 325998, 331311, 325188 |
| Industrial Organic Chemicals | 286 | 325110, 325132, 325192, 325188, 325193, 325120, 325199 |
| Miscellaneous Chemical Products | 289 | 325520, 325920, 325910, 325182, 325510 |
| Natural Gas Liquids | 132 | 211112 |
| Natural Gas Transport | 492 | 486210, 221210 |
| Pulp and Paper Mills | 261 | 322110, 322121, 322122, 322130 |
| Paper Mills | 262 | 322121, 322122 |
| Automobile Manufacturing | 371 | 336111, 336112, 336211, 336992, 336322, 336312, 336330, 336340, 336350, 336399, 336212, 336213 |
| Pharmaceuticals | 283 | 325411, 325412, 325413, 325414 |
| Mining | 211, 212, 213 | 21 |
| Agriculture, Fishing and Hunting | 111, 112, 113, 115. | 11 |

[a] Standard Industrial Classification.
[b] North American Industry Classification System.

Entities potentially affected by the subject rule for this proposed action also include state, local, and tribal governments.

### *B. How Is This Preamble Organized?*

The information presented in this preamble is organized as follows:



## II. Background

### *A. What is Major New Source Review?*

The major NSR program is mandated by parts C and D of title I of the Act. Major NSR is a preconstruction review and permitting program applicable to new or modified major stationary sources (major sources) of air pollutants regulated under the Act. In areas not meeting National Ambient Air Quality Standards (NAAQS) and in ozone transport regions (OTR), the program is implemented under the requirements of part D of title I of the Act. We call this program the ''nonattainment'' major NSR program. In areas meeting NAAQS (''attainment'' areas) or for which there is insufficient information to determine whether they meet the NAAQS (''unclassifiable'' areas), the NSR requirements under part C of title I of

the Act apply. We call this program the Prevention of Significant Deterioration (PSD) program. Collectively, we also commonly refer to these programs as the major NSR program. These regulations are contained in 40 CFR 51.165, 51.166, 52.21, 52.24, and appendix S to part 51.

*B. What sources are subject to major NSR?*

Major NSR applies to (1) construction of new major sources, and (2) major modifications at existing major sources. In either case, the initial step in assessing applicability is to determine whether the source in question qualifies as a ''major source.'' A proposed or existing source qualifies as a major source if it ''emits or has the potential to emit'' a regulated NSR pollutant in an amount greater than the specified annual threshold. We define ''potential to emit'' (PTE) as the maximum capacity of a source to emit a pollutant under its physical and operational design, taking into account any physical or operational limitations on the source that are enforceable as a practical matter. (*See*, for example, § 52.21(b)(4) for the full definition of PTE.)

If a proposed new source's PTE is greater than the applicable major source threshold for one or more regulated NSR pollutants, it is subject to preconstruction review under major NSR. For the PSD program, the major source threshold is 100 tons per year (tpy) for sources in any of 28 source categories listed in the regulations, and 250 tpy for any other type of source. (*See* §§ 51.166(b)(1) and 52.21(b)(1) for the full definition of ''major stationary source'' under PSD.) The major source threshold under nonattainment major NSR is generally 100 tpy, but is lower for some pollutants in nonattainment areas classified as serious, severe, or extreme. (*See* § 51.165(a)(1)(iv) for the full definition of ''major stationary source'' under nonattainment major NSR.) These same major source thresholds also apply to modifications at existing minor sources where the modification by itself has potential emissions in excess of the applicable threshold.

If an existing major source (*i.e.*, an existing source with actual emissions and/or PTE greater than the applicable major source threshold) is planning a physical or operational change, the project is subject to review under major NSR if it is a ''major modification.'' A physical or operational change is a major modification if it meets both of the following two criteria: [1]

- The physical or operational change, taken by itself, would result in a significant increase in emissions of a regulated NSR pollutant; and
- The physical or operational change, taken together with other, contemporaneous emissions increases and decreases at the source, would result in a significant net emissions increase.

The level of emissions that is considered ''significant'' varies by pollutant and, in some cases, by a nonattainment area's classification. For example, an increase of 40 tpy is significant for sulfur dioxide, while 0.6 tpy of lead is considered a significant increase. (*See* §§ 51.166(b)(23) and 52.21(b)(23) for the full definition of ''significant'' under PSD and § 51.165(a)(1)(x) for the full definition under nonattainment major NSR.) In determining the increase in emissions from a physical or operational change, new emissions units are evaluated at their PTE, while existing and replacement units are generally evaluated by comparing their baseline actual emissions before the physical or operational change to their projected actual emissions after the change.

*C. What are fugitive emissions, and how do they figure into major NSR applicability?*

For purposes of major NSR, we define ''fugitive emissions'' as emissions that could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening. (*See*, for example, § 52.21(b)(20).) Examples of fugitive emissions include windblown dust from surface mines and volatile organic compounds (VOCs) emitted from leaking pipes and fittings at petroleum refineries.

Quantifiable fugitive emissions are included in a stationary source's PTE when determining whether the source is a major source only if they are emitted from one of the source categories specifically listed in the major NSR regulations. This is consistent with section 302(j) of the Act, and is made clear in the definition of ''major stationary source'' that is found in the major NSR regulations. (*See*, for example, § 52.21(b)(1)(iii).)

Conversely, under the 2002 NSR rules, fugitive emissions, to the extent quantifiable, are included in determining whether a physical or operational change is a major modification (i.e., in calculating the resulting emissions increase and net emissions increase), regardless of the source category that the emission source belongs to. This is the case because the definitions of the terms ''projected actual emissions'' and ''baseline actual emissions'' under the 2002 NSR rules, which are the definitions used to calculate emission increases at existing units, include quantifiable fugitive emissions. (*See* §§ 52.21(b)(41)(ii)(*b*) and 52.21(b)(48)(ii)(*a*).) In our November 13, 2007 (72 FR 63850, November 13, 2007) notice we proposed to modify this aspect of the current NSR rules to take a consistent approach as to the inclusion of fugitive emissions in threshold major source and major modification determinations.

*D. What is the basis for and history of EPA's treatment of fugitive emissions in major NSR applicability determinations?*

Section 302(j) of the Act sets out the definition of ''major stationary source'' that, along with several other provisions of the Act, provides the basis for the definitions used in the major NSR regulations. The definition in section 302(j) specifies that fugitive emissions are included in major source determinations only for source categories that EPA specifies through rulemaking. As discussed below, EPA enacted regulations pursuant to section 302(j) that specify the source categories for which fugitive emissions are included in the major source determination and has listed these source categories in the ''major stationary source'' definitions. However, the Act is silent regarding the treatment of fugitive emissions for purposes of determining whether a physical or operational change is a major modification. Below, we discuss the history of this issue leading up to this final action.

We first created the list of source categories for which fugitive emissions are included in major source determinations (the ''section 302(j) list'') in the final PSD and nonattainment major NSR rules issued in 1980 on remand from the DC Circuit. (*See* 45 FR 52676, August 7, 1980.) The court remanded our initial major NSR rules for a variety of reasons, including our failure to follow the requirements of section 302(j) in promulgating a partial exemption for fugitive dust. (*See Alabama Power* v. *Costle*, 636 F.2d 323, 369–370 (DC Cir. 1979).)

The promulgated section 302(j) list included the source categories listed in section 169(1) of the Act, which is the definition of ''major emitting facility'' for purposes of PSD. Under that definition, the major source threshold

[1] On October 20, 2005, we proposed different major NSR applicability procedures for modifications at electric generating units. (*See* 70 FR 61081.) Our rulemaking effort for such units is ongoing.

for the listed source categories is 100 tpy, rather than the 250 tpy threshold that applies to other categories of sources. In the preamble to the 1980 major NSR rules, we noted that the *Alabama Power* court stated that ''Congress'' intention, in establishing the list of source categories in section 169(1) of the Act, was to identify facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emission of the deleterious pollutants that befoul our nation's air.'' (*See* 45 FR 52691, August 7, 1980.) In light of that intent, we determined that as a matter of policy, it would be appropriate to count all emissions-including fugitive emissions-in threshold calculations of major NSR applicability for those source categories. (Again, *see* 45 FR 52691, August 7, 1980.) In doing so, we indicated that our listing decisions would be based on whether sources in the category have the potential to degrade air quality significantly. We also indicated that we would consider information raised by commenters that showed that unreasonable socioeconomic impacts relative to the benefits would result from subjecting the sources to the relevant PSD or nonattainment programs.

In addition to the source categories listed in section 169(1), based on application of these criteria, we included on the section 302(j) list ''any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act.'' We noted in the 1980 preamble that categories of sources are regulated under section 111 (New Source Performance Standards or NSPS) or 112 (National Emission Standards for Hazardous Air Pollutants or NESHAP) on the basis of a determination that their emissions seriously and adversely impact ambient air quality. We therefore determined that it was appropriate to include their fugitive emissions in the threshold calculations for purposes of major NSR applicability. We included the August 7, 1980 cutoff date because we believed that sources not regulated by NSPS or NESHAP before the promulgation date of the major NSR rules could not have been afforded a meaningful opportunity to comment on the inclusion of their fugitive emissions in threshold applicability determinations for the source category.

In the preamble to the 1980 NSR rules, we explained that the *Alabama Power* court determined that the ''substantive preconstruction review and permitting requirements of section 165 'apply with equal force to fugitive emissions and emissions from industrial point sources,' '' but went on to explain that this meant only that ''section 165 requires that fugitive emissions be taken into account in determinations of whether NAAQS or allowable increments will be violated * * * and that fugitive emissions be subjected to BACT requirements * * *.'' (*See* 45 FR 52691, August 7, 1980.) Thus, in the preamble to the 1980 rules, we analytically grouped fugitive emissions for purposes of the major source definition and major modifications under the rubric of ''threshold calculations.'' (*See* 45 FR 52690–91, August 7, 1980.)

However, the 1980 NSR regulations on their face require fugitive emissions to be included in threshold applicability determinations for any project, but then exempt from the relevant PSD or nonattainment requirements any project that (1) would be ''major'' only if fugitive emissions were included and (2) does not belong to one of the categories specifically listed pursuant to the section 302(j) rulemaking. (*See*, for example, § 52.21(i)(4)(vii) as promulgated in 1980 at 45 FR 52739, August 7, 1980, respectively. *See* also the discussion at 49 FR 43204, October 26, 1984.) Thus, in the 1980 rules, we included the section 302(j) list in a provision that exempted from PSD permitting requirements ''a particular major stationary source or major modification, if * * * [t]he source or modification would be a major stationary source or major modification only if fugitive emissions, to the extent quantifiable, are considered in calculating the potential to emit of the stationary source or modification and the source does not belong to [any of the categories in the section 302(j) list].'' (*See* §§ 52.21(i)(4), (i)(4)(vii), 45 FR 52738–52739, August 7, 1980.) A similar exclusion applied in the nonattainment major NSR context. (*See* § 51.18(j)(4), 45 FR 52746, August 7, 1980.) In our response to a petition for reconsideration of the 1980 rules submitted on behalf of the American Mining Congress, we continued this approach, stating that ''EPA * * * intended to establish that any source which would be 'major' only if fugitive emissions were taken into account is not to be considered 'major' for any PSD purpose, unless the source belongs to one of the categories on the list which now appears in [§ ]52.21(i)(4)(vii). Similarly, EPA intended to establish that any modification that would be 'major' only if fugitive emissions were taken into account is not to be considered 'major' for any PSD purpose, unless the source * * * belongs to one of the categories on that list.'' Further, we committed to amend the regulations to conform them to these intentions. (*See* letter from Douglas M. Costle, EPA Administrator, to Robert T. Connery, Holland & Hart, January 19, 1981.)

On October 26, 1984 (49 FR 43202, October 26, 1984) we affirmed the interpretation that we had stated in the 1980 NSR rulemaking. (*See* 49 FR 43208, October 26, 1984.) We also added NSR regulatory provisions that the fugitive emissions of a stationary source shall not be included in the threshold determination of whether it is a major stationary source unless the source belongs to one of the categories of sources identified by EPA in its section 302(j) rulemaking. (*See* 49 FR 43209–10, October 26, 1984.)

In a companion notice published on October 26, 1984 (49 FR 43211, October 26, 1984), we solicited public comment on an ''interpretive ruling'' regarding section 302(j) of the Act as it relates to the review of physical or operational changes involving fugitive emissions.[2] In this notice, we observed that in our 1980 NSR rulemaking and when proposing amendments in 1983, we had assumed that the rulemaking requirement in section 302(j) regarding source categories for which fugitive emissions should be considered applies to modification determinations as well as to threshold major source determinations. However, in this 1984 interpretive proposal, we stated that we believed our prior assumption in this regard was incorrect. We proposed to include fugitive emissions for sources in all source categories, to the extent quantifiable, when determining whether a physical or operational change meets the significance thresholds for a modification for purposes of major NSR. (*See* 49 FR 43213–14, October 26, 1984.)

On February 28, 1986 (*see* 51 FR 7090, February 28, 1986), we reopened the comment period to receive further comment on several of the issues addressed in our October 26, 1984 proposal. The comment period ended April 9, 1986. Comments on this proposal are captured in legacy docket A–84–33.

On November 28, 1989 (*see* 54 FR 48870, November 28, 1989), we finalized our 1984 interpretation and concluded that the section 302(j) limitation on including fugitive emissions applies to the threshold

[2] This was an ''interpretive ruling'' in that we proposed to change our previous interpretation of the Act. To put the interpretive ruling into effect, we chose not to finalize the proposed revision to the major modification definition.

determination of whether a source is a major source, but not to the threshold determination of whether a physical or operational change constitutes a major modification. We pointed out that the language of section 302(j) explicitly attaches the rulemaking requirements only to existing or proposed major sources, and says nothing about major modifications to existing sources. We also noted that the PSD and nonattainment major NSR definitions of ''modification'' in section 169(2)(C) and section 171(4) of the Act, respectively, merely cross-reference section 111(a)(4) of the Act, which is the definition of ''modification'' in the NSPS provisions. Because section 111(a)(4) defines modification solely in terms of the total amount of pollution that a change at a source would produce, we believed that Congress intended to establish no qualitative distinction between stack and fugitive emissions. Moreover, we stated that the legislative history on section 302(j) does not refer directly to major modifications, although the conference report on the PSD construction and modification definitions in section 169(2)(C) does provide that Congress' general intent was ''to conform to usage in other parts of the Act'' [123 Cong. Rec. H 11957, col. 3 (daily ed.) (November 1, 1977)]. We reasoned that this passage referred not only to section 111(a)(4), but to usage of these terms in existing EPA regulations under the NSPS and NSR programs, which did not distinguish between fugitive and stack emissions. We concluded that an interpretation of section 302(j) to exempt fugitive emissions from modification calculations ran counter to EPA's longstanding practice, and that if Congress intended a legislative change as to major modifications, it would have said so explicitly. (*See* 54 FR 48882–83, November 28, 1989.) We further concluded that EPA's longstanding practice of considering the fugitive emissions of all sources, not just those on the section 302(j) list, when determining whether a major modification had occurred was reasonable. (*See* 54 FR 48883, November 28, 1989.) In addition, we related that our interpretation likely would not impose new regulatory burdens because fugitive emissions from physical or operational changes would still be excluded from applicability determinations unless the changes occurred at a major source. We reasoned that under the Act and EPA regulations, a modification is ''major'' and subject to review only if the source at which it would occur is also ''major.'' Hence, a modification to a source of predominantly fugitive emissions that does not belong to a currently listed category could not be subject to review, even if its fugitive emissions were taken into account, because the source would not be ''major.'' (*See* 49 FR 43213–14, October 26, 1984.) Based on this reasoning, our November 28, 1989 final action reaffirmed our October 1984 proposed interpretation that the list of fugitive emissions sources created pursuant to section 302(j) does not apply to major modifications and that fugitive emissions for sources in all source categories must be included when determining whether a physical or operational change meets the significance thresholds for purposes of major NSR.

In October 1990, we issued the draft ''New Source Review Workshop Manual,'' [3] in which we stated that under the federal PSD regulations, fugitive emissions ''are included in the potential to emit (and increases in the same due to modification)'' if they occur at one of the source categories listed pursuant to section 302(j). (*See* page A.9 of the Manual, which may be found at *http://www.epa.gov/ttn/nsr/gen/wkshpman.pdf*.) This phrasing seemingly contradicts our November 1989 final interpretive ruling, although we did not intend to change our policy in this area.

In the NSR Improvement final rulemaking published December 31, 2002 (67 FR 80186, December 31, 2002), we promulgated final rules consistent with our November 1989 final interpretive ruling. In that rulemaking, we required the inclusion of fugitive emissions in calculating emissions increases for purposes of determining whether a particular physical or operational change constitutes a major modification requiring a PSD or nonattainment major NSR permit for all major sources, regardless of source category. (*See*, for example, § 52.21(b)(41)(ii)(*b*), which includes fugitive emissions, to the extent quantifiable, in the definition of ''projected actual emissions'' and § 52.21(b)(48)(i)(*a*), which includes fugitive emissions, to the extent quantifiable, in the definition of ''baseline actual emissions.'')

*E. Why did EPA reconsider this aspect of the December 2002 NSR Improvement final rulemaking?*

On July 11, 2003, we received a petition for reconsideration of the December 2002 NSR Improvement final rules from Newmont USA Ltd., dba Newmont Mining Corporation (Newmont). Newmont argued that we failed to comply with the requirements of section 302(j) of the Act in requiring fugitive emissions to be counted for purposes of determining whether a physical or operational change constitutes a major modification for sources in source categories not listed pursuant to section 302(j). Newmont also argued that we failed to provide notice and an opportunity for comment on this issue. The EPA Assistant Administrator for Air and Radiation granted Newmont's petition by letter in January 2004.

**III. What is included in this final action?**

*A. What are the results of EPA's reconsideration?*

Based on our review and consideration of comments received on the issue regarding whether fugitive emissions are to be counted for purposes of determining whether a physical or operational change constitutes a major modification, we are revising the provisions of the December 2002 NSR Improvement final rules related to the treatment of fugitive emissions. We have decided to reverse our existing policy and include fugitive emissions in determining whether a physical or operational change results in a major modification only for sources in the source categories that have been designated through rulemaking pursuant to section 302(j) of the Act. In other words, we have decided to adopt the same approach to fugitive emissions for determining whether a change is a major modification as is currently used for determining whether a source is major.

*B. What are EPA's revisions to major NSR regulations?*

To implement our new approach to fugitive emissions, in this final action we are revising all four main portions of the major NSR program regulations: § 51.165, § 51.166, § 52.21, and appendix S to part 51. The revisions are nearly identical for these regulations because they contain nearly identical provisions related to major modifications. As indicated at proposal, we are including specific revisions for appendix S to part 51 in this action consistent with the changes that we proposed and are finalizing for § 51.165.

For §§ 51.165, 51.166, 52.21, and appendix S to part 51, we are modifying a number of definitions. In addition, we are finalizing the following:

[3] The ''New Source Review Workshop Manual'' is in draft form and the Agency chose not to finalize this manual.

(1) A minor change in the provisions for plantwide applicability limitations (PALs) to preserve the existing treatment of fugitive emissions for PALs.

(2) A modification to the paragraph in each rule that explains how to calculate whether a significant emissions increase will occur as the result of a physical or operational change.

(3) A minor revision in the provisions on monitoring and reporting for physical and operational changes that are found not to be major modifications.

(4) Deletion of a now unnecessary paragraph that provides for a generalized exemption related to fugitive emissions and repeats the section 302(j) source category list.

We are also finalizing revisions to the definitions of ''baseline actual emissions'' and ''projected actual emissions.'' As noted in the Newmont petition, these definitions (which figure in determining the increase associated with a physical or operational change) currently require that fugitive emissions be included, to the extent quantifiable, without regard to source category. Our revisions will qualify this requirement so that fugitive emissions (to the extent quantifiable) must be included for an emissions unit that ''belongs to one of the source categories listed in [the section 302(j) list that appears in the definition of 'major stationary source'] or is located at a major stationary source that belongs to one of the listed source categories.'' For baseline actual emissions, this revision appears in § 51.165(a)(1)(xxxv)(A)(*1*), (B)(*1*), and (C); § 51.166(b)(47)(i)(*a*), (ii)(*a*), and (iii); § 52.21(b)(48)(i)(*a*), (ii)(*a*), and (iii); and, II.A.30(i)(*a*), (ii)(*a*), and (iii) of appendix S to part 51. For projected actual emissions, the revision appears in § 51.165(a)(1)(xxviii)(B)(*2*) and (*4*), § 51.166(b)(40)(ii)(*b*) and (*d*), § 52.21(b)(41)(ii)(*b*) and (*d*), and II.A.24(ii)(*b*) and (*d*) of appendix S to part 51.

Note that the final language refers to emissions units that are, themselves, in a source category on the section 302(j) list, as well as the 302(j) listing status of the entire major stationary source at which the emission unit is located. An emissions unit under NSR means any part of a stationary source that emits or has the potential to emit any regulated NSR pollutant. If either the emissions unit or the parent source is in a source category on the section 302(j) list, the emission unit's fugitive emissions, to the extent quantifiable, must be included for purposes of determining whether a physical or operational change constitutes a modification. This treatment of fugitives from emission units in making major modification determinations is thereby consistent with the treatment of fugitives from emissions units in making major source threshold determinations. We are also finalizing similar language throughout this rule. *See* section IV of this preamble below for additional discussion of the rationale for this language.

The following example illustrates how to consider fugitive emissions from an emission unit within a facility. A fossil-fueled boiler unit that exceeds 250 million British thermal units per hour heat input (MMBtu/hr), and thus meets the definition of a 302(j) listed source category by itself, may be located at an industrial facility whose primary activity is not represented by one of the source categories listed pursuant to section 302(j). In this case, threshold determinations for major modifications at the facility would need to consider fugitive emissions, to the extent quantifiable, from the boiler unit but not from other non-302(j) emissions units at the facility. Alternatively, if a boiler unit did not exceed the 250 MMBtu/hr heat input level, and thus did not meet the definition of a 302(j) listed source category by itself, but was located at a facility represented by a source category on the section 302(j) list due to the facility's primary activity classification, the boiler unit's fugitive emissions, to the extent quantifiable, must be included for purposes of determining whether a physical or operational change constitutes a modification.

We are also finalizing our proposed definition of ''baseline actual emissions'' to maintain the current requirements for PALs. Plantwide applicability limitations are an alternative means of determining the applicability of major NSR to changes at an existing major stationary source. Instead of evaluating each physical or operational change individually, the source tracks total emissions from the source to be sure that they remain below the level of its PAL. Baseline actual emissions are used in setting the level of the PAL.

We continue to believe that it is appropriate to include fugitive emissions (to the extent quantifiable) in setting the level of the PAL and in tracking compliance with it, regardless of the source category. In the preamble to the December 2002 NSR Improvement rules, we explained that the benefit of PALs to the public and the environment is that PALs are designed ''to assure local communities that air emissions from your major stationary source will not exceed the facility-wide cap set forth in the permit unless you first meet the major NSR requirements.'' We further explained that a PAL ''provides a more complete perspective to the public because in setting a PAL, your reviewing authority accounts for all current processes and all emissions units together and reflects the long-term maximum amount of emissions it would allow from your source.'' (*See* 67 FR 80206, December 31, 2002.) We therefore do not believe we can exempt fugitive emissions from being included when setting a PAL. Consequently, we are revising the subparagraph of this definition that addresses PALs to ensure that fugitive emissions continue to be included for the purposes of PALs for all source categories. This revision is found in §§ 51.165(a)(1)(xxxv)(D), 51.166(b)(47)(iv), 52.21(b)(48)(iv), and II.A.30(iv) of appendix S to part 51.

To reinforce our intentions for PALs, we are finalizing a minor revision to the provisions for PALs to state clearly that a PAL is to include fugitive emissions, to the extent quantifiable, ''regardless of whether the emissions unit or major stationary source belongs to one of the source categories listed in [the section 302(j) list].'' This revision is found in §§ 51.165(f)(4)(i)(D), 51.166(w)(4)(i)(*d*), 52.21(aa)(4)(i)(*d*), and IV.K.4(i)(*d*) of appendix S to part 51.

We are also finalizing a revision to the definition of ''major modification'' to mirror the existing definition of ''major stationary source.'' Specifically, we are adding a subparagraph to this definition saying:

> Fugitive emissions shall not be included in determining for any of the purposes of this section whether a physical change in or change in the method of operation of a major stationary source is a major modification, unless the source belongs to one of the source categories listed in [the section 302(j) list that appears in the definition of ''major stationary source'' for the rule] of this section.

This new language is in §§ 51.165(a)(1)(v)(G), 51.166(b)(2)(v), 52.21(b)(2)(v), and II.A.5(vii) of appendix S to part 51.

This action also finalizes a revision to the definition of ''net emissions increase'' to preclude an unlisted major source from including contemporaneous increases and decreases in fugitive emissions in the ''netting analysis'' for a physical or operational change. We do not believe that an unlisted source (which does not include fugitive emissions in determining the increase in emissions from the current physical or operational change) should be able to use decreases in fugitive emissions to ''net out'' of major NSR. Rather, we believe that unlisted sources should treat fugitive emissions consistently for all purposes related to determining the applicability of major NSR to physical

or operational changes. Accordingly, we are adding language at §§ 51.165(a)(1)(*vi*)(C)(*3*), 51.166(b)(3)(iii)(*d*), 52.21(b)(3)(iii)(*c*), and II.A.6(iii) of appendix S to part 51 that states that in order for an increase or decrease in fugitive emissions (to the extent quantifiable) to be considered ''creditable'' in netting analyses, it must occur at an emissions unit that belongs to one of the section 302(j) listed source categories or is located at a major stationary source that belongs to one of section 302(j) listed source categories.

The final definitional changes made in this action ensure consistent treatment of fugitives where fugitive emissions are referenced in other steps in the major NSR program. For this purpose, we are adding subparagraphs to summarize how fugitive emissions are to be addressed in each section and to refer the reader to the relevant provisions. We believe that the added subparagraphs will aid understanding of our intentions regarding fugitive emissions. These revisions are made in §§ 51.165(a)(1)(ix), 51.166(b)(20), 52.21(b)(20), and II.A.9 of appendix S to part 51.

The December 2002 NSR Improvement rulemaking added provisions to the major NSR regulations to clarify the two-step process for determining whether a physical or operational change is a major modification. Step 1 is the evaluation of the proposed change to determine whether it will cause a significant increase in emissions of a regulated NSR pollutant. If so, the source goes on to Step 2, which is a ''netting analysis'' to determine whether the change will result in a significant net emissions increase when taken together with any contemporaneous, creditable emissions increases or decreases that have occurred at the source. This action revises the provisions for Step 1 to clarify that fugitive emissions (to the extent quantifiable) are only included for section 302(j) listed emissions units and source categories. (Clarifications for Step 2 are handled in our revisions to the definitions that are discussed above.) This revision appears in §§ 51.165(a)(2)(ii)(B), 51.166(a)(7)(iv)(*b*), 52.21(a)(2)(iv)(*b*), and IV.I.1(ii) of appendix S to part 51.

The December 2002 NSR Improvement rulemaking also added provisions for monitoring and reporting the emissions that actually occur after a physical or operational change in cases where the change was determined, prior to construction, not to be a major modification. This action makes minor revisions to these provisions to be explicit that fugitive emissions (to the extent quantifiable) need only be monitored and reported if the emissions unit or major stationary source in question is on the section 302(j) list. This revision provides for consistent treatment of fugitive emissions before and after the physical or operational change. This revision affects §§ 51.165(a)(6)(iii) and (iv), 51.166(r)(6)(iii) and (iv), 52.21(r)(6)(iii) and (iv), and IV.J.3 and IV.J.4 of appendix S to part 51.

Finally, we are deleting a paragraph in each of the major NSR regulations that is no longer necessary. The paragraphs deleted were the original paragraphs placed in the rules to implement section 302(j) of the Act. However, after the definition of ''major stationary source'' was revised to include only the section 302(j) list, and we later adopted a policy (reversed now by this action) that fugitive emissions must be counted for all source categories in major modification determinations, these paragraphs tended to confuse the issue. With this action, we provide a uniform approach to fugitive emissions for major source and major modification determinations, and these paragraphs have now become completely unnecessary. Accordingly, in this action we are removing and reserving the following paragraphs: §§ 51.165(a)(4), 51.166(i)(1)(ii), 52.21(i)(1)(vii), and II.F. of appendix S to part 51.

*C. What is the effect of this action on the minor NSR program?*

Major NSR programs are very similar across the United States, prescribed in significant detail as they are by the Act and the implementing federal regulations. In contrast, state and local minor NSR programs are subject only to general requirements under §§ 51.160–164 and, as a consequence, may vary significantly from area to area.[4] As a result, we do not know, with certainty, how such programs typically address fugitive emissions in minor NSR permitting. We requested comment on this topic.

We believe that it is important for minor NSR programs to be clear regarding the treatment of fugitive emissions in all areas of the program. This will afford all sources consistent treatment and a ''level playing field.'' In addition, a common understanding of program requirements from the outset is important to avoid controversy and wasted resources during the permitting process. In light of the importance of clear requirements regarding the treatment of fugitive emissions, this action requires that each implementation plan as a minimum element must be explicit in specifying how fugitive emissions are to be accounted for in all aspects of the minor NSR program. We discuss this requirement more specifically in section V of this preamble.

We recently proposed minor NSR and nonattainment major NSR regulations for sources in those areas of Indian country where tribes do not have an EPA-approved implementation plan. (*See* 71 FR 48696.) We proposed in the minor NSR rule to require minor sources to include fugitive emissions to the extent quantifiable for applicability purposes for all sources, or include them only for source categories listed pursuant to section 302(j), or exclude them for all sources. In the final tribal minor NSR rule, we will adopt one of these proposed approaches. When we finalize the minor NSR rule for Indian country, we expect to address the treatment of fugitive emissions consistent with this final rule.

We solicited comment on all aspects of our proposal regarding minor NSR. We also solicited comment on whether we should include rule language in 40 CFR 51.160 (for example, at § 51.160(e)) to require state, local, and tribal minor NSR programs to directly address fugitive emissions in minor NSR rules.

The comments received on the minor NSR program aspects of the proposed rule generally split into two groups: (1) Those that agreed with EPA that it is important for minor NSR programs to be clear regarding the treatment of fugitive emissions and that these requirements should be explicitly stated in a state's implementation plan, and (2) those who felt state and local permitting authorities should not be required to provide an explicit description of how they treat fugitive emissions in their minor NSR programs.

Several commenters from the second group questioned whether EPA can require state and local agencies to specify explicitly how they will treat fugitive emissions in all aspects of their minor NSR programs. They argued that states have latitude to customize their programs and that EPA does not have the authority to require states to include this clarification as a minimal element of their minor NSR program. These commenters were generally concerned that EPA, by requesting information on how fugitives were being treated in minor NSR programs, was trying to extend aspects of the proposed rule to minor NSR programs and thus extend their authority beyond major NSR program requirements.

[4] There are currently no approved tribal minor NSR programs.

We disagree with commenters that believe EPA is attempting, with this rule, to establish minimal state minor NSR requirements for fugitive emissions. The purpose of this rule is not to prescribe specific requirements or dictate how minor NSR programs should be constructed and operated to address fugitive emission sources. We fully recognize that states have considerable latitude to customize their minor NSR programs as long as they meet the basic purpose of ensuring that construction and modification of minor sources does not interfere with attainment and maintenance of the NAAQS.

We do believe, however, that it is important for minor NSR programs to be clear regarding the treatment of fugitive emissions in all areas of the program. We disagree with commenters that our requirement in this action for state, local, and subject tribal authorities to provide an explanation of how they treat fugitives in their implementation plans falls outside our authority. Section 110(a)(2)(C) of the Act and our responsibility to review implementation plans provides us with authority to specify the inclusion of this minimum element in state, local, and tribal minor NSR programs. We believe a common understanding of program requirements from the outset is important to reviewing program objectives and avoiding controversy and wasted resources during the permitting process.

## IV. What is the rationale for this final action?

### *A. The Newmont Petition*

The thrust of Newmont's petition for reconsideration is two-fold:

1. The EPA did not comply with the requirements of section 302(j) of the Act when we included fugitive emissions in the definitions of ''baseline actual emissions'' and ''projected actual emissions'' for purposes of determining whether a change at a facility constitutes a ''major modification.''

2. The EPA did not provide notice or an opportunity for comment on this approach, since these definitions were not proposed in the 1996 proposed major NSR revisions. (*See* 61 FR 38250, July 23, 1996).

As we noted in the 1984 and 1989 **Federal Register** notices where we proposed and finalized the interpretive ruling that established our existing approach to fugitive emissions for major modifications, the language of the Act does not resolve the issue of whether the fugitive emissions provisions of section 302(j) were intended by Congress to apply to major modifications as well as major sources. On its face, section 302(j) mandates rulemaking only for determining whether a new source is to be considered a ''major stationary source,'' and does not explicitly address major modifications. Neither does the definition of ''modification'' in section 111(a)(4) address the issue. As discussed above, in our 1989 notice we also noted that interpreting section 302(j) to exempt fugitive emissions from modification calculations ran counter to our longstanding practice, and reasoned that if Congress meant the section 302(j) rulemaking provision to cover major modifications, it would have said so. We believe this interpretation remains a permissible construction of the statute, and that since the time we finalized the interpretive ruling in 1989, we required that fugitive emissions be included in major modification determinations. For these reasons, we disagree with the petition on the two counts summarized above.

As stated in our proposal, we now believe, however, that the absence of reference to ''major modification'' in section 302(j) simply does not dispose of the issue to reconsider the inclusion of fugitive emissions in determining major modifications. For PSD at least, Congress only added major modifications to the program in ''technical and conforming amendments'' after enacting the 1977 Clean Air Act Amendments and even as to nonattainment major NSR, defined ''modification'' only by cross-reference. Similarly, we believe the legislative history is scant; Congress simply adverted to its desire to ''conform [the PSD definition of construction] to usage in other parts of the Act.'' (*See* 123 Cong. Rec. 36331 (Nov. 1, 1977).) We cannot conclude from the statutory text or the legislative history what Congress explicitly intended on this point; the evidence is simply too ambiguous. Accordingly, we believe that we continue to have discretion under the second prong of *Chevron, USA* v. *NRDC*, 467 U.S. 837, 842–43 (1984), to adopt ''a permissible construction of the statute.''

### *B. Policy and Legal Rationale*

We believe that section 302(j) evinces, at a minimum, an intent by Congress to require a special look at fugitive emissions for purposes of calculating a source's emissions for NSR purposes. The statute is silent or ambiguous on the applicability of section 302(j) to the question of whether a physical or operational change is a modification. That is, we do not believe that the Act precludes us from applying the section 302(j) restrictions on counting fugitive emissions to the methodology for determining whether a physical and operation change constitutes a major modification for NSR purposes. Moreover, although no authoritative conference or committee report addresses the issue of how fugitive emissions should be addressed in NSR permitting, there are numerous examples in committee hearings on the bills that led up to the 1977 Amendments of industry testimony to the effect that in many cases fugitive emissions would not be susceptible to control or would be exceedingly costly to control, or would be infeasible to measure. *See e.g.*, Hearings on Clean Air Act Amendments of 1977, Subcomm. on Health and the Environment, House Comm. on Interstate and Foreign Commerce, March 11, 1977, H.R. Rep. No. 95–59 at 1327 (statement of Earl Mallick, American Iron and Steel Inst.) (high costs of controlling fugitive emissions); *Id.*, Part 2, March 18, 1975, H.R. Rept. No. 94–25 at 690 (testimony of Fred Tucker, National Steel Corp.) (impossible to comply with SIP limits on fugitive emissions); Hearings on Implementation of the Clean Air Act—1975, Subcomm. on Environmental Pollution, Sen. Comm. on Public Works, Apr. 22, 1975, S. Rept. No. 94–H10, Pt. 1 at 757 (statement of David M. Anderson, Bethlehem Steel Corp. to effect that control of fugitive emissions would be enormously costly but would have ''a net negative environmental impact''); *Id.*, Pt. 2, App. A at 2026 (statement of Cast Metals Federation) (fugitive emissions control at nonferrous metals smelters extremely costly with adverse energy impacts and no improvement in air quality). But *see Id.*, App. B at 2232–33 (EPA written responses to Committee questions) (for some industries fugitive control can be critical to attainment of standards).

In light of this legislative history, it is reasonable to read section 302(j) of the Act as reflecting a decision by Congress that it simply did not know enough to make the critical decisions regarding the extent to which fugitive emissions should be included in threshold applicability determinations both for purposes of determining whether a source is a major source, and whether a physical or operational change constitutes a modification. Rather, we believe Congress assigned the resolution of these complex issues to EPA.

As stated in the proposal, for policy and programmatic reasons, we now believe that it is better to adopt a uniform approach to these threshold determinations as they relate to fugitive emissions. We feel that this final action is most consistent with EPA's earliest

and most nearly contemporaneous construction of the statute contained in the 1980 NSR rules, which required that sources count fugitive emissions when determining whether an emissions increase qualifies as a major modification only if the source belonged to a section 302(j) listed category. By returning to a procedure that removes differentiation in the treatment of fugitive emissions for major source and modification threshold determinations, we provide a more uniform approach that we believe more accurately represents the original intent of Congress in establishing the section 302(j) provisions and the resultant 1980 rules that followed.

In addition, with this final action we believe we now have addressed the additional regulatory burden that was not adequately recognized in the 1984 notice. (49 FR 43213–14, October 26, 1984.) We believe our assertion in the 1984 notice (*see* 49 FR 43213–14, October 26, 1984) that the interpretation that we proposed then ''likely would not impose new regulatory burdens'' was not correct; our interpretation proposed in 1984 and finalized in 1989 imposed a new regulatory burden on major sources in a source category not on the section 302(j) list, since their fugitive emissions would be counted in determining whether they had made a change constituting a major modification and thus possibly subjecting those modifications to NSR review.

Some commenters supported EPA's proposed exclusion of fugitive emissions in threshold determinations for major modifications at non-section 302(j) listed sources under the PSD and nonattainment NSR programs. They believe that EPA's current policy of including these emissions in such determinations conflicts with EPA's historical policy of excluding fugitive emissions in applicability determinations for sources not included on the section 302(j) list and creates confusion in the permitting process by providing for differential treatment of fugitive emissions.

Many of those who commented that they support the proposed rule also argued that EPA's 1989 interpretive ruling, which includes fugitive emissions in applicability determinations for *all* sources, was based on a misreading of section 302(j) and that EPA adopted (in 2002 NSR Improvement final rules) the interpretive ruling policy into its regulations without notice or comment. They felt that we did not accurately describe our historical policy in the proposed rule by failing to state that our previous treatment of fugitives, as read under the 1989 interpretive ruling and as codified in the 2002 NSR Improvement final rules, were incorrect interpretations.

We disagree with commenters that there were inaccuracies in describing our past decisions and discretion to include fugitives in NSR rule interpretations and guidance materials. While we acknowledge that our position on inclusion of fugitive emissions for determining major modifications for all sources has changed over the years, we do not agree with commenters that any previous interpretations or rulings were not permissible constructions of the statute. We cannot conclude from the statutory text at 302(j) or the legislative history what Congress explicitly intended in regards to inclusion of fugitive emissions for calculating major modifications. As a result, we believe that we have used our discretion under the second prong of *Chevron, USA* v. *NRDC*, 467 U.S. 837, 842–43 (1984), to adopt ''a permissible construction of the statute.'' We have similarly exercised our discretion to do so with this final action.

Other commenters generally opposed EPA excluding fugitive emissions from non-section 302(j) listed sources in threshold determinations for major modifications under the NSR programs and believed that the proposed revisions to the NSR rules incorrectly implement section 302(j) provisions and are not consistent with past practice and guidance regarding the treatment of fugitive emissions. They argued that EPA's own past finding as to the Congressional intent regarding treatment of fugitive emissions under the NSR program (54 FR 48870, November 28, 1989) show that section 111(a)(4) of the Act ''defines modification solely in terms of the total amount of pollution that a change at a source would produce,'' thus leading the EPA to conclude that Congress intended to establish no qualitative distinction between stack and fugitive emissions (72 FR 63854, November 13, 2007). These commenters urged EPA to reverse the proposed action and to retain the current policy regarding treatment of fugitives as included in the 2002 NSR Improvement rules.

We disagree with comments that these revisions to the NSR rules incorrectly implement section 302(j) and that our construction of the statute included in the 2002 NSR Improvement rules should be considered the correct interpretation of the Section 302(j) provisions. We believe now that the absence of reference to ''major modification'' in section 302(j) simply does not dispose of the issue of whether there was Congressional intent to limit inclusion of fugitive emissions in threshold applicability determinations for major modifications to listed section 302(j) sources. Accordingly, we believe that we continue to have discretion under the second prong of *Chevron, USA* v. *NRDC*, 467 U.S. 837, 842–43 (1984), to adopt ''a permissible construction of the statute.'' As such, we do not believe that the Act precludes us from applying the section 302(j) restrictions on counting fugitive emissions to the methodology for determining whether a physical and operation change constitutes a major modification.

We feel that this final action is most consistent with EPA's earliest, most nearly contemporaneous construction of the statute in the 1980 rules, which required that sources count fugitive emissions when determining whether an emissions increase qualifies as a major modification only if the source belonged to a section 302(j) listed category. By returning to a procedure that removes differentiation in the treatment of fugitive emissions for major source and modification threshold determinations, we provide a more uniform approach that we believe more accurately represents the original intent of Congress in establishing the section 302(j) provisions and the resultant 1980 rules that followed.

## V. When will these changes take effect in the federal PSD Program, and will states be required to revise their State Implementation Plans (SIPs) to incorporate this final action?

We are requiring that these changes take effect in the Federal PSD permit program by February 17, 2009. This means that we will apply these rules in any area without a SIP-approved PSD Program for which we are the reviewing authority, or for which we delegated our authority to issues permits to a state, local or tribal reviewing authority on that date.

We are also requiring that the requirements of this final action be established as minimum program elements of the PSD and nonattainment NSR programs approved by EPA as part of SIPs. Notwithstanding this requirement, it may not be necessary for a state or local authority to revise its SIP to begin to implement these changes.[5] Some state or local authorities may be able to adopt these changes through a change in interpretation of existing

[5] Currently, there are no tribal permitting agencies with an approved Tribal Implementation Plan (TIP) to implement the major NSR permitting program.

language in the approved SIP without the need to revise their SIP.

For any state or local authority that can implement the changes without revising its approved SIP, we propose that the changes become effective when the reviewing authority publicly announces that it accepts these changes by interpretation. Although no SIP change may be necessary in certain areas that adopt these changes by interpretation, we encourage state and local authorities in such areas to make such SIP changes in the future to enhance the clarity of the existing rules.

For areas that need to revise their SIPs to adopt these changes, these changes would not be effective in such areas until we approve the SIP revision. We are requiring that such state and local authorities submit revisions to SIPs to reflect requirements that are at least as stringent as the minimum program elements we adopt in this final rule within 3 years after the rule's promulgation date. We are also allowing state and local authorities to maintain NSR program elements that have the effect of meeting the minimum program elements of this rule, but that, in these cases, the state and local authority must submit an explanation for that conclusion to EPA by the SIP submission deadline.

We are also requiring state, local, and subject tribal authorities to explicitly specify in their implementation plans how the reviewing authority will treat fugitive emissions in all aspects of their minor NSR program. Section 110(a)(2)(C) of the Act provides us with authority to specify the inclusion of this minimum element in state, local, and tribal minor NSR programs. Therefore, we are requiring state, local, and subject tribal authorities to specify this in their implementation plan within 3 years from the promulgation date of this action.

We received comments in the proposal on establishing the requirements of this action as minimum program elements for SIP-approved PSD programs. One commenter stated that they believed EPA could not lawfully make the proposed requirements a minimum program element for SIP-approved PSD programs. Other commenters provided that section 116 of the Act stipulates that states are free to adopt air pollution control requirements that are more stringent than those required by the Act or EPA regulation and therefore should not be required to adopt any minimum program requirements in the proposal. One commenter stated that California state law specifically prevents the relaxation of NSR programs and that forcing California to adopt rule amendments that are less stringent would require California air pollution control districts to violate state law.

We disagree with commenters who believe we do not have authority to establish the revisions to the treatment of fugitive emissions under the major NSR program, as finalized in this action, as minimum program elements of the NSR programs. The basis for establishing minimum program elements is rooted in well established statutory authority and interpretations for implementing the federal NSR program. We interpret the requirements of section 110 of the Act to require states to meet a certain minimum set of requirements that we specify, consistent with the Act, before any SIP can be approved by the Administrator, while section 116 does not allow states to adopt or enforce any SIP requirements less stringent than any minimum program element we specify through rulemaking. Moreover, the minimum program elements we establish in the NSR programs in no way precludes the development of more stringent major NSR programs by California, or any other state or local agencies in areas covered by SIP-approved PSD Programs.

We also received comments on the impact of the proposed fugitive emission requirements on state and local air quality implementation plans. Several commenters opposed the EPA's proposal and reconsideration on the treatment of fugitives primarily because they believe it would impede their efforts to achieve attainment of health standards for ozone and $PM_{2.5}$ and their ability to prevent significant deterioration in attainment areas. Some of these commenters argued that the proposal makes NSR applicability less stringent by exempting fugitive emissions from major modification applicability determinations which would result in an increase in fugitive emissions from non-listed sources when determining whether NAAQS or allowable increments will be violated.

We agree with commenters that this action could result in some sources (those not on the section 302(j) list) not having to go through NSR review for major modifications; however, we disagree that this action will provide a blanket exemption to fugitive emissions from non-section 302(j) sources. This action does not prohibit in any way a reviewing authority from requiring control of fugitive emissions by emission standards or limitations or modeling of quantifiable fugitive emissions, regardless of source category, where such measures might be considered necessary for compliance with a NAAQS or for other environmental protection purposes. We fully recognize that some states and localities may need to regulate additional fugitive emissions under their implementation plan for attainment purposes. We do not intend to preclude such regulation in either major or minor NSR where necessary to achieve the purposes of the Act. This rule only affects the treatment of fugitives in threshold applicability tests to determine what constitutes a major modification. If a source is determined to be either a major source or major modification due to its non-fugitive emissions, then all applicable pollutant emissions at the source, including fugitive, are subject to subsequent NSR review steps (*e.g.*, BACT/LAER review, air quality impacts) according to NSR program requirements.

This action in no way prevents reviewing authorities from controlling fugitive emissions through their SIP rules (*e.g.*, minor source NSR program), through any other requirements under the Act (*e.g.*, MACT standards), or state and local permitting programs that would control these emissions. We also specifically include, and reemphasize in this action (see section VI of this preamble), consideration to surrounding air quality (*e.g.*, nonattainment areas) as a criteria in determining if it is reasonable to collect, capture, and control fugitive emissions.

We also believe by returning to the original 1980 NSR rule construction regarding fugitives, we have kept intact the air quality goals of the statute. In the preamble to the 1980 major NSR rules, we noted that the *Alabama Power* court stated that ''Congress'' intention, in establishing the list of source categories in section 169(1) of the Act, was to identify facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emission of the deleterious pollutants that befoul our nation's air.'' (*See* 45 FR 52691, August 7, 1980.) In light of that intent, we determined that as a matter of policy, it would be appropriate to count all emissions—including fugitive emissions—in threshold calculations of applicability for those source categories. In doing so, we indicated that our listing decisions would be based on whether sources in the category have the potential to degrade air quality significantly. We believe that the section 302(j) listing continues to address the air quality impacts from major emitting facilities and that this action preserves the intended air quality improvement strategies under the major NSR program.

**VI. What are the guiding principles for determining fugitive emissions?**

In our major NSR and title V permit rules, ''fugitive emissions'' means ''those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.'' In practice, we interpret the phrase ''could not reasonably pass'' by determining whether such emissions can be reasonably collected or captured (*e.g.*, enclosures or hoods). Under this interpretation, it is axiomatic that any emissions actually collected or captured by the source are non-fugitive emissions. The answer is less clear when the source is not currently collecting or capturing the emissions. In these circumstances, we make case-by-case determinations as to whether a source could reasonably collect or capture such emissions.

Our past determinations articulate a number of principles we use in making these case-by-case determinations, though none may express the entirety of our policy. Moreover, some EPA memoranda, when viewed in isolation, may appear to provide divergent positions. Accordingly, we rearticulate our guiding principles in making these case-by-case determinations, and expand the explanation of these principles to enhance the understanding of the regulated community. Specifically, EPA will use the following guiding principles in determining whether emissions qualify as fugitive:

1. Determining which emissions could ''reasonably pass'' is a case-by-case decision based on whether or not the emissions can be reasonably collected or captured.

2. Because another similar facility collects, captures, or controls emissions does not mean that it is reasonable for others to do the same, but it is a factor in each consideration.

(a) If a source already collects or captures and discharges the emissions through a stack, chimney, vent or other functionally equivalent opening, then such emissions are non-fugitive at that source.

(b) If we establish a national emissions standard or regulation that requires some sources in the source category to collect or capture and control such emissions, then this weighs heavily towards a finding that the emissions are non-fugitive at other sources in this category; and

(c) The more common collection or capture of such emissions is by other similar sources, the more heavily this factor should weigh toward a finding that collection is reasonable.

3. The cost to collect or capture and control emissions is a factor when considering what is ''reasonable.''

(a) The combined costs to collect or capture and control emissions can be used as an alternative measure for the costs of emissions capture or collection alone in the case-by-case analysis;

(b) The surrounding air quality (*e.g.*, nonattainment areas) is a consideration when deciding if costs (collection, capture, control) are reasonable, and

(c) If it is not technically or economically feasible to control the emissions, then collection or capture of such emissions may not be reasonable.

As we stated at proposal, we believe that these three overarching principles represent our existing policy on defining fugitive emissions. Moreover, we believe that these elaborations on these basic principles represent a reasonable interpretation of our existing regulatory language to be applied to future fugitive emissions determinations. Accordingly, we do not propose specific changes to the existing regulatory language to accommodate this final action.

Our second principle relates to a concept we established in one of our initial guidance memorandums defining fugitive emissions. Specifically, we indicated that a consideration in the case-by-case analysis is whether emissions are ''ordinarily'' collected or captured by other sources in the source category. In subsequent memoranda, we interchanged the term ''ordinarily'' for ''commonly.'' [6] In a more recent memorandum, we describe this element in terms of a presumption.[7] We view these presumptions as no more than suggesting a starting point for the case-by-case analysis.[8] These guiding principles recognize that our existing guidance does not establish a non-rebuttable presumption, and does not attempt to establish a specific methodology states must use in conducting the case-by-case analysis. However, the expanded principles explain how states should weigh collection or capture of emissions by other similar sources in that analysis.

Although costs have always been a consideration in determining whether emissions are fugitive, we historically focused on the cost of collection or capture and not the cost of control. Notwithstanding our past practice, we believe that it is reasonable to consider the cost and economic feasibility of control in determining whether emissions can be reasonably captured or collected. For example, the cost of controlling emissions may be helpful in the analysis if cost data on collection, capture and control in the aggregate are more available or more easily calculated than cost data on collection or capture alone.

Thus, with this action, we are allowing that the reviewing authority may consider the reasonableness of the combined costs of capture or collection and control as an alternative to considering only the cost of collection or capture. Notably, however, we expect permitting authorities to find higher costs reasonable when considering combined costs as an alternative compared to what would be reasonable if considering capture or collection costs alone. We also believe that accounting for the differences in attainment status is appropriate, because permitting authorities tend to accept higher collection, capture, and control costs as reasonable in areas where air quality problems are more severe.

Finally, as technology improved, the technical feasibility to collect or capture virtually any source of emissions likewise evolved. For example, it is technically feasible to build a large capture device to collect virtually any type of process emissions. Yet, these captured emissions may contain air pollutants in such small concentrations that there is no technically or economically-feasible method to control the emissions once captured. Yet, under a strict interpretation of whether emissions are ''reasonably collected,'' we could find that such emissions are non-fugitive because they are reasonably collectable. Nonetheless this would fail to provide meaning to the term ''fugitive emissions'' as intended by Congress.

As expressed by the *Alabama Power* court,

''In the general definitional section of the Act, section 302(j), Congress employed the term 'fugitive emissions' to refer to one manner of emission of any air pollutant. As

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[6] Compare Memo from Gerald A. Emison, Director, Office of Air Quality Planning and Standards to David P. Howekamp, Director, Air Management Division, Region IX, *Emissions from Landfills* (Oct. 6, 1987) (landfills are not ordinarily constructed with gas collection systems) *to* Memo from John S. Seitz, Director, Office of Air Quality Planning and Standards, to Director, Air, Pesticides and Toxics Management Division, Region I and V, *et al., Classification of Emissions from Landfills for NSR Applicability Purposes* (Oct. 21, 1994) (* * * use of systems has become more common).

[7] *See e.g.*, Memo from Thomas C. Curran, Director, Information Transfer and Program Integration Division, to Judith M. Katz, Director, Air Protection Division, *Interpretation of the Definition of Fugitive Emissions in Parts 70 and 71* (Feb. 10, 1999).

[8] Recent case law suggests that the Agencies possess a limited ability to establish presumptions through guidance. *See e.g. General Elec. Co.* v. *EPA,* 290 F.3d 377 (DC Cir. 2002) (document stating without qualification that a certain value may be used to satisfy regulation was substantive rule; created norm or safe harbor that private parties can rely on).

commonly understood, emissions, from an 'industrial point source' include emissions emanating from a stack or from a chimney. By contrast, 'fugitive emissions' are emissions from a facility that escape from other than from a point source.'' [9]

In our proposed 1979 major NSR rule, we followed this common understanding of the term ''fugitive emissions.'' When we finalized our rule in 1980, we changed the definition of fugitive emissions from those emissions ''which do not reasonably pass'' through a stack or vent, to those that ''could not reasonably pass'' to avoid creating a disincentive for a source to collect and control emissions when technically and economically feasible. It was not our intent to interpret the term in a way that could eliminate the distinction between fugitive and non-fugitive emissions. Accordingly, we believe that when the only reason to collect or capture such emissions would be to control the emissions, and there is no technical or economically feasible means to control the emissions, then collecting the emissions is nonsensical, and thus, may not be reasonable.

Although this aspect of our principles may expand on how we historically considered costs in a case-by-case analysis, we believe that this interpretation remains fully consistent with Congress' intent in distinguishing fugitive emissions from non-fugitive emissions in the Act. The promulgated section 302(j) list includes the source categories listed in section 169(1) of the Act, which is the definition of ''major emitting facility'' for purposes of PSD. In the preamble to the 1980 major NSR rules, we noted that the *Alabama Power* court stated that Congress' intention in establishing the list of source categories in section 169(1) of the Act was to identify facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emission of the deleterious pollutants that befoul our nation's air.'' (45 FR 52691, August 7, 1980). Thus, the purpose of the fugitive emissions inquiry is to determine which emissions should count for determining source size with a view towards requiring large sources to install pollution controls. If the emissions cannot be controlled, then it is reasonable to consider this factor in determining whether such emissions can be ''reasonably'' collected or captured.

We received several comments on our proposed elaborated guidelines for determining fugitive emissions. Several commenters supported EPA's guiding principles for determining fugitive emissions and for the inclusion of control costs as one of the case-by-case criteria that could be used for determining fugitive emissions. Two commenters, however, disagreed with the addition of ''cost of control'' to ''cost of capture or collection'' as one of the cost criteria that reviewing authorities may consider in determining whether emissions could reasonably pass through a stack, chimney, vent, or other functionally equivalent opening. One of these commenters stated that the presumption of the elaborated guidance in the proposed rule is that if it is not technically or economically feasible to control the emissions—regardless of the technical or economic feasibility of capture—then it is not reasonable to capture them and they are therefore fugitive. The same commenter also felt that this new cost criterion could require permitting authorities to do additional upfront cost analyses prior to permit application, thereby increasing demand on limited resources.

Another commenter supported the use of costs for either capture or collection and control or just for capture and collection, and also supports allowing permitting authorities to account for attainment status when considering the cost of collection, capture and control as higher costs may be found acceptable in ''dirtier'' areas.

We disagree with the comments that guidance should not allow the reviewing authority to consider the cost of control. We believe that in some cases it is beneficial to consider the cost and economic feasibility of control in determining whether emissions can be reasonably captured or collected. For example, the cost of controlling emissions may be helpful in the analysis if cost data on collection, capture and control in the aggregate are more available or more easily calculated than cost data on collection or capture alone.

Further, this guidance provides that the reviewing authority may consider the reasonableness of the combined costs of capture or collection and control as an alternative to considering only the cost of collection or capture. This elaboration on guidance does not place a regulatory requirement on the reviewing authority to take any specific approach to considering cost in determining fugitive emissions. Therefore, this alternative clearly identifies the cost factor, among many other case-specific factors, as an interpretive tool that a reviewing authority may use in determining whether fugitive emission can be reasonably collected or captured.

[9] *Alabama Power* v. *Costle,* 636 F.2d at 368.

## VII. Statutory and Executive Order Reviews

### *A. Executive Order 12866—Regulatory Planning and Review*

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action'' because it is likely to raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

### *B. Paperwork Reduction Act*

This action does not impose any new information collection burden. We are not promulgating any new paperwork requirements (*e.g.*, monitoring, reporting, recordkeeping) as part of this proposed action. However, OMB has previously approved the information collection requirements contained in the existing regulations (40 CFR parts 51 and 52) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* and has assigned OMB control number 2060–0003. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

### *C. Regulatory Flexibility Analysis*

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

For purposes of assessing the impacts of this action on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201); (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this final action 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.

A Regulatory Flexibility Act Screening Analysis (RFASA) developed as part of a 1994 draft Regulatory Impact Analysis (RIA) and incorporated into the September 1995 ICR renewal analysis, showed that the changes to the NSR program due to the 1990 Clean Air Act Amendments would not have an adverse impact on small entities. This analysis encompassed the entire universe of applicable major sources that were likely to also be small businesses (approximately 50 ''small business'' major sources). Because the administrative burden of the NSR program is the primary source of the NSR program's regulatory costs, the analysis estimated a negligible ''cost to sales'' (regulatory cost divided by the business category mean revenue) ratio for this source group. Currently, and as reported in the current ICR, there is no economic basis for a different conclusion.

We believe the changes in this final action will reduce the regulatory burden associated with the major NSR program for sources, including small businesses, that are not included in the section 302(j) list. The requirements of this final action will not affect sources, including small businesses, that are included in the section 302(j) list; regulatory requirements for these sources will be unchanged.

These changes will improve the clarity of the requirements for unlisted major sources, and may prevent some physical or operational changes at such sources from qualifying as major modifications when they would have been major modifications under the currently existing rules. Thus, the effect of these final changes will be to improve the operational flexibility of unlisted major sources. We have therefore concluded that this final action will relieve regulatory burden for all affected small entities.

*D. Unfunded Mandates Reform Act*

This action contains no federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for state, local, or tribal governments or the private sector. The changes required by this final action are expected to result in a small, one-time increase in the burden imposed upon reviewing authorities in order for the revised rules to be included in the state's SIP (except in states that determine that they can implement the approach in this proposed action without a SIP revision). In addition, we believe these changes will actually reduce the regulatory burden associated with the major NSR program by improving the operational flexibility of owners and operators (with an attendant decrease in the number of major modification applications that reviewing authorities must process). Therefore, 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 the UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. As discussed above, this final rule does not impose any new requirements on 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 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. In addition, we believe these final changes will actually reduce the regulatory burden associated with the major NSR program by improving the operational flexibility of owners and operators, with an attendant decrease in the number of major modification applications that reviewing authorities must process. Thus, Executive Order 13132 does not apply to this rule.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and state and local governments, EPA specifically solicited comment on the proposed rule from state and local officials.

In response to the proposed rule, two commenters stated that the workload for them will increase significantly if permitting authorities are required to undertake the task of segregating fugitive emissions from NSR applicability calculations. They asserted that they anticipate disputes and appeals of their determinations on fugitive emissions. They argued that including all emissions for all sources is less resource-intensive for permitting authorities than making case-by-case determinations of whether to include fugitive emissions.

While the change in this rule is expected to result in a small, one-time increase in the burden imposed upon reviewing authorities in order for the revised rules to be included in the state's SIP (except in states that determine that they can implement the approach in this proposed action without a SIP revision), we disagree with comments that the burden will increase significantly for permitting authorities. Calculations and identification of fugitive emissions are prepared by the permit applicants and submitted for review and approval by the permitting authorities. We believe the proposed rule changes could actually reduce the regulatory burden associated with the major NSR program by improving the operational flexibility of owners and operators, with an attendant decrease in the number of major modification applications that reviewing authorities must process.

*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 9, 2000). No tribal government currently has an approved tribal implementation plan (TIP) under the Act to implement the NSR program; therefore the federal government is currently the NSR reviewing authority in Indian country. Thus, tribal governments should not experience added burden from this proposed rule, nor should their laws be affected with respect to implementation of this rule. Thus, Executive Order 13175 does not apply to this action.

Although Executive Order 13175 does not apply to this action, EPA solicited comments from tribal officials in developing this action. A summary of the concerns raised during that solicitation and EPA's response to those concerns is provided below.

Two tribal authorities commented that there was not adequate consultation with the tribes on the proposed rule and how it corresponds with the proposed Tribal Minor Source NSR Permitting Rule. Also, they believe that the statement in the preamble of the proposed rule soliciting tribal input does not reach the type of outreach and consultation that is needed and required. Because they view the consultation as inadequate, the commenters believe that EPA's statement that the proposed rule will not put undue burden onto tribes because the EPA is the reviewing authority in tribal territories is presumptuous and not reflective of the consultation process.

We disagree with the commenters that adequate consultation with the tribes on the proposed rule did not take place. EPA specifically solicited additional comment on this proposed rule from tribal officials. While Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications,'' this rule does not have tribal implications. No tribal government currently has an approved TIP under the Act to implement the NSR program; therefore the federal government is currently the NSR reviewing authority in Indian country. In addition, this rule has no tribal implications on title V rules (part 71 and part 70) because only one tribe has a delegated part 71 program and no tribe has a part 70 program (the delegated program uses the guidance as proposed by EPA). Also, because this rule only provides interpretive guidance relative to the fugitive source definition of those rules, no permitting authorities would likely need to update their title V program or rules to implement this federal rule. Thus, tribal governments should not experience added burden from this proposed rule, nor should their laws be affected with respect to implementation of this rule. Thus, Executive Order 13175 does not apply to this rule.

Regarding the Tribal Minor Source NSR Permitting Rule, we recently proposed minor NSR and nonattainment major NSR regulations for sources in those areas of Indian country where tribes do not have an EPA-approved implementation plan. (See 71 FR 48703, August 21, 2006.) We proposed in the minor NSR rule to require minor sources to include fugitive emissions to the extent quantifiable for applicability purposes for all sources, or include them only for source categories listed pursuant to section 302(j), or exclude them for all sources. In the final tribal minor NSR rule, we will adopt one of these proposed approaches and we expect to address the treatment of fugitive emissions consistent with this final rule. The question of how the requirements of E.O. 13175 have been met for the tribal minor NSR permitting rule will be addressed when that rule is finalized.

*G. Executive Order 13045—Protection of Children From Environmental Health Risks and Safety Risks*

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 EO has the potential to influence the regulation. This action is not subject to EO 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 a ''significant energy action'' as defined in Executive Order 13211 (66 FR 18355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. We believe the changes set out in this final action may actually reduce the regulatory burden associated with the major NSR program, and may therefore have a positive effect on the supply, distribution, or use of energy, by improving the operational flexibility of owners and operators.

*I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, 12(d) (15 U.S.C. 272 note), directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (for example, 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 action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

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

Executive Order 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. This final action, in conjunction with other existing programs, would not relax the control measures on sources regulated by the rule and therefore would not cause emissions 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 the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of 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 January 20, 2009.

**VIII. Judicial Review**

Under section 307(b)(1) of the Act, judicial review of today's final action is available by filing of a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by February 17, 2009. Any such judicial review is limited to only those objections that are raised with reasonable specificity in timely comments. Under section 307(b)(2) of the Act, the requirements of this final action may not be challenged later in civil or criminal proceedings brought by us to enforce these requirements.

**IX. Statutory Authority**

The statutory authority for this action is provided by sections 101, 107, 110, and 301 of the Act as amended (42 U.S.C. 7401, 7407, 7410, and 7601).

**List of Subjects**

*40 CFR Part 51*

Administrative practice and procedure, Air pollution control, Carbon monoxide, Fugitive emissions, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Transportation, Volatile organic compounds.

*40 CFR Part 52*

Administrative practice and procedure, Air pollution control, Carbon monoxide, Fugitive emissions, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Transportation, Volatile organic compounds.

Dated: December 10, 2008.

**Stephen L. Johnson,**

*Administrator.*

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

## PART 51—[AMENDED]

■ 1. The authority citation for part 51 continues to read as follows:

**Authority:** 23 U.S.C. 101; 42 U.S.C. 7401–7671q.

### Subpart I—[Amended]

■ 2. Section 51.165 is amended as follows:

■ a. By adding paragraph (a)(1)(v)(G).

■ b. By adding paragraph (a)(1)(vi)(C)(*3*).

■ c. By revising paragraph (a)(1)(ix).

■ d. By revising paragraphs (a)(1)(xxviii)(B)(*2*) and (a)(1)(xxviii)(B)(*4*).

■ e. By revising paragraphs (a)(1)(xxxv)(A)(*1*), (a)(1)(xxxv)(B)(*1*), (a)(1)(xxxv)(C), and (a)(1)(xxxv)(D).

■ f. By revising paragraph (a)(2)(ii)(B).

■ g. By removing and reserving paragraph (a)(4).

■ h. By revising paragraphs (a)(6)(iii) and (a)(6)(iv).

■ i. By revising paragraph (f)(4)(i)(D).

**§ 51.165 Permit requirements.**

(a) * * *

(1) * * *

(v) * * *

(G) Fugitive emissions shall not be included in determining for any of the purposes of this section whether a physical change in or change in the method of operation of a major stationary source is a major modification, unless the source belongs to one of the source categories listed in paragraph (a)(1)(iv)(C) of this section.

(vi) * * *

(C) * * *

(*3*) As it pertains to an increase or decrease in fugitive emissions (to the extent quantifiable), it occurs at an emissions unit that is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or it occurs at an emissions unit that is located at a major stationary source that belongs to one of the listed source categories. Fugitive emission increases or decreases are not creditable for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (a)(1)(iv)(C) of this section and that are not, by themselves, part of a listed source category.

* * * * *

(ix) *Fugitive emissions* means those emissions which could not reasonably pass through a stack, chimney, vent or other functionally equivalent opening. Fugitive emissions, to the extent quantifiable, are addressed as follows for the purposes of this section:

(A) In determining whether a stationary source or modification is major, fugitive emissions from an emissions unit are included only if the emissions unit is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or the emissions unit is located at a stationary source that belongs to one of the source categories listed in paragraph (a)(1)(iv)(C) of this section. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (a)(1)(iv)(C) of this section and that are not, by themselves, part of a listed source category. (See paragraphs (a)(1)(iv)(C) and (a)(1)(v)(G) of this section.)

(B) For purposes of determining the net emissions increase associated with a project, an increase or decrease in fugitive emissions is creditable only if it occurs at an emissions unit that is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or if the emission unit is located at a major stationary source that belongs to one of the listed source categories. Fugitive emission increases or decreases are not creditable for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (a)(1)(iv)(C) of this section and that are not, by themselves, part of a listed source category. (See paragraph (a)(1)(vi)(C)(*3*) of this section.)

(C) For purposes of determining the projected actual emissions of an emissions unit after a project, fugitive emissions are included only if the emissions unit is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or if the emission unit is located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (a)(1)(iv)(C) of this section and that are not, by themselves, part of a listed source category. (See paragraph (a)(1)(xxviii)(B)(*2*) of this section.

(D) For purposes of determining the baseline actual emissions of an emissions unit, fugitive emissions are included only if the emissions unit is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or if the emission unit is located at a major stationary source that belongs to one of the listed source categories, except that, for a PAL, fugitive emissions shall be included regardless of the source category. With the exception of PALs, fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (a)(1)(iv)(C) of this section and that are not, by themselves, part of a listed source category. (See paragraphs (a)(1)(xxxv)(A)(*1*), (a)(1)(xxxv)(B)(*1*), (a)(1)(xxxv)(C), and (a)(1)(xxxv)(D) of this section.)

(E) In calculating whether a project will cause a significant emissions increase, fugitive emissions are

included only for those emissions units that are part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section, or for any emissions units that are located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (a)(1)(iv)(C) of this section and that are not, by themselves, part of a listed source category. (See paragraph (a)(2)(ii)(B) of this section.)

(F) For purposes of monitoring and reporting emissions from a project after normal operations have been resumed, fugitive emissions are included only for those emissions units that are part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section, or for any emissions units that are located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (a)(1)(iv)(C) of this section and that are not, by themselves, part of a listed source category. (See paragraphs (a)(6)(iii) and (iv) of this section.)

(G) For all other purposes of this section, fugitive emissions are treated in the same manner as other, non-fugitive emissions. This includes, but is not limited to, the treatment of fugitive emissions for offsets (see paragraph (a)(3) of this section) and for PALs (see paragraph (f)(4)(i)(D) of this section).

* * * * *

(xxviii) * * *

(B) * * *

(*2*) Shall include emissions associated with startups, shutdowns, and malfunctions; and, for an emissions unit that is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or for an emissions unit that is located at a major stationary source that belongs to one of the listed source categories, shall include fugitive emissions (to the extent quantifiable); and

* * * * *

(*4*) In lieu of using the method set out in paragraphs (a)(1)(xxviii)(B)(*1*) through (*3*) of this section, may elect to use the emissions unit's potential to emit, in tons per year, as defined under paragraph (a)(1)(iii) of this section. For this purpose, if the emissions unit is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or if the emissions unit is located at a major stationary source that belongs to one of the listed source categories, the unit's potential to emit shall include fugitive emissions (to the extent quantifiable).

* * * * *

(xxxv) * * *

(A) * * *

(*1*) The average rate shall include emissions associated with startups, shutdowns, and malfunctions; and, for an emissions unit that is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or for an emissions unit that is located at a major stationary source that belongs to one of the listed source categories, shall include fugitive emissions (to the extent quantifiable).

* * * * *

(B) * * *

(*1*) The average rate shall include emissions associated with startups, shutdowns, and malfunctions; and, for an emissions unit that is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or for an emissions unit that is located at a major stationary source that belongs to one of the listed source categories, shall include fugitive emissions (to the extent quantifiable).

* * * * *

(C) For a new emissions unit, the baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero; and thereafter, for all other purposes, shall equal the unit's potential to emit. In the latter case, fugitive emissions, to the extent quantifiable, shall be included only if the emissions unit is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or if the emissions unit is located at a major stationary source that belongs to one of the listed source categories.

(D) For a PAL for a major stationary source, the baseline actual emissions shall be calculated for existing electric utility steam generating units in accordance with the procedures contained in paragraph (a)(1)(xxxv)(A) of this section, for other existing emissions units in accordance with the procedures contained in paragraph (a)(1)(xxxv)(B) of this section, and for a new emissions unit in accordance with the procedures contained in paragraph (a)(1)(xxxv)(C) of this section, except that fugitive emissions (to the extent quantifiable) shall be included regardless of the source category.

* * * * *

(2) * * *

(ii) * * *

(B) The procedure for calculating (before beginning actual construction) whether a significant emissions increase (*i.e.*, the first step of the process) will occur depends upon the type of emissions units being modified, according to paragraphs (a)(2)(ii)(C) through (F) of this section. For these calculations, fugitive emissions (to the extent quantifiable) are included only if the emissions unit is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or if the emissions unit is located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (a)(1)(iv)(C) of this section and that are not, by themselves, part of a listed source category. The procedure for calculating (before beginning actual construction) whether a significant net emissions increase will occur at the major stationary source (*i.e.*, the second step of the process) is contained in the definition in paragraph (a)(1)(vi) of this section. Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase.

* * * * *

(4) [Reserved]

* * * * *

(6) * * *

(iii) The owner or operator shall monitor the emissions of any regulated NSR pollutant that could increase as a result of the project and that is emitted by any emissions units identified in paragraph (a)(6)(i)(B) of this section; and calculate and maintain a record of the annual emissions, in tons per year on a calendar year basis, for a period of 5 years following resumption of regular operations after the change, or for a period of 10 years following resumption of regular operations after the change if the project increases the design capacity or potential to emit of that regulated NSR pollutant at such emissions unit. For purposes of this paragraph (a)(6)(iii), fugitive emissions (to the extent quantifiable) shall be monitored if the emissions unit is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or if the emissions unit is located at a major stationary source that belongs to one of the listed source categories.

(iv) If the unit is an existing electric utility steam generating unit, the owner or operator shall submit a report to the reviewing authority within 60 days after

the end of each year during which records must be generated under paragraph (a)(6)(iii) of this section setting out the unit's annual emissions, as monitored pursuant to paragraph (a)(6)(iii) of this section, during the year that preceded submission of the report.

* * * * *

(f) * * *

(4) * * *

(i) * * *

(D) The PAL shall include fugitive emissions, to the extent quantifiable, from all emissions units that emit or have the potential to emit the PAL pollutant at the major stationary source, regardless of whether the emissions unit or major stationary source belongs to one of the source categories listed in paragraph (a)(1)(iv)(C) of this section.

* * * * *

■ 3. Section 51.166 is amended as follows:

■ a. By revising paragraph (a)(7)(iv)(*b*).

■ b. By adding paragraph (b)(2)(v).

■ c. By removing the period at the end of paragraph (b)(3)(iii)(*c*) and adding ''; and'' in its place.

■ d. By adding paragraph (b)(3)(iii)(*d*).

■ e. By revising paragraph (b)(20).

■ f. By revising paragraphs (b)(40)(ii)(*b*) and (b)(40)(ii)(*d*).

■ g. By revising paragraphs (b)(47)(i)(*a*), (b)(47)(ii)(*a*), (b)(47)(iii), and (b)(47)(iv).

■ h. By removing and reserving paragraph (i)(1)(ii).

■ i. By revising paragraphs (r)(6)(iii) and (r)(6)(iv).

■ j. By revising paragraph (w)(4)(i)(*d*).

**§ 51.166 Prevention of significant deterioration of air quality.**

(a) * * *

(7) * * *

(iv) * * *

(*b*) The procedure for calculating (before beginning actual construction) whether a significant emissions increase (*i.e.*, the first step of the process) will occur depends upon the type of emissions units being modified, according to paragraphs (a)(7)(iv)(*c*) through (*f*) of this section. For these calculations, fugitive emissions (to the extent quantifiable) are included only if the emissions unit is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or if the emission unit is located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (b)(1)(iii) of this section and that are not, by themselves, part of a listed source category. The procedure for calculating (before beginning actual construction) whether a significant net emissions increase will occur at the major stationary source (*i.e.*, the second step of the process) is contained in the definition in paragraph (b)(3) of this section. Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase.

* * * * *

(b) * * *

(2) * * *

(v) Fugitive emissions shall not be included in determining for any of the purposes of this section whether a physical change in or change in the method of operation of a major stationary source is a major modification, unless the source belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section.

(3) * * *

(iii) * * *

(*d*) As it pertains to an increase or decrease in fugitive emissions (to the extent quantifiable), it occurs at an emissions unit that is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or it occurs at an emission unit that is located at a major stationary source that belongs to one of the listed source categories. Fugitive emission increases or decreases are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (b)(1)(iii) of this section and that are not, by themselves, part of a listed source category.

* * * * *

(20) *Fugitive emissions* means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening. Fugitive emissions, to the extent quantifiable, are addressed as follows for the purposes of this section:

(i) In calculating whether a project will cause a significant emissions increase, fugitive emissions are included only for those emissions units that are part of one of the source categories listed in paragraph (b)(1)(iii) of this section, or for any emissions units that are located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (b)(1)(iii) of this section and that are not, by themselves, part of a listed source category. (See paragraph (a)(7)(iv)(b) of this section.)

(ii) In determining whether a stationary source or modification is major, fugitive emissions from an emissions unit are included only if the emissions unit is part of one of the stationary source categories listed in paragraph (b)(1)(iii) of this section or the emissions unit is located at a stationary source that belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (b)(1)(iii) of this section and that are not, by themselves, part of a listed source category. (See paragraphs (b)(1)(iii) and (b)(2)(v) of this section.)

(iii) For purposes of determining the net emissions increase associated with a project, an increase or decrease in fugitive emissions is creditable only if it occurs at an emissions unit that is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or if the emissions unit is located at a major stationary source that belongs to one of the listed source categories. Fugitive emission increases or decreases are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (b)(1)(iii) of this section and that are not, by themselves, part of a listed source category. (See paragraph (b)(3)(iii)(*d*) of this section.)

(iv) For purposes of determining the projected actual emissions of an emissions unit after a project, fugitive emissions are included only if the emissions unit is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or if the emissions unit is located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (b)(1)(iii) of this section and that are not, by themselves, part of a listed source category. (See paragraph (b)(40)(ii)(*b*) and (*d*) of this section.

(v) For purposes of determining the baseline actual emissions of an emissions unit, fugitive emissions are included only if the emissions unit is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or if the emissions unit is located at a major stationary source that belongs to one of the listed source categories, except that, for a PAL,

fugitive emissions shall be included regardless of the source category. With the exception of PALs, fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (b)(1)(iii) of this section and that are not, by themselves, part of a listed source category. (See paragraphs (b)(47)(i)(*a*), (b)(47)(ii)(*a*), (b)(47)(iii), and (b)(47)(iv) of this section.)

(vi) For purposes of monitoring and reporting emissions from a project after normal operations have been resumed, fugitive emissions are included only for those emissions units that are part of one of the source categories listed in paragraph (b)(1)(iii) of this section, or for any emissions units that are located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (b)(1)(iii) of this section and that are not, by themselves, part of a listed source category. (See paragraphs (r)(6)(iii) and (iv) of this section.)

(vii) For all other purposes of this section, fugitive emissions are treated in the same manner as other, non-fugitive emissions. This includes, but is not limited to, the treatment of fugitive emissions for the application of best available control technology (see paragraph (j) of this section), source impact analysis (see paragraph (k) of this section), additional impact analyses (see paragraph (o) of this section), and PALs (see paragraph (w)(4)(i)(*d*) of this section).

* * * * *

(40) * * *

(ii) * * *

(*b*) Shall include emissions associated with startups, shutdowns, and malfunctions; and, for an emissions unit that is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or for an emissions unit that is located at a major stationary source that belongs to one of the listed source categories, shall include fugitive emissions (to the extent quantifiable); and

* * * * *

(*d*) In lieu of using the method set out in paragraphs (b)(40)(ii)(*a*) through (*c*) of this section, may elect to use the emissions unit's potential to emit, in tons per year, as defined under paragraph (b)(4) of this section. For this purpose, if the emissions unit is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or if the emissions unit is located at a major stationary source that belongs to one of the listed source categories, the unit's potential to emit shall include fugitive emissions (to the extent quantifiable).

* * * * *

(47) * * *

(i) * * *

(*a*) The average rate shall include emissions associated with startups, shutdowns, and malfunctions; and, for an emissions unit that is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or for an emissions unit that is located at a major stationary source that belongs to one of the listed source categories, shall include fugitive emissions (to the extent quantifiable).

* * * * *

(ii) * * *

(*a*) The average rate shall include emissions associated with startups, shutdowns, and malfunctions; and, for an emissions unit that is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or for an emissions unit that is located at a major stationary source that belongs to one of the listed source categories, shall include fugitive emissions (to the extent quantifiable).

* * * * *

(iii) For a new emissions unit, the baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero; and thereafter, for all other purposes, shall equal the unit's potential to emit. In the latter case, fugitive emissions, to the extent quantifiable, shall be included only if the emissions unit is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or if the emissions unit is located at a major stationary source that belongs to one of the listed source categories.

(iv) For a PAL for a major stationary source, the baseline actual emissions shall be calculated for existing electric utility steam generating units in accordance with the procedures contained in paragraph (b)(47)(i) of this section, for other existing emissions units in accordance with the procedures contained in paragraph (b)(47)(ii) of this section, and for a new emissions unit in accordance with the procedures contained in paragraph (b)(47)(iii) of this section, except that fugitive emissions (to the extent quantifiable) shall be included regardless of the source category.

* * * * *

(i) * * *

(1) * * *

(ii) [Reserved]

* * * * *

(r) * * *

(6) * * *

(iii) The owner or operator shall monitor the emissions of any regulated NSR pollutant that could increase as a result of the project and that is emitted by any emissions unit identified in paragraph (r)(6)(i)(*b*) of this section; and calculate and maintain a record of the annual emissions, in tons per year on a calendar year basis, for a period of 5 years following resumption of regular operations after the change, or for a period of 10 years following resumption of regular operations after the change if the project increases the design capacity or potential to emit of that regulated NSR pollutant at such emissions unit. For purposes of this paragraph (r)(6)(iii), fugitive emissions (to the extent quantifiable) shall be monitored if the emissions unit is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or if the emissions unit is located at a major stationary source that belongs to one of the listed source categories.

(iv) If the unit is an existing electric utility steam generating unit, the owner or operator shall submit a report to the reviewing authority within 60 days after the end of each year during which records must be generated under paragraph (r)(6)(iii) of this section setting out the unit's annual emissions, as monitored pursuant to paragraph (r)(6)(iii) of this section, during the calendar year that preceded submission of the report.

* * * * *

(w) * * *

(4) * * *

(i) * * *

(*d*) The PAL shall include fugitive emissions, to the extent quantifiable, from all emissions units that emit or have the potential to emit the PAL pollutant at the major stationary source, regardless of whether the emissions unit or major stationary source belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section.

* * * * *

**Appendix S to Part 51—[Amended]**

■ 4. Appendix S to Part 51 is amended as follows:

■ a. By adding paragraph II.A.5(vii).

■ b. By revising paragraph II.A.6(iii).

■ c. By revising paragraph II.A.9.

■ d. By revising paragraphs II.A.24(ii)(*b*) and II.A.24(ii)(*d*).

■ e. By revising paragraphs II.A.30(i)(*a*), II.A.30(ii)(*a*), II.A.30(iii), and II.A.30(iv).

■ f. By removing and reserving paragraph II.F.

■ g. By revising paragraph IV.I.1(ii).
■ h. By revising paragraphs IV.J.3. and IV.J.4.
■ i. By revising paragraph IV.K.4(i)(*d*).

**Appendix S to Part 51—Emission Offset Interpretative Ruling**

* * * * *

II. * * *
A. * * *
5. * * *

(vii) Fugitive emissions shall not be included in determining for any of the purposes of this Ruling whether a physical change in or change in the method of operation of a major stationary source is a major modification, unless the source belongs to one of the source categories listed in paragraph II.A.4(iii) of this Ruling.

6. * * *

(iii) An increase or decrease in actual emissions is creditable only if:

(*a*) The reviewing authority has not relied on it in issuing a permit for the source under this Ruling, which permit is in effect when the increase in actual emissions from the particular change occurs; and

(*b*) As it pertains to an increase or decrease in fugitive emissions (to the extent quantifiable), it occurs at an emissions unit that is part of one of the source categories listed in paragraph II.A.4(iii) of this Ruling or it occurs at an emissions unit that is located at a major stationary source that belongs to one of the listed source categories.

* * * * *

9. *Fugitive emissions* means those emissions which could not reasonably pass through a stack, chimney, vent or other functionally equivalent opening. Fugitive emissions, to the extent quantifiable, are addressed as follows for the purposes of this Ruling:

(i) In determining whether a stationary source or modification is major, fugitive emissions from an emissions unit are included only if the emissions unit is part of one of the source categories listed in paragraph II.A.4(iii) of this Ruling or the emissions unit is located at a stationary source that belongs to one of the source categories listed in paragraph II.A.4(iii) of this Ruling. (See paragraphs II.A.4(iii) and II.A.5(vii) of this Ruling.)

(ii) For purposes of determining the net emissions increase associated with a project, an increase or decrease in fugitive emissions is creditable only if it occurs at an emissions unit that is part of one of the source categories listed in paragraph II.A.4(iii) of this Ruling or if the emission unit is located at a major stationary source that belongs to one of the listed source categories. Fugitive emission increases or decreases are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph II.A.4(iii) of this Ruling and that are not, by themselves, part of a listed source category. (See paragraph II.A.6(iii) of this Ruling.)

(iii) For purposes of determining the projected actual emissions of an emissions unit after a project, fugitive emissions are included only if the emissions unit is part of one of the source categories listed in paragraph II.A.4(iii) of this Ruling or if the emission unit is located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph II.A.4(iii) of this Ruling and that are not, by themselves, part of a listed source category. (See paragraph II.A.24(ii)(*b*) of this Ruling.)

(iv) For purposes of determining the baseline actual emissions of an emissions unit, fugitive emissions are included only if the emissions unit is part of one of the source categories listed in paragraph II.A.4(iii) of this Ruling or if the emission unit is located at a major stationary source that belongs to one of the listed source categories, except that, for a PAL, fugitive emissions shall be included regardless of the source category. With the exception of PALs, fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph II.A.4(iii) of this Ruling and that are not, by themselves, part of a listed source category. (See paragraphs II.A.30(i)(*a*), II.A.30(ii)(*a*), II.A.30(iii), and II.A.30(iv) of this Ruling.)

(v) In calculating whether a project will cause a significant emissions increase, fugitive emissions are included only for those emissions units that are part of one of the source categories listed in paragraph II.A.4(iii) of this Ruling, or for any emissions units that are located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph II.A.4(iii) of this Ruling and that are not, by themselves, part of a listed source category. (See paragraph IV.I.1(ii) of this Ruling.)

(vi) For purposes of monitoring and reporting emissions from a project after normal operations have been resumed, fugitive emissions are included only for those emissions units that are part of one of the source categories listed in paragraph II.A.4(iii) of this Ruling, or for any emissions units that are located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph II.A.4(iii) of this Ruling and that are not, by themselves, part of a listed source category. (See paragraphs IV.J.3 and IV.J.4 of this Ruling.)

(vii) For all other purposes of this Ruling, fugitive emissions are treated in the same manner as other, non-fugitive emissions. This includes, but is not limited to, the treatment of fugitive emissions for offsets (see paragraph IV.C of this Ruling) and for PALs (see paragraph IV.K.4(i)(*d*) of this Ruling).

* * * * *

24. * * *

(ii) * * *

(*b*) Shall include emissions associated with startups, shutdowns, and malfunctions; and, for an emissions unit that is part of one of the source categories listed in paragraph II.A.4(iii) of this Ruling or for an emissions unit that is located at a major stationary source that belongs to one of the listed source categories, shall include fugitive emissions (to the extent quantifiable); and

* * * * *

(*d*) In lieu of using the method set out in paragraphs II.A.24(ii)(*a*) through (*c*) of this Ruling, may elect to use the emissions unit's potential to emit, in tons per year, as defined under paragraph II.A.3 of this Ruling. For this purpose, if the emissions unit is part of one of the source categories listed in paragraph II.A.4(iii) of this Ruling or if the emissions unit is located at a major stationary source that belongs to one of the listed source categories, the unit's potential to emit shall include fugitive emissions (to the extent quantifiable).

* * * * *

30. * * *

(i) * * *

(*a*) The average rate shall include emissions associated with startups, shutdowns, and malfunctions; and, for an emissions unit that is part of one of the source categories listed in paragraph II.A.4(iii) of this Ruling or for an emissions unit that is located at a major stationary source that belongs to one of the listed source categories, shall include fugitive emissions (to the extent quantifiable).

* * * * *

(ii) * * *

(*a*) The average rate shall include emissions associated with startups, shutdowns, and malfunctions; and, for an emissions unit that is part of one of the source categories listed in paragraph II.A.4(iii) of this Ruling or for an emissions unit that is located at a major stationary source that belongs to one of the listed source categories, shall include fugitive emissions (to the extent quantifiable).

* * * * *

(iii) For a new emissions unit, the baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero; and thereafter, for all other purposes, shall equal the unit's potential to emit. In the latter case, fugitive emissions, to the extent quantifiable, shall be included only if the emissions unit is part of one of the source categories listed in paragraph II.A.4(iii) of this Ruling or if the emissions unit is located at a major stationary source that belongs to one of the listed source categories.

(iv) For a PAL for a major stationary source, the baseline actual emissions shall be calculated for existing electric utility steam generating units in accordance with the procedures contained in paragraph II.A.30(i) of this Ruling, for other existing emissions units in accordance with the procedures contained in paragraph II.A.30(ii) of this Ruling, and for a new emissions unit in accordance with the procedures contained in paragraph II.A.30(iii) of this Ruling, except that fugitive emissions (to the extent

quantifiable) shall be included regardless of the source category.

* * * * *

F. [Reserved]

* * * * *

IV. * * *

I. * * *

1. * * *

(ii) The procedure for calculating (before beginning actual construction) whether a significant emissions increase (*i.e.*, the first step of the process) will occur depends upon the type of emissions units being modified, according to paragraphs II.I.1(iii) through (v) of this Ruling. For these calculations, fugitive emissions (to the extent quantifiable) are included only if the emissions unit is part of one of the source categories listed in paragraph II.A.4(iii) of this Ruling or if the emissions unit is located at a major stationary source that belongs to one of the listed source categories. The procedure for calculating (before beginning actual construction) whether a significant net emissions increase will occur at the major stationary source (*i.e.*, the second step of the process) is contained in the definition in paragraph II.A.6 of this Ruling. Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase.

* * * * *

J. * * *

3. The owner or operator shall monitor the emissions of any regulated NSR pollutant that could increase as a result of the project and that is emitted by any emissions units identified in paragraph IV.J.1(ii) of this Ruling; and calculate and maintain a record of the annual emissions, in tons per year on a calendar year basis, for a period of 5 years following resumption of regular operations after the change, or for a period of 10 years following resumption of regular operations after the change if the project increases the design capacity or potential to emit of that regulated NSR pollutant at such emissions unit. For purposes of this paragraph IV.J.3, fugitive emissions (to the extent quantifiable) shall be monitored if the emissions unit is part of one of the source categories listed in paragraph II.A.4(iii) of this Ruling or if the emissions unit is located at a major stationary source that belongs to one of the listed source categories.

4. If the unit is an existing electric utility steam generating unit, the owner or operator shall submit a report to the reviewing authority within 60 days after the end of each year during which records must be generated under paragraph IV.J.3 of this Ruling setting out the unit's annual emissions, as monitored pursuant to paragraph IV.J.3 of this Ruling, during the year that preceded submission of the report.

* * * * *

K. * * *

4. * * *

(i) * * *

(*d*) The PAL shall include fugitive emissions, to the extent quantifiable, from all emissions units that emit or have the potential to emit the PAL pollutant at the major stationary source, regardless of whether the emissions unit or major stationary source belongs to one of the source categories listed in paragraph II.A.4(iii) of this Ruling.

* * * * *

## PART 52—[AMENDED]

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

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

## Subpart A—[Amended]

■ 6. Section 52.21 is amended as follows:

■ a. By revising paragraph (a)(2)(iv)(*b*).

■ b. By adding paragraph (b)(2)(v).

■ c. By removing the period at the end of paragraph (b)(3)(iii)(*b*) and adding ''; and'' in its place.

■ d. By adding paragraph (b)(3)(iii)(*c*).

■ e. By revising paragraph (b)(20).

■ f. By revising paragraphs (b)(41)(ii)(*b*) and (b)(41)(ii)(*d*).

■ g. By revising paragraphs (b)(48)(i)(*a*), (b)(48)(ii)(*a*), (b)(48)(iii), and (b)(48)(iv).

■ h. By removing and reserving paragraph (i)(1)(vii).

■ i. By revising paragraphs (r)(6)(iii) and (r)(6)(iv).

■ j. By revising paragraph (aa)(4)(i)(*d*).

### § 52.21 Prevention of significant deterioration of air quality.

(a) * * *

(2) * * *

(iv) * * *

(*b*) The procedure for calculating (before beginning actual construction) whether a significant emissions increase (*i.e.*, the first step of the process) will occur depends upon the type of emissions units being modified, according to paragraphs (a)(2)(iv)(*c*) through (*f*) of this section. For these calculations, fugitive emissions (to the extent quantifiable) are included only if the emissions unit is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or if the emission unit is located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (b)(1)(iii) of this section and that are not, by themselves, part of a listed source category. The procedure for calculating (before beginning actual construction) whether a significant net emissions increase will occur at the major stationary source (*i.e.*, the second step of the process) is contained in the definition in paragraph (b)(3) of this section. Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase.

* * * * *

(b) * * *

(2) * * *

(v) Fugitive emissions shall not be included in determining for any of the purposes of this section whether a physical change in or change in the method of operation of a major stationary source is a major modification, unless the source belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section.

(3) * * *

(iii) * * *

(*c*) As it pertains to an increase or decrease in fugitive emissions (to the extent quantifiable), it occurs at an emissions unit that is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or it occurs at an emission unit that is located at a major stationary source that belongs to one of the listed source categories.

* * * * *

(20) *Fugitive emissions* means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening. Fugitive emissions, to the extent quantifiable, are addressed as follows for the purposes of this section:

(i) In calculating whether a project will cause a significant emissions increase, fugitive emissions are included only for those emissions units that are part of one of the source categories listed in paragraph (b)(1)(iii) of this section, or for any emissions units that are located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (b)(1)(iii) of this section and that are not, by themselves, part of a listed source category. (See paragraph (a)(2)(iv)(*b*) of this section.)

(ii) In determining whether a stationary source or modification is major, fugitive emissions from an emissions unit are included only if the emissions unit is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or if the emission unit is located at a stationary source that belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph

(b)(1)(iii) of this section and that are not, by themselves, part of a listed source category. (See paragraphs (b)(1)(iii) and (b)(2)(v) of this section.)

(iii) For purposes of determining the net emissions increase associated with a project, an increase or decrease in fugitive emissions is creditable only if it occurs at an emissions unit that is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or if the emission unit is located at a major stationary source that belongs to one of the listed source categories. Fugitive emission increases or decreases are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (b)(1)(iii) of this section and that are not, by themselves, part of a listed source category. (See paragraph (b)(3)(iii)(*c*) of this section.)

(iv) For purposes of determining the projected actual emissions of an emissions unit after a project, fugitive emissions are included only if the emissions unit is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or if the emission unit is located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (b)(1)(iii) of this section and that are not, by themselves, part of a listed source category. (See paragraph (b)(41)(ii)(*b*) and (*d*) of this section.

(v) For purposes of determining the baseline actual emissions of an emissions unit, fugitive emissions are included only if the emissions unit is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or if the emission unit is located at a major stationary source that belongs to one of the listed source categories, except that, for a PAL, fugitive emissions shall be included regardless of the source category. With the exception of PALs, fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (b)(1)(iii) of this section and that are not, by themselves, part of a listed source category. (See paragraphs (b)(48)(i)(*a*), (b)(48)(ii)(*a*), (b)(48)(iii), and (b)(48)(iv) of this section.)

(vi) For purposes of monitoring and reporting emissions from a project after normal operations have been resumed, fugitive emissions are included only for those emissions units that are part of one of the source categories listed in paragraph (b)(1)(iii) of this section, or for any emissions units that are located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (b)(1)(iii) of this section and that are not, by themselves, part of a listed source category. (See paragraphs (r)(6)(iii) and (iv) of this section.)

(vii) For all other purposes of this section, fugitive emissions are treated in the same manner as other, non-fugitive emissions. This includes, but is not limited to, the treatment of fugitive emissions for the application of best available control technology (see paragraph (j) of this section), source impact analysis (see paragraph (k) of this section), additional impact analyses (see paragraph (o) of this section), and PALs (see paragraph (aa)(4)(i)(*d*) of this section).

* * * * *

(41) * * *

(ii) * * *

(*b*) Shall include emissions associated with startups, shutdowns, and malfunctions; and, for an emissions unit that is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or for an emissions unit that is located at a major stationary source that belongs to one of the listed source categories, shall include fugitive emissions (to the extent quantifiable); and

* * * * *

(*d*) In lieu of using the method set out in paragraphs (b)(41)(ii)(*a*) through (*c*) of this section, may elect to use the emissions unit's potential to emit, in tons per year, as defined under paragraph (b)(4) of this section. For this purpose, if the emissions unit is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or if the emission unit is located at a major stationary source that belongs to one of the listed source categories, the unit's potential to emit shall include fugitive emissions (to the extent quantifiable).

* * * * *

(48) * * *

(i) * * *

(*a*) The average rate shall include emissions associated with startups, shutdowns, and malfunctions; and, for an emissions unit that is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or for an emissions unit that is located at a major stationary source that belongs to one of the listed source categories, shall include fugitive emissions (to the extent quantifiable).

* * * * *

(ii) * * *

(*a*) The average rate shall include emissions associated with startups, shutdowns, and malfunctions; and, for an emissions unit that is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or for an emissions unit that is located at a major stationary source that belongs to one of the listed source categories, shall include fugitive emissions (to the extent quantifiable).

* * * * *

(iii) For a new emissions unit, the baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero; and thereafter, for all other purposes, shall equal the unit's potential to emit. In the latter case, fugitive emissions, to the extent quantifiable, shall be included only if the emissions unit is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or if the emissions unit is located at a major stationary source that belongs to one of the listed source categories.

(iv) For a PAL for a major stationary source, the baseline actual emissions shall be calculated for existing electric utility steam generating units in accordance with the procedures contained in paragraph (b)(48)(i) of this section, for other existing emissions units in accordance with the procedures contained in paragraph (b)(48)(ii) of this section, and for a new emissions unit in accordance with the procedures contained in paragraph (b)(48)(iii) of this section, except that fugitive emissions (to the extent quantifiable) shall be included regardless of the source category.

* * * * *

(i) * * *

(1) * * *

(vii) [Reserved]

* * * * *

(r) * * *

(6) * * *

(iii) The owner or operator shall monitor the emissions of any regulated NSR pollutant that could increase as a result of the project and that is emitted by any emissions unit identified in paragraph (r)(6)(i)(*b*) of this section; and calculate and maintain a record of the annual emissions, in tons per year on a calendar year basis, for a period of 5 years following resumption of regular operations after the change, or for a period of 10 years following resumption of regular operations after the change if

the project increases the design capacity or potential to emit of that regulated NSR pollutant at such emissions unit. For purposes of this paragraph (r)(6)(iii), fugitive emissions (to the extent quantifiable) shall be monitored if the emissions unit is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or if the emissions unit is located at a major stationary source that belongs to one of the listed source categories.

(iv) If the unit is an existing electric utility steam generating unit, the owner or operator shall submit a report to the Administrator within 60 days after the end of each year during which records must be generated under paragraph (r)(6)(iii) of this section setting out the unit's annual emissions, as monitored pursuant to paragraph (r)(6)(iii) of this section, during the calendar year that preceded submission of the report.

* * * * *

(aa) * * *

(4) * * *

(i) * * *

(*d*) The PAL shall include fugitive emissions, to the extent quantifiable, from all emissions units that emit or have the potential to emit the PAL pollutant at the major stationary source, regardless of whether the emissions unit or major stationary source belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section.

* * * * *

[FR Doc. E8–29998 Filed 12–18–08; 8:45 am]

**BILLING CODE 6560–50–P**

Federal Register

Friday,
December 19, 2008

## Part III

# Department of Health and Human Services

### Centers for Medicare & Medicaid Services

### 42 CFR Parts 447 and 455
### Medicaid Program; Disproportionate Share Hospital Payments; Final Rule

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Centers for Medicare & Medicaid Services**

**42 CFR Parts 447 and 455**

**[CMS–2198–F]**

**RIN 0938–AN09**

## Medicaid Program; Disproportionate Share Hospital Payments

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Final rule.

**SUMMARY:** This final rule sets forth the data elements necessary to comply with the requirements of Section 1923(j) of the Social Security Act (Act) related to auditing and reporting of disproportionate share hospital payments under State Medicaid programs. These requirements were added by Section 1001(d) of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA).

**DATES:** *Effective Date:* This rule is effective on January 19, 2009.

**FOR FURTHER INFORMATION CONTACT:** Venesa Day, (410) 786–8281; Rory Howe, (410) 786–4878; and Rob Weaver, (410) 786–5914.

**SUPPLEMENTARY INFORMATION:**

### I. Background

Title XIX of the Social Security Act (Act) authorizes Federal grants to States for Medicaid programs that provide medical assistance to low-income families, the elderly and persons with disabilities. Section 1902(a)(13)(A)(iv) of the Act requires that States make Medicaid payment adjustments for hospitals that serve a disproportionate share of low-income patients with special needs. Section 1923 of the Act contains more specific requirements related to such disproportionate share hospital (DSH) payments, including aggregate annual state-specific limits on Federal financial participation under Section 1923(f), and hospital-specific limits on DSH payments under Section 1923(g). Under those hospital specific limits, a hospital's DSH payments may not exceed the costs incurred by that hospital in furnishing services during the year to Medicaid patients and the uninsured, less other Medicaid payments made to the hospital, and payments made by uninsured patients (''uncompensated care costs''). In addition, Section 1923(a)(2)(D) requires States to provide an annual report to the Secretary describing the payment adjustments made to each disproportionate share hospital.

Section 1001(d) of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (Pub. L. 108–173, enacted on December 8, 2003) added Section 1923(j) to the Act to require States to report additional information about their DSH programs. Section 1923(j)(1) of the Act requires States to submit an annual report that includes the following:

- Identification of each DSH facility that received a DSH payment under the State's Medicaid program in the preceding fiscal year and the amount of DSH payments paid to that hospital in the same year.
- Such other information as the Secretary of Health and Human Services determines necessary to ensure the appropriateness of DSH payments.

Section 1923(j)(2) of the Act also requires States to have their DSH payment programs independently audited and to submit the independent certified audit annually to the Secretary. The certified independent audit must verify:

- The extent to which hospitals in the State have reduced uncompensated care costs to reflect the total amount of claimed expenditures made under Section 1923 of the Act.
- DSH payments to each hospital comply with the applicable hospital-specific DSH payment limit.
- Only the uncompensated care costs of providing inpatient hospital and outpatient hospital services to Medicaid eligible individuals and uninsured individuals as described in Section 1923(g)(1)(A) of the Act are included in the calculation of the hospital-specific limits.
- The State included all Medicaid payments, including supplemental payments, in the calculation of such hospital-specific limits.
- The State has separately documented and retained a record of all its costs under the Medicaid program, claimed expenditures under the Medicaid program, uninsured costs in determining payment adjustments under Section 1923 of the Act, and any payments made on behalf of the uninsured from payment adjustments under Section 1923 of the Act.

In addition to these reporting requirements, under Section 1923(j) of the Act, Federal matching payments are contingent upon a State's submission of the annual DSH report and independent certified audit.

### II. Summary of the Proposed Regulations

On August 26, 2005, we published in the **Federal Register** (70 FR 50262–50268) a notice of proposed rulemaking implementing the reporting and auditing requirements for State Disproportionate Share Hospital payments. In this notice of proposed rulemaking, we proposed modifying the DSH reporting requirements in Federal regulations at 42 CFR 447 by providing the following changes to our regulations:

1. Reporting Requirements

To implement the reporting requirements in Section 1923(j)(1) of the Act, we proposed to modify the DSH reporting requirements in Federal regulations at 42 CFR 447.

- We proposed to add a new paragraph (c) to the reporting requirements in § 447.299.
- We proposed to redesignate the documentation requirements in paragraph (c) as paragraph (d) and redesignate the deferrals and disallowances information in paragraph (d) as paragraph (e), respectively.
- We proposed a list of information to reflect the data elements necessary to ensure that DSH payments are appropriate such that each qualifying hospital receives no more in DSH payments than the amount permitted under Section 1923(g) of the act.
- We proposed that paragraph (c) would require each State receiving an allotment under Section 1923(f) of the Act, beginning with the first full State fiscal year (SFY) immediately after the enactment of Section 1001(d) of the Medicare Prescription Drug, Improvement, and Modernization Act (MMA) and each year thereafter, to report to us the list of information detailed in an Reporting form, which was published in the September 23, 2005 correction notice entitled ''Medicaid Programs; Disproportionate Share Hospital Payments''.
- We proposed that States will need to consider a Section 1011 payment when determining the hospital's DSH limit, because the total DSH payments should not exceed the total amount of uncompensated care at the hospital.
- The information supplied on this spreadsheet would satisfy the requirements under Sections 1923(a)(2)(D) and 1923(j)(1) of the Act.

2. Audit Requirements

We explained the statute's requirement for States to verify their methodology for computing the hospital specific DSH limit and the DSH

payments made to hospitals. As required by Section 1923(j)(2) of the Act, these five items identified in statute would provide independent verification that State Medicaid DSH payments comply with the hospital-specific DSH limit in Section 1923(g) of the Act, and that such limits are accurately computed.

- In § 455.201, we proposed that ''SFY'' stands for State fiscal year.
- We proposed to define that an ''independent audit'' means an audit conducted according to the standards specified in the generally accepted government auditing standards issued by the Comptroller General of the United States.
- We proposed adding a new § 455.204(a) to reflect Section 1923(j) of the Act's requirement that each State must submit annually the independent certified audit of its DSH program as a condition for receiving Federal payments under Section 1903(a)(1) and 1923 of the Act.
- We proposed to add a new § 455.204(b) to reflect the requirement that States must obtain an independent certified audit, beginning with an audit of its State fiscal year 2005 DSH program.
- We proposed a submission requirement within 1 year of the independent certified audit.
- We proposed that in the audit report, the auditor must verify whether the State's method of computing the hospital-specific DSH limit and the DSH payments made to the hospital comply with the five items required by Section 1923(j)(2) of the Act.

**III. Discussion of Public Comments**

On August 26, 2005, we set forth a proposed rule implementing the reporting and auditing requirements for State disproportionate share hospital payments (DSH). In this notice of proposed rulemaking, we proposed several modifications to the DSH reporting requirements and detailed the statutory auditing requirements for States to verify their methodology for computing the hospital-specific DSH limit to ensure that DSH payments made to eligible hospitals do not exceed such limits.

We received 119 timely public comments, in response to the August 26, 2005, proposed rule. The comments came from a variety of correspondents, including professional associations, national and State organizations, physicians, hospitals, advocacy groups, State Medicaid programs, State Legislators, and members of the Congress. The following is a summary of the comments received and our response to those comments.

*A. General Comments on Auditing and Reporting Provisions*

We received the following general comments regarding the proposed regulation:

*Comment:* Many commenters believe the proposed regulation exceeds the Congressional intent of the statutory authority of the MMA, makes substantive interpretations and changes to longstanding DSH policy not required by MMA and attempts to establish new policy.

*Response:* The statutory authority under MMA instructed States to report and audit specific payments and specific costs. Section 1923(j)(1)(B) of the Act specifically delegated to the Secretary authority to require reporting of information ''necessary to ensure the appropriateness of payment adjustments made under this Section.'' These regulations require reporting of data elements that are specifically related to the appropriateness of DSH payments, and thus are consistent with that statutory provision. The regulations provide States with uniform instructions that contain detailed identification of the necessary data elements. The audit requirements also specified in Section 1923(j)(2) of the Act, and these regulations specifically track the statutory requirements.

*Comment:* Many commenters are concerned that CMS has used the MMA provisions, which only relate to reporting and auditing, to dramatically change the financing of the Medicaid DSH program; this change would have serious implications for hospitals that care for the low-income and uninsured.

*Response:* Neither the statute nor the implementing regulation addresses the financing of DSH payments. The statutory authority under MMA instructed States to report and audit specific payments and the underlying calculations. While it could be that this information discloses impermissible payments (or ''financing''), this does not reflect a change in the standards for such payments. Instead the information will ensure that payments conform with existing applicable law.

*Comment:* Several commenters noted that the proposed rule purports to implement statutory reporting and audit requirements that do not alter any of the substantive standards regarding the calculation of costs under the hospital-specific DSH cap. They asserted that it would be completely improper for CMS to employ preamble language, or include in the rule provisions that would alter substantive standards under the auspices of new statutory reporting requirements.

*Response:* The provisions of this rule do not alter the fundamental statutory requirements to calculate DSH hospital-specific uncompensated care costs, and audit such calculations, in order to demonstrate that payments are proper. This rulemaking sets forth reporting requirements to ensure uniformity in the understanding and implementation of these requirements. By doing so, the rule will ensure that the basis for DSH payments is clear, including the required hospital-specific uncompensated care cost calculations, and set forth the necessary elements for an independent audit of those cost calculations and payments following the statute as amended by the MMA.

*Comment:* A few commenters expressed disagreement with the manner in which the proposed regulation would employ audits to determine whether States are making Medicaid DSH payments in appropriate amounts. These commenters argued that audits should not limit State discretion in the manner in which DSH payments are calculated. These commenters objected to the proposed requirements that auditors determine whether DSH is being calculated ''correctly'' when there has never been a single, true, definitive definition of exactly what ''correct'' means. In other words, the commenters argued that the regulation proposes counting on auditors to help impose a standard that does not currently exist.

*Response:* We disagree that the calculations involved in applying the hospital-specific DSH limits are discretionary. There have been clear and longstanding standards for calculating the costs of hospital services that apply to the calculation of hospital-specific DSH limits. The statutory authority under MMA instructed States to report and audit specific payments and specific costs to ensure compliance with those standards.

The applicable standards are based on existing statutes, regulations, and interpretive guidance. In 1993, Congress imposed hospital-specific limitations on the level of DSH payments to which qualifying hospitals were entitled. Section 1923(g)(1)(A) specifies that DSH payments cannot exceed, ''the costs incurred during the year of furnishing hospital services (as determined by the Secretary and net of payments under this title, other than under this Section, and by uninsured patients * * *)''. In 1994, CMS issued guidance that clarified that the 1993 hospital-specific ''cost'' limit includes both inpatient and outpatient hospital services for Medicaid individuals and individuals

with no source of third party coverage. Moreover, the calculation of hospital costs is subject to longstanding cost principles contained in Office of Management and Budget Circulars, including Circular A–110, and, to the extent not addressed in those Circulars, in Generally Accepted Accounting Principles (GAAP). In addition, over the years CMS has addressed hospital cost accounting in considerable detail in the Medicare program, and has developed cost reporting forms and procedures that offer further guidance on these issues.

*Comment:* A few commenters stated that, to the extent that CMS retains substantive changes to DSH policy in this regulation, CMS should acknowledge that this regulation does more than merely implement reporting and auditing requirements against existing standards.

*Response:* This regulation does not alter any of the substantive standards regarding the calculation of hospital costs, but requires that auditors apply those standards in determining the hospital-specific DSH limit. The preamble and the regulation set forth reporting requirements to ensure that the basis for DSH payments is clear, including the required hospital-specific uncompensated care cost calculations, and set forth the necessary elements for an independent audit of those cost calculations and payments.

*Comment:* Several commenters noted that States have implemented and carried out their DSH programs pursuant to methodologies set forth in CMS-approved Medicaid State plan amendments which were developed consistent with the DSH statute that provides States the flexibility to adopt procedures and methodologies tailored to each State's health care delivery system. The commenters asserted that the proposed rule would impose new substantive requirements that would be implemented through third-party auditors applying standards that are at odds with existing State plan provisions. They asserted that the approved Medicaid plan in each Medicaid State plan should provide the substantive basis for the independent audits and reports required under Section 1923(j). Because CMS approved the Medicaid State plan provisions and has not implemented the statutory process that would be required to render them invalid, the commenters stated that the Medicaid State plans should be deemed to reflect current Federal policy on the implementation of the Medicaid DSH program and be the standard by which FFP is available for State Medicaid expenditures.

*Response:* In reviewing State DSH payments, auditors must first determine whether the DSH payments were initially calculated using the methodology authorized by the approved Medicaid State plan. These Medicaid State plans, in part, articulate the methods and standards by which States set payment rates. Section 4.19–A of the Medicaid State plan includes the methodologies States utilize to make Medicaid DSH payments. The statutory hospital-specific limit, however, overlays that methodology because it is determined by actual uncompensated costs of inpatient and outpatient hospital services. States typically include a provision within the Medicaid State plan that DSH payments will not exceed each qualifying hospital's DSH limit.

The DSH payment methodologies contained in Section 4.19–A of the Medicaid State plan do not specifically identify the cost components included in the hospital-specific DSH limits but are governed by longstanding principles set forth in statutes, regulations, and agency guidance.

While CMS recognizes that States must use prospective estimates to determine DSH payments in a given Medicaid State plan rate year, the audits required by the MMA are statutorily required to verify the extent to which such estimates are reflective of the actual costs and that resultant payments do not exceed such cost limitations imposed by Congress.

*Comment:* Several commenters noted that the proposed rule would establish DSH policy that reaches beyond the reporting and audit requirements outlined in Section 1001(d). They cited the example that, if a State fails to comply with the reporting and auditing requirements, CMS proposes to impose a penalty that would result in the loss of Federal matching Medicaid dollars.

*Response:* Section 1923(j) of the Act very clearly stipulates that Medicaid DSH payments are conditioned upon the submission of the annual report and independent certified audit is required. However, with respect to requiring recovery of any overpayments, the regulation does not impose an immediate penalty that would result in the loss of Federal matching dollars. As described in subsequent responses to comments specific to the auditing component of the regulation, because a trial period will be required for auditors to refine audit methodologies, findings from Medicaid State plan rate year 2005 through 2010 will be used only for the purpose of determining prospective hospital-specific cost limits and the actual DSH payments associated with a particular year.

Beginning in Medicaid State plan rate year 2011, to the extent that audit findings demonstrate that DSH payments exceed the documented hospital-specific cost limits, CMS will regard them as representing discovery of overpayments to providers that, pursuant to 42 CFR Part 433, Subpart F, triggers the return of the Federal share to the Federal government (unless the DSH payments are redistributed by the State to other qualifying hospitals as an integral part of the audit process). This is not a ''penalty'' but instead reflects adjustment of an overpayment that was not consistent with Federal statutory limits. We note that, to the extent that States wish to redistribute DSH payments that exceed hospital-specific limits, the Federally approved Medicaid State plan must reflect that payment policy.

*Comment:* A few commenters said there are existing administrative procedures for determining a Medicaid State plan's compliance with Federal Medicaid law, which include a notice and hearing process. Nothing in Section 1923 or its legislative history suggests that Congress intended to circumvent these longstanding procedures through the audit and reporting requirements. Therefore, any attempt to do so in the guise of these implementing regulations would be invalid.

*Response:* The MMA independent audit procedures establish a process for discovery of DSH overpayments that trigger existing responsibilities for States to refund the Federal share of Medicaid overpayments to providers. The audits provide information that will identify DSH payments that exceed the amounts permitted under Section 1923(g)(1) of the Act and incorporated by reference into approved State plans. This information, in the form of an independent certified audit obtained by the State, will result in discovery of DSH overpayments and will trigger requirements to refund the Federal share of those overpayments, pursuant to existing requirements at 42 CFR Part 433, Subpart F. States that do not refund the Federal share of overpayments will be subject to disallowance of claims for Federal funds, and will have notice and an opportunity for a hearing through the Medicaid disallowance process. We believe this is consistent with the apparent purpose of the audit requirement to ensure the financial integrity of State DSH payments, and to ensure that DSH payments are targeted at addressing the burdens faced by hospitals which serve a

disproportionate share of low income patients.

*Comment:* Many commenters said that the Medicaid DSH program was designed to recognize the financial burden borne by those hospitals that take care of a disproportionate number of low income and uninsured individuals, and to provide financial assistance essential for these safety net providers to continue to take care of patients. Medicaid DSH funds are critical to the future viability of their hospitals. They were concerned that any new policy interpretation that results in substantially lower DSH payments or affects prior year DSH payments will have a significant financial impact on (safety net) hospitals, and will threaten their ability to continue to serve the community. Because of the negative impact on hospitals and on the patients they serve, the commenters strongly urge CMS to rethink its approach in this proposed rule. A few commenters stated that changing the Federal position on this matter could cause significant financial problems for State Medicaid programs.

*Response:* This rule does not impose any new restrictions on DSH payments. The statute calls for reporting and auditing of DSH payments, to ensure that such payments comply with existing statutory requirements limitations. This rule does not restrict the aggregate DSH funding that is available, nor does it effect DSH payments that comply with all statutory requirements. Consequently, there should be no effect on DSH payments that have been properly made to hospitals to account for the burden of treating a disproportionate share of low income patients.

*Comment:* Several commenters referenced the 1994 guidance to State Medicaid Directors in which CMS granted flexibility in allowing a State to use the definition of allowable costs in its State Medicaid plan or any other definition as long as the costs determined under such a definition do not exceed the amounts that would be allowable under the Medicare principles of cost reimbursement. They argued that this pronouncement was consistent with the principle that Medicaid is a Federal-State partnership and should be continued. Since this is a Medicaid DSH program, they assert that the State should be permitted to determine the definition of allowable costs as either not exceeding amounts allowable under Medicare principles of cost reimbursement or amounts that would be consistent with the State's existing Medicaid program. They asked that the rule reaffirm State flexibility in defining allowable costs.

*Response:* States have considerable discretion to determine allowable inpatient and outpatient costs when determining payment rates under their Medicaid State plan, but Section 1923(g)(1) of the Act provides for a Federal limitation based on costs that must be calculated in accordance with Federal accounting standards. In accordance with this principle, the 1994 guidance provided State flexibility to define Medicaid costs for purposes of setting Medicaid payment rates. But this flexibility does not apply to calculation of hospital-specific DSH limits to the extent that State-defined costs exceed those permitted under Medicare cost principles.

Moreover, the hospital-specific limit is based on the costs incurred for furnishing ''hospital services'' and does not include costs incurred for services that are outside either the State or Federal definition of inpatient or outpatient hospital services. While States have some flexibility to define the scope of ''hospital services,'' States must use consistent definitions of ''hospital services.'' Hospitals may engage in any number of activities, or may furnish practitioner or other services to patients, that are not within the scope of ''hospital services.'' A State cannot include in calculating the hospital-specific DSH limit cost of services that are not defined under its Medicaid State plan as a Medicaid inpatient or outpatient hospital service.

*Comment:* Numerous commenters said the proposed rule violates Administrative Procedure's Act rulemaking requirements because there was inadequate notice and opportunity for public comment on the proposed policy to limit hospital costs includable in the Medicaid DSH calculation. The commenters stated this is a proposed regulation for a reporting requirement only and that the cited statutory authority for the proposed rule has no bearing on allowability of costs in DSH calculation. These commenters stated the rule would substantively change longstanding DSH policy without appropriately calling for direct public comment.

*Response:* CMS published the Notice of Public Rule Making on August 26, 2005. As part of this publication, a 60 day comment period was provided. CMS received and considered numerous comments, as discussed in this preamble. Through this process, rulemaking requirements under the Administrative Procedure Act have been met. Moreover, the rule does not substantively change the standards for DSH payments, or for the review of hospital-specific limits on such payments. Even if the rule did make changes to those standards, however, CMS has followed the appropriate rulemaking procedures for such changes. Fundamentally, this rule implements statutory requirements to review and audit the calculation of DSH hospital-specific limits, including only the costs of those hospital services that are specified in the statute, and accounting for such costs consistently with existing applicable cost accounting principles.

*Comment:* One commenter further indicated that this is not just an issue of notice and comment rulemaking as required under the Administrative Procedure Act, it is an issue of Federal-State comity. The commenter asserted that the requirements contained in the proposed rule are not consistent with Supreme Court decisions providing that, if Congress intends to impose a condition on the grant of Federal moneys, it must do so unambiguously.

*Response:* The statute expressly requires that States report and audit DSH payments consistent with existing statutory limitations on such payments; this rule simply defines the nature and scope of these reporting and audit requirements. These requirements are related to ensuring Medicaid program integrity and transparency by providing information to identify improper payments, and the cost of meeting those requirements may be claimed as an administrative cost of the Medicaid program, eligible for Federal matching funding. As such, the statutory requirements are not new substantive responsibilities, but are part of existing State responsibilities to administer State Medicaid programs. Moreover, the Medicaid statute expressly requires the Secretary to identify necessary reporting requirements and the Secretary has oversight authority to ensure compliance with the statutory audit requirements. This rule provides detailed identification of the data elements necessary to comply with such reporting and auditing requirements expressly contained in statute. As an interpretation and implementation of clear statutory responsibilities, this rule is consistent with the cited Supreme Court decisions.

*B. Reporting*

1. Retroactivity

*Comment:* One commenter stated that their State would need to make several regulation changes that would need to be retroactive to July 1, 2005. The State

currently does not have a procedure to change regulations retroactively.

*Response:* CMS does not agree that States would need to retroactively change their programs to comply with the audit and reporting requirements associated with Medicaid State plan rate year 2005. The audit and reporting requirements discussed in this regulation can be met through prospective actions by States, and thus do not have retroactive effect. While the information disclosed by the audit and reporting requirements may reveal the need for retroactive adjustments to account for payments that are improper, this is no different from any other audit situation. Moreover, in order to ensure a period for developing and refining audit practices, we are providing for a transition period through Medicaid State plan rate year 2010, before audit results will be given weight other than in making prospective estimates of hospital costs for the purposes of ongoing DSH payments.

*Comment:* Many commenters stated that applying the proposed rule's requirements to dates of service prior to State fiscal year (SFY) 2005 would represent an undue administrative burden and a hardship for States and hospitals. Several commenters stated that it is unreasonable to expect that States are going to have readily available to them for SFY 2005, the data elements that CMS is just now requiring to be reported under this proposal. Applying the changes to the reporting requirements to SFY 2005 is a retroactive application and puts the States in the position of struggling to retrieve data that was not collected during SFY 2005. This would ultimately be to the detriment of the providers if the States are unable to capture all of the uncompensated care costs when they submit their reports. Many other commenters suggested all reporting and auditing requirements be prospective. In addition, they suggested linking the new reporting and auditing requirements to the first State fiscal year beginning after the finalization of the rule, no earlier than SFY 2006, with an audit being no earlier than 2 years later.

A few commenters stated that the effective date of State Fiscal Year (SFY) 2005 would not give hospitals time needed to modify their procedures to comply with State instructions for reporting made pursuant to the final regulations.

*Response:* We have modified the regulation to address concerns regarding the inability to complete the audit one year from the end of SFY 2005. The final regulation provides at 447.204(b) that:

1. The Medicaid State plan rate year 2005, rather than State fiscal year 2005, is the first time period subject to the audit. The basis for this modification is recognition of varying fiscal periods between hospitals and States. The Medicaid State plan rate year is the one uniform time period under which all States estimate uncompensated costs in order to make DSH payments under the approved Medicaid State plan.

2. In recognition of timing issues related to initiating the audit process, States may concurrently complete the Medicaid State plan rate year 2005 and 2006 audits by no later than September 30, 2009.

3. Each subsequent audit beginning with Medicaid State plan rate year 2007 must be completed by the last day of the Federal fiscal year (FFY), September 30, ending three years from the Medicaid State plan rate year under audit. This means that the 2007 Medicaid State plan rate year must be audited by September 30, 2010.

4. Each audit report must be submitted to CMS within 90 days of the completion of the audit. The report associated with Medicaid State plan rate years 2005 and 2006 are due no later than December 31, 2009. The 2007 Medicaid State plan rate year audit report must be submitted to CMS by December 31, 2010.

In addition, we have added a transition period at 447.204(d) to reflect concerns that auditing techniques may need to be reviewed and refined. Findings of the Medicaid State plan rate year audits through 2010 will not be given weight other than for purposes of prospective Medicaid State plan rate year uncompensated care cost estimates and associated DSH payments. This means that, starting in Medicaid State plan rate year 2011, such findings should be used in the calculation of prospective estimates related to DSH payments.

We are also making clear that DSH payments that, after the regulatory transition period, are found in the audit process to exceed the hospital-specific cost limits are provider overpayments that must be promptly returned to the Federal Government or redistributed by States to other qualifying hospitals. (Such redistribution authorities must be articulated in the Federally approved Medicaid State plan.) After the transition period to ensure the accuracy and reliability of audit techniques, such audit findings represent discovery of an overpayment under existing regulations at 42 CFR Part 433, Subpart F. We note that the regulatory transition provision is not intended to preclude review of DSH payments and discovery of overpayments prior to Medicaid State plan rate year 2011, to the extent that such review is independent of the State audit process.

*Comment:* One commenter noted that the proposed reporting requirements do not provide for any option to request an extension for the submission of the information or audit.

*Response:* As indicated in the response above, we have extended the audit and report submission date in the regulation. These extended time frames are detailed in a prior response and the regulation has been revised accordingly. Based on the revisions, the time frames are sufficiently long that there should be no need for extensions beyond the revised time frames. In the event of a natural disaster, or other incident beyond a State's control, we would consider providing relief in the context of a demonstration project that addresses the overall circumstances of the State.

*Comment:* Many commenters noted that the NPRM applies these new changes to retroactively FY 2005 when most DSH plans are already in place. Medicaid State Plans, regulations, and/or statutes will need to be amended to reflect the new reporting and audit requirements, which are retroactive to 7/1/05.

*Response:* CMS does not agree that States would need to retroactively change regulations to comply with the audit and reporting requirements associated with Medicaid State plan rate year 2005. In the audit process, Medicaid State plan DSH payments in the State plan rate year 2005 will be reviewed against uncompensated care costs during that same period (for example, OBRA 93 hospital-specific limits), which is consistent with the existing statutory provisions of Section 1923(g)(1). States will not need to retroactively modify their Medicaid State plans to comply with this regulation. The DSH reimbursement methodologies contained in Medicaid State plans articulate the methods by which States make DSH payments and already contain assurances that such DSH reimbursement methodologies will not exceed the OBRA 93 hospital-specific DSH limits. Typically, States currently rely on unaudited surveys to estimate uncompensated care in eligible hospitals, and this regulation would simply require reconciliation based on statutory cost limits using a more accurate audit methodology.

Under this regulation, the State DSH audit and report will use actual cost and payment data beginning with the Medicaid State plan rate year 2005 to ensure that DSH payments in the

approved Medicaid State plan did not exceed DSH eligible costs in hospitals receiving DSH payments. As noted above, to allow a period to develop and refine audit techniques, we also have included a transition period before audit results will be directly used to identify provider overpayments.

*Comment:* One commenter stated that the proposed reporting requirements refer to submission timing on two different pages, which are inconsistent with each other. On Page 50264 of the **Federal Register** under the Audit Requirements Section, it states, ''We are proposing a submission requirement within 1 year of the independent certified audit.'' On Page 50268 of the **Federal Register** under the List of Subjects Section, where the proposed revisions to Section 455.204(b) are indicated, it states, ''Timing. Beginning with State fiscal year (SFY) 2005, a State must submit to CMS an independent certified audit report no later than 1 year after the completion of each State's fiscal year.''

*Response:* The regulation has been modified to achieve consistent audit and reporting time frames. Generally, audits will examine prior period DSH payments and such audit must be completed by the last day of the FFY ending three years from the Medicaid State plan rate year under audit. Reports of the audit will be due within 90 days of completion of the audit. A special transition period is provided for Medicaid State plan rate year 2005 and 2006 audits. Further detail of audit and reporting are described in other responses to comments.

2. Effect of Lag in Medicaid Claims

*Comment:* Several commenters noted that there is already a requirement for States to indicate the regular Medicaid rate payments paid to the hospital for the SFY as part of the Medicaid claims information provided to CMS through the Medicaid Statistical Information System (MSIS). Claims may be submitted to the State for payment up to one year after the date of service. Therefore, payments made by the State for claims with dates of service in the SFY may be submitted up to a year after the service date by the hospital. The payment information would not be available before 12 months after the SFY at a minimum. Obtaining the amount paid by the State for the SFY being reported is not possible by the end of the SFY.

*Response:* Based on the modifications to the audit and reporting deadlines, the existing requirement at 42 CFR 447.45(d) for provider claims to be filed within a year from the date of service and promptly paid by the State, and the existing two-year timely claim filing requirement at 45 CFR 95.7, there should not be a significant adjustment to Medicaid payments that would warrant a corrected report. To the extent that such an adjustment to Medicaid payments occurs and States claim Federal matching dollars (or return Federal matching dollars) as a prior period adjustment, States should correct the audit and report by indicating post-audit adjustments to Medicaid and DSH payments (or uncompensated care costs if Medicaid payment adjustments affect the Medicaid shortfall).

States must consider post-audit adjustments, as information about them becomes available, to the extent that the State's DSH methodology involves prospective estimates of uncompensated care, at least beginning in Medicaid State plan rate year 2011. Similarly, such adjustments must be reported in the quarter the underlying claims were paid, and must be considered to determine if there were overpayments, beginning with Medicaid State plan rate year 2011 (although in some cases, the State plan may authorize the State to redistribute the overpaid funds to another eligible hospital). The regulation has been modified to include this provision.

*Comment:* A few commenters noted that the proposed rules do not indicate the submission dates for the Annual DSH Reports. Based on 1) the data reporting that is required, 2) the fact that some of these data will need to be audited under the proposed provisions of § 455.204, and 3) the fact that the audit is proposed to be required by one year after the close of the State fiscal year to which the reporting and the audit apply, we assume the reporting is contemplated to be submitted less than a year after the close of the State fiscal year. To the extent that CMS is requesting actual (and potentially audited) cost data for the fiscal year, that information must be gathered from hospitals and reviewed by the States prior to completion of the Annual DSH Report. The commenters pointed out that much of the required data are found only on Medicare cost reports, which are submitted no sooner than five months after year-end and are desk reviewed no sooner than 11 months after year end. Given this, the reporting timeframes that appear to be contemplated are not realistic. The commenters urged that CMS allow sufficient time for the States to complete this process.

*Response:* We have modified the regulation to clarify that the annual DSH reports are due at the same time as the completed independent audits. We believe that this time frame is sufficient for the State, hospitals and auditors to meet their respective responsibilities to review the accuracy of the State's DSH payments.

3. Eligible Uncompensated Care

*Comment:* Many commenters asserted that the language in the proposed regulation that excluded bad debts from being considered part of uncompensated care exceeded the statutory authorization since the statute does not specifically address that issue. These commenters argued that bad debts are part of the burden of providing care to uninsured, and underinsured patients for whom the hospital receives no payment. The commenters believe that the proposed rule is inconsistent with Congressional intent, and actually works to weaken the statute's purpose. These commenters cited the conference report language for the Omnibus Budget Reconciliation Act of 1993 provision establishing the hospital-specific DSH limit, stating that the cost of providing services to uninsured patients would be net of any out of pocket payments received from uninsured individuals. They argued that this language clearly implies an intent that only amounts received, and not bad debt should be considered when implementing the hospital-specific DSH limit.

*Response:* Implicit in these comments is a misunderstanding of the term ''bad debt.'' Bad debt arises when there is non-payment on behalf of an individual who has third party coverage. Section 1923(g)(1) is clear that the hospital-specific uncompensated care limit is calculated based only on costs arising from individuals who are Medicaid eligible or uninsured, not costs arising from individuals who have third party coverage. Thus, while the Medicaid statute does not specifically exclude bad debt from the definition of uncompensated care costs, there is nothing in the statute that would suggest that any costs related to services provided to individuals with third party coverage, including bad debt, are within that definition.

*Comment:* One commenter noted that if an uninsured patient does not pay the amount he or she was expected to pay, that may be recorded by the hospital as bad debt. The OBRA 1993 limit as prescribed by Section 1923(g) provides that the costs of furnished services are net of non-DSH payments under Medicaid and payments by uninsured patients. The statute does not authorize reductions to uncompensated care costs for amounts that patients were expected

to pay, only for payments that are actually made.

*Response:* We agree. The statutory definition of uncompensated care includes the costs of furnishing hospital services to uninsured patients, minus the payments actually received from those patients.

To the extent that hospitals do not currently separately identify uncompensated care related to services provided to individuals with no source of third party coverage from uncompensated care costs of patients with insurance, hospitals will need to modify their accounting systems to separate the two categories in order to properly document that DSH payments are within the hospital-specific limit.

Uncompensated inpatient and outpatient hospital care costs for individuals without third party coverage is then offset by payments actually made by or on behalf of those patients in the Medicaid State plan rate year under audit, except for payments made by State-only or local-only government programs for services provided to indigent patients.

*Comment:* Numerous commenters asserted that the proposed rule was contrary to the interpretation that bad debt should be considered when implementing the hospital-specific DSH limit that was found in CMS guidance in 1994 and again in 2002, and asked for a continuation of the prior interpretation.

*Response:* In 1994, CMS clarified the 1993 hospital-specific ''cost'' limit to include outpatient hospital services, in addition to inpatient hospital services, for Medicaid individuals and individuals with no source of third party coverage. This clarification of cost under the hospital-specific DSH limit was established in recognition of historical Congressional references to hospital services under its ongoing instruction regarding DSH. The 1994 letter to State Medicaid Directors did not specifically refer to bad debt, nor did it contain any language that should have suggested that the hospital specific limit calculation should include costs (whether compensated or uncompensated) related to individuals who had third party coverage. Similarly, the State Medicaid Director letter dated August, 2002 specifically addressed the treatment of Medicaid supplemental UPL payments for purposes of calculating uncompensated care; the treatment of costs associated with inmates of correctional facilities; and, the inclusion of Medicaid managed care days in the Medicaid inpatient utilization rate formula. Nothing in that letter addressed the issue of bad debt and the calculation of DSH eligible costs. The provisions in this rule that expressly exclude bad debt from the calculation of the hospital specific limit are based on the statutory language and do not represent any change in CMS policy.

*Comment:* Several commenters stated that the proposed rule fails to clarify how bad debt would be calculated.

*Response:* Bad debt arises when there is non-payment on behalf of an individual who has third party coverage. Section 1923(g)(1) is clear that the hospital-specific uncompensated care limit is calculated based only on costs arising from individuals who are Medicaid eligible or uninsured, not costs arising from individuals who have third party coverage. To the extent that hospitals do not currently separately identify uncompensated care related to services provided to individuals with no source of third party coverage from bad debts from patients with insurance, hospitals will need to modify their accounting systems to separate the two categories in order to properly document that DSH payments are within the hospital specific limit. We are not prescribing the details of how hospitals can accurately measure uncompensated care; the precise methodology may vary depending on individual circumstances (but will have to provide an auditable basis for the measurement). As described in later comments, the source of this information will be derived from hospital cost reports, hospital financial statements, and other hospital accounting records.

*Comment:* One commenter said that bad debts represent an enormous uncompensated cost to providers and pointed out that the Medicare program recognizes this reality and reimburses providers 70 percent of their Medicare bad debt write-offs. The commenter suggested that Medicaid should operate similarly to Medicare in this respect.

*Response:* The Medicare DSH program and the Medicaid DSH program are separate programs authorized by different Sections of the statute and with different purposes and goals. The Medicaid statute does not specifically authorize payment based on bad debts, nor does it authorize including bad debts in the calculation of the hospital specific limit under Section 1923(g)(1). We note, however, that the hospital specific limit is not a payment methodology, and States could recognize bad debts in constructing DSH payment methodologies that provide for payments less than or equal to the hospital specific limit for each hospital.

*Comment:* One commenter noted that the provider will report the ''Provision for Medicaid Bad Debt'' as a component of its uncompensated total. As such, the Provision for Bad Debt is an estimate, a Balance Sheet account, not an expense account, and deductibles and coinsurance, along with other charges, are estimated in that account. The actual bad debt expense is booked against the provision and/or allowance and most facilities would need to drill down on the Provision for Bad Debt account to get actual bad debt expense related to uninsured cost.

*Response:* Setting up an accounting category to aggregate charges and revenues associated with uninsured individuals receiving inpatient and/or outpatient services from a hospital should be an accounting system adjustment not far removed from the process of setting up an account for any other payer category. To the extent that hospitals do not currently separately identify uncompensated care related to services provided to individuals with no source of third party coverage from other uncompensated care costs, hospitals will need to modify their accounting systems to do so. For purposes of the initial audits under the transitional provision of the regulation, States and auditors may need to develop methodologies to analyze current audited financial statements and other accounting records to properly segregate uncompensated costs.

Only the inpatient and outpatient hospital charges associated with individuals with no source of third party coverage for such services can be applied to the Medicare cost report for purposes of calculating the uninsured uncompensated care cost component of the hospital-specific DSH limit. Hospitals must also ensure that no duplication of such charges exist in their accounting records. This information must be made available to the auditor for certification.

*Comment:* One commenter questioned whether claims denied by insurers for lack of prior authorization or claims submitted too late would be considered uninsured since the service is not reimbursed by the insurer and the amount is not a contractual allowance. The commenter asserted that, in that instance, the cost of that portion of the stay is uninsured.

*Response:* Section 1923(g)(1) refers to the costs of hospital services furnished by the hospital ''in individuals who * * * have no health insurance (or other source of third party coverage).'' We have always read this language to distinguish between care furnished to individuals who have health insurance

or other coverage, and care furnished to those who do not. We have never read this language to be service-specific and we believe that such an interpretation would be inconsistent with the broad statutory references to insurance or other coverage. Furthermore, such a reading would result in cost shifting from private sector coverage to the Medicaid program. We interpret the phrase ''who have health insurance (or other third party coverage)'' to broadly refer to individuals who have creditable coverage consistent with the definitions under 45 CFR Parts 144 and 146, as well as individuals who have coverage based upon a legally liable third party payer. The phrase would not include individuals with insurance that provides only excepted benefits, such as those described in 45 CFR 146.145, unless that insurance actually provides coverage for the hospital services at issue (such as when an automobile liability insurance policy pays for a hospital stay).

Improper billing by a provider does not change the status of the individual as insured or otherwise covered. In no instance should costs associated with claims denied by a health insurance carrier for such a reason be included in the calculation of hospital-specific uncompensated care costs.

*Comment:* One commenter argued that small hospitals budget for and count on receiving funding related to uncompensated bad debt, and argued that it would be unfair to remove bad debt from the DSH payment equation for all of 2005.

*Response:* Bad debt arises when there is non-payment on behalf of an individual who has third party coverage. Section 1923(g)(1) is clear that the hospital-specific uncompensated care limit is calculated based only on costs arising from individuals who are Medicaid eligible or uninsured, not costs arising from individuals who have third party coverage. As we discuss below, the regulation provides a transition period for reliance on audit findings. Findings for Medicaid State Plan years 2005–2010 will not be given weight except to the extent that the findings draw into question the reasonableness of State uncompensated care costs estimates used for calculations of prospective DSH payments for Medicaid State plan year 2011 and thereafter. This regulation requires an independent certified audit of Medicaid State plan DSH payments beginning with the Medicaid State plan rate year 2005, including comparison to the hospital-specific limits. As discussed above, this regulation does not change the costs that are included in calculating the hospital-specific limit. As discussed in a prior response, however, because the auditing process is new and will need to be refined, the 2005 audit findings will be used solely to review prospective DSH payments beginning with Medicaid State plan rate year 2011.

*Comment:* Several commenters stated that the recent growth of health plans and health savings accounts with high deductibles and/or have exclusion limits, is putting new burdens on hospitals in terms of unreimbursed costs. The proposed rule fails to clarify whether non-payment of beneficiaries' deductibles and co-payments would be considered bad debt and/or should be applied as a reduction in determining uncompensated care costs.

*Response:* Costs associated with services furnished to individuals who have limited health insurance or other third party coverage are not included in the calculation of the hospital-specific DSH limit. Specifically, the DSH limit does not include amounts associated with unpaid co-pays or deductibles for such individuals (bad-debt associated with third party coverage). Health savings accounts associated with high deductible third-party coverage typically provide a source for co-pays and deductibles as well as premium contributions or co-insurance. When health savings accounts are not sufficient to cover such charges, however, the individual remains insured and therefore hospital services costs are not considered not within the statutory calculation of the hospital specific limit.

*Comment:* A number of commenters stated that hospitals should not be denied DSH payments for uncollectible co-pays and deductibles for patients eligible for charity care based on a hospital's policy or for bad debts that in fact are true charity care but cannot be accounted for as such because the patient would not or could not fill out a hospital's charity care application or did not qualify for charity care but was uninsured.

*Response:* States have considerable flexibility in developing DSH payment methodologies, and such uncollectible amounts could be a factor in a State DSH payment methodology but can only be considered in calculating the hospital-specific limit on DSH payments if they meet the statutory criteria. Costs that can be included in the hospital-specific limit set forth at Section 1923(g) of the Act are hospital costs associated with uncompensated Medicaid costs and uncompensated costs of hospital services provided to individuals without health insurance (for example, the uninsured).

Charity care is a term used by hospitals to describe an individual hospital's program of providing free or reduced charge care to those that qualify for the particular hospital's charity care program. The term also may be defined by a State in determining qualification for DSH payments under the low-income utilization rate methodology set forth in Section 1923(b)(3) of the Act. Depending on the definition used, hospital costs associated with the uninsured may be a subset of charity care in the hospital or may entirely encompass a hospital's charity care program. Regardless of a hospital's definition/parameter on what constitutes charity care, States and hospitals must comply with Federal Medicaid DSH law and policy guidance in determining what portion of their specific charity care program costs qualify under the hospital-specific DSH cost limits.

To the extent that hospitals do not separately identify uncompensated care related to services provided to individuals with no source of third party coverage, hospitals will need to modify their accounting systems to do so. And hospitals must ensure that no duplication of such charges exist in their accounting records. For purposes of the initial audits, States and auditors may need to develop methods to analyze current audited financial statements and other accounting records to properly segregate uncompensated costs.

*Comment:* A few commenters noted that if a patient does not have health insurance, the costs of services provided to that patient may be included in calculating the hospital-specific limit, even if revenues related to that patient are uncollectible and eventually written off as bad debt. They argued that the touchstone for purposes of the DSH limit is whether the individual has third party coverage, not whether the hospital has or has not treated the patient's account as bad debt.

*Response:* We agree. As long as the costs are for services furnished to uninsured patients, they may be included in the calculation of the hospital-specific limit, regardless of whether the hospital treats the costs as bad debt on its own books.

*Comment:* A few commenters said that hospitals are currently required to report both charity and bad debt costs to the State Medicaid program to assure that the hospital will not receive excess Medicaid DSH payment. The commenters indicated that this requirement is part of an approved

Medicaid State plan that has been in place for numerous years, and asserted that the proposed requirements would be an unwarranted departure from this practice.

*Response:* We recognize that this rule may necessitate some changes in current practices, but we believe these changes are warranted in order to ensure compliance with the statutory hospital-specific limit. As discussed above, the statutory calculation does not refer to charity care or bad debts, but expressly refers to uncompensated costs of furnishing hospital services to individuals eligible for Medicaid or individuals who have no health insurance or other third party coverage.

*Comment:* A few commenters were concerned that the regulation lacks a clear and appropriate definition of ''third-party coverage.'' In particular, the commenters believe that third-party coverage should explicitly be defined in a manner that makes clear that third-party coverage does not include State and local programs to pay for care for indigent and uninsured individuals and that ''lack of third-party coverage'' also encompasses patients who lack coverage for the service provided, not necessarily any coverage at all.

*Response:* We disagree. As discussed above, Section 1923(g)(1) of the Act refers to costs of hospital services furnished to ''individuals without health insurance (or other source of third party coverage).'' We have always read this language to distinguish between care furnished to individuals who have health insurance or other coverage, and care furnished to those who do not. We have never read this language to be service-specific and we believe that such an interpretation would be inconsistent with the broad statutory references to insurance or other coverage. Furthermore, such a reading would result in cost shifting from private sector coverage to the Medicaid program. We interpret the phrase ''who have health insurance (or other third party coverage)'' to refer to individuals who have creditable coverage consistent with the definitions under 45 CFR Parts 144 and 146, as well as individuals who have coverage based upon a legally liable third party payer.

4. Dual Eligibles

*Comment:* A few commenters indicated that days attributable to dual eligibles should be included in the calculation described in Section 1923(a) relating to determining DSH eligibility.

*Response:* The Medicaid Inpatient Utilization Rate (MIUR) is a calculation that includes all Medicaid eligible days. To the extent that an inpatient hospital day for a dually-eligible Medicare/Medicaid patient qualifies as a Medicaid day, that day would be included in the MIUR calculation.

*Comment:* One commenter questioned whether the costs attributable to dual eligibles be included in the calculation described in SSA § 1923(g) relating to uncompensated care costs. The commenter asserted that these costs should be excluded because the purpose of the DSH upper payment limit is to limit DSH payments to hospitals to no more than the difference between the cost and payments of Medicaid and the uninsured. The commenter indicated that, since Medicare is the primary payer for the duals, it seems appropriate to exclude the costs of those patients from this calculation, since the payments are also excluded.

*Response:* We disagree; since Section 1923(g)(1) does not contain an exclusion for dually eligible individuals, we believe the costs attributable to dual eligibles should be included in the calculation of the uncompensated costs of serving Medicaid eligible individuals. But in calculating those uncompensated care costs, it is necessary to take into account both the Medicare and Medicaid payments made, since those payments are contemplated under Title XIX. In calculating the Medicare payment for service, the hospital would have to include the Medicare DSH adjustment and any other Medicare payment adjustment (Medicare IME and GME) with respect to that service.

5. Charity and Indigent Care

*Comment:* One commenter questioned how a hospital would classify individuals who had Medicaid coverage for some discharges and no insurance for others.

*Response:* The hospital-specific DSH limit comprises uncompensated care costs of furnishing inpatient and outpatient hospital services to Medicaid eligible individuals and individuals with no source of third party coverage for the inpatient and outpatient hospital services they receive. If an individual is Medicaid eligible on the day they received inpatient or outpatient hospital services, then those services would be included in calculating the hospital-specific limit. To the extent the Medicaid payment does not fully cover the cost of the inpatient or outpatient hospital services provided, the unreimbursed costs of those services would be counted in calculating that limit. Services that are not within the State's definition of inpatient or outpatient hospital services, and any revenue associated with such services, however, would not be included in that calculation. The same is true for hospital services furnished to individuals whose insurance status fluctuates; hospital services furnished while individuals are uninsured would be included in the calculation, and those furnished while individuals are insured would not be included.

*Comment:* One commenter requested an explanation of the difference between ''charity care'' and care provided to the uninsured.

*Response:* As we explained above, charity care is a term used by hospitals to describe an individual hospital's program of providing free or reduced charge care to those that qualify for the particular hospital's charity care program. The term also may be defined by a State in determining qualification for DSH payments under the low-income utilization rate (LIUR) methodology set forth in Section 1923(b)(3) of the Act. Depending on the parameters of the individual charity care programs, hospital costs associated with the uninsured may be a subset of charity care in the hospital or may entirely encompass a hospital's charity care program. Regardless of a hospital's definition/parameter on what constitutes charity care, States and hospitals must comply with Federal Medicaid DSH law and policy guidance in determining what portion of their specific charity care program costs qualify under the hospital-specific DSH cost limits.

As noted, charity care is addressed in the Medicaid statute at Section 1923(b)(3)(B)(i) of the Act and is a variable in the formula used to determine a hospitals low-income utilization rate as part of the qualification criteria for DSH payments. The charity care variable, while not further defined by statute is offset in the LIUR formula by the subsidies provided by state and local governments to assist hospitals in serving individuals with no other source of third party coverage. For purposes of defining a hospital's LIUR, States may adopt a reasonable definition of charity care to reflect care given free or with reduced charge to indigent individuals.

The term is not used in Section 1923(g) of the Act which defines the costs eligible for DSH payments and that limits DSH eligible costs to the uncompensated inpatient and outpatient hospital costs associated with Medicaid eligible individuals and individuals without health insurance, (for example, the uninsured).

For purposes of Section 1923(g)(1) hospital-specific DSH limits, uninsured individuals are those individuals without a source of third-party coverage

(except coverage from State or local programs based on indigency). Self-pay, in terms of the hospital-specific DSH limits, are those individuals who are responsible to pay for the hospital services provided them because they have no source of third party coverage, (for example, the uninsured). Revenues required to be offset against a hospital's DSH limit would include any amounts received by the hospital by or on behalf of either ''self-pay'' or uninsured individuals during the Medicaid State plan rate year under audit (except payments from State or local programs based on indigency).

To the extent that hospitals do not separately identify uncompensated care related to services provided to individuals with no source of third party coverage from other uncompensated care costs, hospitals will need to modify their accounting systems to do so. For purposes of the initial audits, States and auditors may need to develop methodologies to analyze current audited financial statements and other accounting records to properly segregate uncompensated costs. It is important to note that only the inpatient and outpatient hospital charges associated with individuals with no source of third party coverage for such services can be applied to the Medicare cost report for purposes of calculating the uninsured uncompensated care cost component of the hospital-specific DSH limit. Hospitals must also ensure that no duplication of such charges exist in their accounting records. This information must be made available to the auditor for certification.

To the extent that hospitals include such eligible uncompensated inpatient and outpatient hospital care as part of their hospital-specific DSH limit calculation, the included costs must be offset by payments actually made by or on behalf of patients with no source of third party coverage in the Medicaid State plan rate year under audit. These payments do not include payments made by State-only or local-only government programs for services provided to indigent patients.

*Comment:* A few commenters requested a definition of Indigent Care Revenue. They believe the language suggests that this term refers to revenue from individuals with no source of third party coverage for inpatient and outpatient hospital services they receive, irrespective of the individuals' income, despite the fact that ''indigent'' usually implies low income. The commenters would like CMS to confirm that this interpretation is correct.

*Response:* We agree that this term was confusing and we have changed its usage in the final regulation. We refer instead to ''uninsured'' revenue to refer to compensation for hospital services received from or on behalf of individuals with no source of third party coverage (regardless of whether the patient is indigent). These payments do not include payments made by State-only or local-only government programs for services provided to indigent patients.

*Comment:* Some commenters asked for more clarity with regard to what is included in the category of indigent care revenue (§ 447.299(c)(12)), and a definition of third party payments. They asked in particular about the treatment of payments made by State and other government programs make payments to hospitals on behalf of indigent individuals. The regulation should contain language that clarifies this in order to avoid confusion.

*Response:* We agree. Section 1923(g)(1)(A) of the Act specifies that, ''payments made to a hospital for services provided to indigent patients by a State or a unit of local government within a State, shall not be considered to be a source of third party payment.'' Therefore, we have changed the usage of the term ''indigent care revenue'' and refer instead to ''uninsured revenue.'' In addition, we have added language to clarify that uninsured revenue does not include payments for hospital services provided to indigent patients by a State or a unit of local government within a State.

*Comment:* One commenter questioned how CMS previously audited indigent care revenue.

*Response:* CMS has previously performed certain reviews of State DSH programs as part of its financial management work plan under Medicaid. In addition, the Office of the Inspector General has previously performed several reviews of State DSH programs nationally.

*Comment:* One commenter stated CMS should clarify whether the required data element refers to services provided to patients whose third party coverage makes no payment to the hospital; for example, the patient may have exhausted benefits coverage, the hospital may have failed to properly bill for the service, or the service provided may not be a covered benefit.

*Response:* Costs included in calculating the hospital-specific limit do not include costs associated with individuals who are not Medicaid-eligible and have health insurance, even if that health insurance is limited. In no instance should costs associated claims denied by a health insurance carrier due to improper billing be included in the hospital-specific DSH limit. In addition, to the extent that the inpatient and/or outpatient hospital services received are not within the definition of inpatient and/or outpatient hospital services under the State Medicaid plan, such service costs should not be included in calculating the hospital-specific DSH limit. The treatment of inpatient and outpatient hospital services provided to the uninsured and underinsured also must be consistent with the definition of inpatient and/or outpatient services under the approved Medicaid State plan.

*Comment:* One commenter questioned at what point an individual is coded as self pay.

*Response:* The hospital-specific limit is calculated, in part, using uncompensated costs of providing inpatient and outpatient hospital services to individuals without health insurance (for example, the uninsured). While some hospitals may refer to such individuals as ''self-pay,'' that term could have a broader meaning.

For purposes of determining hospital-specific DSH limits, uninsured individuals are those individuals without health insurance or another source of third-party coverage for inpatient and/or outpatient hospital services. Information on insurance or third party coverage status is routinely collected by hospitals, and should be found in patient records. We interpret the phrase ''who have health insurance (or other third party coverage)'' to broadly refer to individuals who have creditable coverage consistent with the definitions under 45 CFR Parts 144 and 146, as well as individuals who have coverage based upon a legally liable third party payer. The phrase would not include individuals who have insurance that provides only excepted benefits, such as those described in 42 CFR 146.145, unless that insurance actually provides coverage for the hospital services at issue (such as when an automobile liability insurance policy pays for a hospital stay).

Revenues required to be offset against a hospital's DSH limit would include any amounts received by the hospital by or on behalf of uninsured individuals during the Medicaid State plan rate year under audit.

*Comment:* One commenter noted that the phrasing of this requirement implies that the State should report all payments unrelated to third party coverage. The commenter suggested that, as some individuals can pay for certain hospital bills privately, these payments would be included within

this definition and those private pay amounts would be included as Indigent Care Revenue. The commenter asserted that, if this is correct, bad debts should be included in uncompensated care; and if this is incorrect, CMS should clarify what amounts are to be included as revenue from the indigent, and how the indigent and their revenues are to be identified.

*Response:* It would be incorrect to include reductions in uncompensated care in calculating the hospital-specific limit based on private pay amounts for individuals with insurance or other third party coverage. Revenues required to be offset against a hospital's DSH limit would include any amounts received by the hospital by or on behalf of uninsured individuals during the Medicaid State plan rate year under audit. Section 1923(g)(1)(A) of the Act requires that the hospital-specific cost limit be reduced by payments under Title XIX and payments made by uninsured patients. To the extent that hospitals do not separately identify uncompensated care related to services provided to individuals with no source of third party coverage from uncompensated care costs not eligible under the hospital-specific DSH limits, hospitals will need to modify their accounting systems to do so. For purposes of the initial audits, States and auditors may need to develop methodologies to analyze current audited financial statements and other accounting records to properly segregate uncompensated costs.

In sum, to the extent that hospitals include such uncompensated inpatient and outpatient hospital care as part of their hospital-specific DSH limit calculation, the included costs must be offset only by payments actually made by or on behalf of patients with no source of third party coverage in the Medicaid State plan rate year under audit. These payments do not include payments made by State-only or local-only government programs for services provided to indigent patients, nor do they include payments by patients with a source of third party coverage. We have revised the regulation text to try to clarify these points.

*Comment:* One commenter believes CMS' use of the term ''uncompensated care costs'' throughout the regulation and preamble may be confusing because the hospital industry generally uses the same term to mean the combined costs related to charity care and bad debt for all patients (not limited to uninsured patients). The commenter suggested that CMS intends a more limited use of the term in this regulation that would be restricted to uncompensated care costs associated with Medicaid and uninsured patients. The commenter suggested that CMS should not use the term ''uncompensated care costs'' to refer to uncompensated costs associated only with Medicaid and uninsured patients. To better facilitate hospital compliance, the commenter recommends that CMS use a different term, such as ''uncompensated Medicaid and uninsured costs.''

*Response:* While we regret any confusion, the term ''uncompensated care costs'' has been used in this concept since the statutory change in 1993, and we have sought to alleviate confusion by explaining in detail the meaning of the term in this context. The uncompensated care costs eligible under DSH were clearly articulated in the August 26, 2005 proposed regulation. That is, the uncompensated care costs eligible under the hospital-specific DSH limit include the unreimbursed costs of providing inpatient and outpatient hospital services to Medicaid eligible individuals and the unreimbursed costs of providing inpatient and outpatient hospital services to individuals with no source of third party reimbursement. Therefore, all uncompensated costs billed as inpatient hospital services and outpatient hospital services to Medicaid eligible individuals and to individuals with no source of third party reimbursement are eligible under the DSH limit.

To the extent that hospitals do not separately identify uncompensated care related to services provided to individuals with no source of third party coverage from uncompensated care costs not eligible under the hospital-specific DSH limits, hospitals will need to modify their accounting systems prospectively to do so. For purposes of the initial audits, States and auditors may need to develop methodologies to analyze current audited financial statements and other accounting records to properly segregate uncompensated costs.

*Comment:* A few commenters requested a definition of what is considered uninsured.

*Response:* We interpret the statutory phrase ''who have health insurance (or other third party coverage)'' to broadly refer to individuals who have creditable coverage consistent with the definitions under 45 CFR Parts 144 and 146, as well as individuals who have coverage based upon a legally liable third party payer. The phrase would not include individuals who insurance that provides only excepted benefits, such as those described in 42 CFR 146.145, unless that insurance actually provides coverage for the hospital services at issue (such as when an automobile liability insurance policy pays for a hospital stay).

*Comment:* One commenter stated that there could be a case where a patient comes into a hospital and has an income over the charity care level (for example, 400 percent over the poverty level) and the patient charges are not booked to uncompensated care but booked to self-pay. The patient does not pay and the account is written off to bad debt. In that case, the commenter asked whether the cost of that charge would be counted as Medicaid DSH or as a component of bad debt. In addition, the commenter asked if the facility could write-off the account as uncompensated care and not bad debt. Currently, many facilities may be writing off to bad debt because the regulations appear to be more specific.

*Response:* This regulation does not directly address all potential DSH payment methodologies, but does address the calculation of the hospital-specific limit on DSH payments. As discussed in previous responses, the categories of charity care and self pay are not relevant to calculation of the hospital-specific limit. For the calculation, it is necessary to know the uncompensated costs of providing inpatient and outpatient hospital services to individuals without health insurance (for example, the uninsured). To the extent that hospitals do not separately identify uncompensated care related to services provided to individuals with no health insurance or other source of third party coverage, hospitals will need to modify their accounting systems to do so.

*Comment:* One commenter questioned whether it is CMS' intent that the uninsured, their charges, their payments, and their costs be calculated and reported without regard to any income or asset threshold? Please explain CMS' intent regarding asset and income thresholds and the uninsured.

*Response:* The statutory provision at Section 1923(g)(1) does not provide for any income or asset threshold in measuring uncompensated care for uninsured individuals for purposes of the hospital-specific limit on DSH payments. Presumably, such individuals with higher incomes will be able to pay some or all of the cost of their care, and the costs will thus not be uncompensated. Moreover, we reiterate that the hospital-specific limit is not a DSH payment methodology, and States may impose stricter limits on costs that they will consider in determining payment.

*Comment:* One commenter noted that the CMS proposed rule would reward hospitals whose liberal charity policies

result in high charity care amounts. By not using their best efforts to collect on patient's accounts, the commenter indicated that these institutions pass on a greater financial burden to the Medicaid program under this proposal. The commenter asserted that hospitals have a duty to make a reasonable effort when collecting accounts from patients who do not have insurance or in instances where insurance does not provide complete coverage.

*Response:* This rule implements the audit and reporting of DSH payments to determine compliance with the hospital-specific DSH limits and is not intended to create an incentive for qualifying DSH hospitals not to collect on patients' accounts. First, States are limited in their ability to make DSH payments by their annual DSH allotments. Second, States are not required to make DSH payments to qualifying hospitals in an amount equal to the hospital-specific limit. The hospital-specific limit is not a DSH payment methodology, and States may impose stricter limits on costs that they will consider in determining payment. Taken together, we believe it is unlikely hospitals will forgo revenues from patients in hope that such costs/services would be fully subsidized by the Medicaid DSH payment.

*Comment:* One commenter said that several States have many non-Medicaid indigent care programs. In many of these programs, the commenter indicated that the sponsoring government or agency provides a minimal payment to the hospital. The commenter noted that the proposed regulations are not clear whether the loss on such programs/patients is includable in uncompensated care costs.

*Response:* Inpatient and outpatient hospital service costs provided to beneficiaries of State-only indigent care programs that have no other source of third party coverage may be included in a hospital's DSH cost limit. Section 1923(g)(1)(A) of the Act specifies that, ''payments made to a hospital for services provided to indigent patients by a State or a unit of local government within a State, shall not be considered to be a source of third party payment.'' Such State or local government payments should not be offset against the inpatient and outpatient hospital service costs associated with individuals qualifying for such State or local government payment programs.

However, it is important to note that Medicaid inpatient and outpatient hospital revenues received by hospitals in excess of Medicaid inpatient and outpatient hospital costs must also be offset against the eligible uncompensated inpatient and outpatient hospital costs associated with individuals with no source of third party coverage for the inpatient outpatient hospital services they received.

*Comment:* One commenter requests CMS clarify how the indigent are to be identified. In particular, the commenter asked for clarification on the treatment of other State or local funded services for indigent patients and how that fits into the reporting for the uninsured, and noted that some hospitals have included items in the ''uninsured'' category that are State or locally funded. Examples include items such as county jail patients, public employee workers' compensation funded services, and services to juveniles referred from secure State facilities.

*Response:* We interpret the phrase ''who have health insurance (or other third party coverage)'' to broadly refer to individuals who have creditable coverage consistent with the definitions under 45 CFR Parts 144 and 146, as well as individuals who have coverage based upon a legally liable third party payer. The phrase would not include individuals who insurance that provides only excepted benefits, such as those described in 42 CFR 146.145, unless that insurance actually provides coverage for the hospital services at issue (such as when an automobile liability insurance policy pays for a hospital stay). The phrase also does not include coverage or payments made on the basis of indigency by a State or a local unit of government within the State, pursuant to Section 1923(g)(1)(A) of the Act.

Inpatient and outpatient hospital costs incurred for individuals for which the State or local government is responsible on a basis other than indigency should not be included in calculating the hospital-specific limit. This would include costs for care for which the State makes payments on the basis of status as State employees, prisoners or other wards of the State. A State Medicaid Director letter dated August 16, 2002 specifically addressed the issue of treatment for Medicaid DSH purposes of hospital costs associated with inmates of correctional facilities. The letter specified that these costs were ineligible as uncompensated costs for purposes of DSH because the inmates are wards of the State and the State is directly responsible for their basic economic and medical needs. Failure to do so would be in violation of the eighth Amendment of the Constitution. Similarly, inmates of a county jail or juvenile facility are wards of the State or local government detaining them and their basic economic and medical needs are the obligation of that governmental entity.

In addition, uncompensated inpatient and/or outpatient hospital costs associated with providing services for public employee worker's compensation programs are not eligible for inclusion in a hospital's DSH limit. Worker's compensation programs provide third party coverage for medical services that is not based on indigency.

*Comment:* One commenter said that CMS should further clarify what costs may be included in the costs of services for the uninsured, in particular, how ancillary and pharmacy services should be addressed.

*Response:* There are no special accounting principles related to the reporting and auditing requirements under this regulation. Costs and revenues should be determined based on otherwise applicable cost accounting principles for hospitals. As part of the Medicare 2552–96 cost reporting and allocation step down process, ancillary service costs may be allocated to inpatient and outpatient hospital services provided to Medicaid eligible patients and patients with no source of third party coverage. To the extent that the allocated ancillary service costs are not reimbursed they may be included in the hospital-specific DSH limit.

Pharmacy service costs are separately identified on the Medicare 2552–96 cost report and are not recognized as an inpatient or outpatient hospital service. Pharmacy service costs that are not part of an inpatient or outpatient rate and are billed as pharmacy service and reimbursed as such are not considered eligible for inclusion in the hospital-specific uncompensated cost limit.

*Comment:* Many commenters stated that the current accounting systems at most hospitals would not allow them to accurately segregate payments received from individuals with third party coverage from payments received from individuals without third party coverage.

*Response:* To the extent that hospitals do not separately identify uncompensated care related to services provided to individuals with no source of third party coverage from uncompensated care costs not eligible under the hospital-specific DSH limits, hospitals will need to modify their accounting systems to prospectively do so. Setting up an accounting category to aggregate charges and revenues associated with uninsured individuals receiving inpatient and/or outpatient services from a hospital should be an accounting system adjustment not far removed from the process of setting up

an account for any other payer category. For purposes of the initial audits, States and auditors may need to develop methodologies to analyze audited financial statements and other accounting records to properly segregate uncompensated costs.

*Comment:* A few commenters stated that, in their States, for the vast majority of DSH hospitals, the State achieves compliance with the hospital-specific DSH limit because DSH payments are less than Medicaid uncompensated care alone, which is calculated for each hospital on the Medicaid cost reporting forms. For this reason, the commenters asserted that the State does not require most DSH hospitals to report costs of uninsured patients on the cost reporting forms, and requiring them to do so would be an unnecessary and significant burden. The commenters recommended that the proposed rule be amended to include a provision granting States the option to not report uninsured costs for some or all hospitals where Medicaid losses justify the DSH payment made. Some commenters recommend that the proposed rule be amended to include a provision granting States the option to not report uninsured costs for some or all hospitals where Medicaid losses alone justify the DSH payment.

*Response:* The statute requires that each State report to CMS data, and submit a certified audit, that verifies that all hospitals receiving DSH payments under the Medicaid State plan actually qualify to receive such payments and that such payments do not exceed the hospital-specific DSH limit. Even if a State only makes DSH payments under its approved Medicaid State plan that relate to the uncompensated care of providing inpatient and outpatient hospital services to Medicaid individuals (that is, Medicaid shortfall), it would be possible for payments to a hospital to exceed the hospital-specific limit if the hospital had a surplus in furnishing hospital services to the uninsured. While this may be an unlikely circumstance, we cannot at this time be certain that it never occurs. Therefore, in such a circumstance we will accept reporting limited to Medicaid uncompensated care only when the hospital provides a certification that it incurred additional uncompensated care costs serving uninsured individuals. When we review certified audit reports submitted by States, we will consider whether more flexibility would be warranted, and we may address the issue in future reporting instructions.

*Comment:* Numerous commenters cited the agency's 1994 letter to State Medicaid programs as offering additional guidance by stating that the cost of services provided individuals with third party coverage, but whose third party coverage did not cover the hospital services the individual received, could be included. These commenters asked for CMS to incorporate this principle into this final rule.

*Response:* We do not agree with this reading of the 1994 CMS State Medicaid Director letter, which did not refer to underinsured individuals. Moreover, the statute appears to be clear on this issue. While we regret any misconceptions about that letter, we take this opportunity to clarify that the only costs relevant to the calculation of the hospital-specific limit are costs of furnishing hospital services to individuals who are Medicaid eligible or who have no health insurance (or other source of third party coverage).

*Comment:* One commenter questioned whether claims denied by insurers for lack of medical necessity are considered uninsured.

*Response:* The costs of services for individuals who have health insurance are not included in calculating the hospital-specific limit, even if insurance claims for that particular service are denied for any reason. Section 1923(g)(1) of the Act includes in the calculation costs of providing hospital services to individuals without health insurance or other third party coverage (for example, the uninsured). Claims denied by a health insurance carrier, including a Medicaid contracted managed care organization, for any reason other than the inpatient/outpatient service or services provided were not covered services within the individuals health benefit package are furnished to individuals who have health insurance coverage. The same is true of services for which claims are denied due to improper billing, lack of preauthorization, lack of medical necessity, or non-coverage under the third party insurance package.

*Comment:* One commenter stated that if an individual has an ambulatory benefit, but does not have an inpatient benefit, this individual should be considered uninsured when inpatient hospital treatment is provided. The costs a hospital incurs for the provision of care to these individuals should be included in determining the cost of uncompensated care.

*Response:* We interpret the phrase ''who have health insurance (or other third party coverage)'' to broadly refer to individuals who have creditable coverage consistent with the definitions under 45 CFR Parts 144 and 146, as well as individuals who have coverage based upon a legally liable third party payer. The phrase would not include individuals who have insurance that provides only excepted benefits, such as those described in 42 CFR 146.145, unless that insurance actually provides coverage for the hospital services at issue (such as when an automobile liability insurance policy pays for a hospital stay). An individual with insurance that provides only an ambulatory benefit would qualify as having health insurance unless the benefit is further limited so that it is considered an excepted benefit (for example, restricted to onsite ambulatory medical clinics, limited to a particular diagnosis, or restricted to an indemnity benefit). We are not aware of health insurance plans that offer only ambulatory benefits, and do not believe this is a common practice in the industry.

6. Section 1011 Payments

*Comment:* Numerous commenters requested an explanation of the rationale for requiring States to consider Section 1011 payments in DSH limit calculations when the statute does not refer to Section 1011 payments as a factor in determining the hospital's uncompensated care burden. They asserted that Section 1011 payments do not appear to fit in the statutory categories of Medicaid payments, health plan payments, or payments made by uninsured patients, that are required to be ''netted'' from cost for the purpose of the DSH limit calculations. The commenters request CMS to amend the proposed rule to eliminate the proposed treatment of Section 1011 payments.

*Response:* Section 1011 payments are made to a hospital for the costs incurred for the provision of specific services to specific aliens to the extent that the provider was not otherwise reimbursed (through insurance or otherwise) for such services. Because a portion of the Section 1011 payments are made for uncompensated care costs that are also eligible under the hospital-specific DSH limit (for example, costs associated with those Section 1011 eligible aliens with no source of third party coverage for the inpatient and outpatient hospital services they receive and inpatient and outpatient hospital services not considered eligible under Section 1011), a defined portion of the Section 1011 payment must be recognized as an amount paid on behalf of those ''uninsured'' Section 1011 eligible aliens, which would offset the hospital's uncompensated cost under the hospital-specific limit. The information necessary to properly segregate eligible

1011 costs under the hospital-specific DSH limit from Section 1011 costs not eligible under the hospital-specific limit is already maintained in hospital accounting records for purposes of compliance with Section 1011. Section 1011 costs not eligible under the hospital-specific DSH limit include any inpatient and/or outpatient service provided to a Section 1011 eligible individual who also had a source of third party coverage for such services (for example, commercial insurance, workmen's compensation, automobile insurance coverage). Similarly, Section 1011 revenues attributable to inpatient and outpatient hospital services provided to Section 1011 eligible aliens with a source of third party coverage for the inpatient and outpatient hospital services they receive or that are inpatient and outpatient hospital services not considered eligible under Section 1011 would not be offset against eligible uncompensated care costs under the hospital-specific limit.

Considering the portion of Section 1011 payments attributable to eligible aliens with no source of third party coverage for the inpatient and outpatient hospital services they receive as revenue for purposes of calculating the hospital-specific DSH limit does not change the hospital's ability to be fully reimbursed for eligible uncompensated inpatient and outpatient hospital services. This portion of the Section 1011 payments are an additional source of funding to hospitals and can assist States in managing the DSH allotments in a manner that recognizes a broader universe of hospitals that provide a disproportionate share of services to Medicaid and low-income individuals. Offsetting the portion of the Section 1011 payments in no way prevents a hospital from receiving DSH payments up to 100 percent of the unreimbursed cost of providing inpatient and outpatient hospital services to individuals with no source of third party coverage. Section 1011 revenues attributable to inpatient and outpatient hospital services provided to Section 1011 eligible aliens with a source of third party coverage for the inpatient and outpatient hospital services they receive or that are inpatient and outpatient hospital services not considered eligible under Section 1011 would not be offset against eligible uncompensated care costs under the hospital-specific limit.

The form associated with the reporting requirements has been modified to separately identify Section 1011 payments from other revenue sources.

*Comment:* A few commenters noted the State does not have access to information on Section 1011 payments made to hospitals by the Secretary. The commenters asked whether CMS intends to provide each State a hospital-specific report that quantifies the Section 1011 payments and the time period during which the payments were made. If not, the commenters asked for clarification on how States should collect and validate this information.

*Response:* CMS has produced a General DSH Audit and Reporting Protocol, which specifically addresses the source documents to be utilized in performing the DSH audit and report. One of the source documents will be hospital audited financial statements. The Section 1011 payments would necessarily be identified as a revenue source in the hospitals' audited financial statements. Each DSH hospital must identify to the State the portion of Section 1011 payments received during the Medicaid State plan rate year under audit as described in the prior response to comment. These payments will then be considered a revenue offset against the total eligible uncompensated care comprising the hospital-specific DSH limit. The information necessary to properly segregate eligible Section 1011 costs under the hospital-specific DSH limit from Section 1011 costs not eligible under the hospital-specific limit is already maintained in hospital accounting records for purposes of compliance with Section 1011. Section 1011 costs not eligible under the hospital-specific DSH limit include any inpatient and/or outpatient service provided to a Section 1011 eligible individual who also had a source of third party coverage for such services (for example, commercial insurance, workmen's compensation, automobile insurance coverage). Similarly, Section 1011 revenues attributable to inpatient and outpatient hospital services provided to Section 1011 eligible aliens with a source of third party coverage for the inpatient and outpatient hospital services they receive or that are inpatient and outpatient hospital services not considered eligible under Section 1011 would not be offset against eligible uncompensated care costs under the hospital-specific limit.

*Comment:* One commenter requests clarification as to how CMS proposes that such information be considered. If a State is required to rely on self-reported hospital data then the State also requests clarification regarding why self-reported hospital data is sufficient for one purpose (Section 1011 payments or managed care payments) but not another (regular rate payments).

*Response:* We anticipate that States and auditors will use the best available data. The DSH audit will rely on existing financial and cost reporting tools currently used by all hospitals participating in the Medicare program, and available State data on Medicaid fee-for-service payments. These documents would include the Medicare 2552–96 cost report and audited hospital financial statements and accounting records in combination with information provided by the States' Medicaid Management Information Systems (MMIS) and the approved Medicaid State plan governing the Medicaid payments made during the audit period. There are three specific types of revenues that must be included in the audit to which the State conducting the audit will not have access. They are: (1) Medicaid and DSH payments received from States other than the State in which the hospital is located, (2) Medicaid MCO payments and, (3) payments by or on behalf of uninsured individuals (other than State and local government indigent care payments). The State and CMS must rely on hospital audited financial statements and accounting records to provide this information. In addition, hospital cost information is available only from a reporting hospital. The State and CMS must rely on hospital 2552–96 cost reports to provide this information. When the State has the most central and current information through its MMIS (for example, data on Medicaid payments in State fee-for-service inpatient hospital, outpatient hospital and DSH payments) that system will be the best source of the information.

*Comment:* One commenter suggested that CMS should offset Medicare DSH payments with these payments.

*Response:* There is no statutory authority to support the commenter's suggestion. The hospital-specific DSH limit does not contemplate consideration of costs and revenues for services provided to Medicare beneficiaries except when those beneficiaries are dually eligible for Medicaid services. Moreover, Medicare DSH payments are governed under separate statutory authority and recognize the higher costs incurred by DSH facilities that are associated with Medicare hospital services, and do not recognize costs related to services provided to uninsured individuals.

In contrast, Section 1011 payments specifically reimburse hospital costs of providing uncompensated emergency services they are required to provide under Section 1867 of the Act (EMTALA) to undocumented and other eligible aliens, some of whom have no

source of third party coverage for the inpatient and outpatient hospital services they receive. To the extent a portion of Section 1011 payments are paid to a hospital to offset these uncompensated care costs eligible under the hospital-specific DSH limit, a defined portion of the Section 1011 payment must be recognized as a payment on behalf of those individuals when determining a hospital's eligible uncompensated cost under the hospital-specific DSH limit. If the hospital also received a Section 1011 payment to satisfy the same uncompensated costs that are included as part of the hospital's specific DSH limit, the Section 1011 payment must be included as an offsetting revenue source reducing the total amount of uncompensated care eligible for Medicaid DSH payments.

*Comment:* One commenter said that the requirement to consider Section 1011 payments as revenue offsetting costs of services for the uninsured could significantly reduce DSH payments for vulnerable DSH-eligible hospitals and children's hospitals.

*Response:* CMS does not believe that treating the portion of Section 1011 payments, for those uninsured Section 1011 eligible aliens, as revenue for purposes of calculating the hospital-specific DSH limit in any way compromises the hospital's ability to be fully reimbursed for uncompensated inpatient and outpatient hospital services. Instead, Section 1011 payments are an additional source of funding to hospitals and can assist States in managing the DSH allotments in a manner that recognizes a broader universe of hospitals that provide a disproportionate share of services to Medicaid and low-income individuals. Offsetting the portion of Section 1011 payments in no way prevents a hospital from receiving DSH payments up to 100 percent of the unreimbursed cost of providing inpatient and outpatient hospital services to individuals with no source of third party coverage. Section 1011 revenues attributable to inpatient and outpatient hospital services provided to Section 1011 eligible aliens with a source of third party coverage for the inpatient and outpatient hospital services they receive or that are inpatient and outpatient services not considered eligible under Section 1011 would not be offset against eligible uncompensated care costs under the hospital-specific limit.

*Comment:* One commenter complained that this regulation places a reporting and verification requirement on the State and on hospitals in the State for the Federally administered Section 1011 program.

*Response:* The reporting obligation is based on the requirements under the Medicaid program, which is administered by States. To the extent that Section 1011 payments are paid to a hospital to offset uncompensated care costs eligible under the hospital-specific DSH limit, this Section 1011 payment must be recognized as a payment on behalf of Section 1011 eligible individuals when determining a hospital's eligible uncompensated cost under the hospital-specific DSH limit. The Section 1011 payments are Federal payments that directly pay hospitals and certain other providers for their otherwise unreimbursed costs of providing services required by Section 1867 of the Act (EMTALA). The hospital-specific limit is calculated taking into consideration payments made by or on behalf of uninsured individuals, and there is no statutory exception for payments made under Section 1011.

*Comment:* One commenter asserted that it would be harmful to States to identify which hospitals received Section 1011 payments and the amount of Section 1011 payments received prior to allocating DSH funds.

*Response:* It is not clear what harm would result from greater understanding of the revenues available to pay for uncompensated care. Moreover, reporting is consistent with the need to verify the appropriateness of DSH payments, for the reasons discussed above. And, as we discussed above, proper accounting for Section 1011 payments may provide States with additional flexibility in the use of their limited DSH allotment.

*Comment:* One commenter requests CMS to clarify for providers and states that only supplemental Medicaid payments (to the exclusion of Section 1011 funds, which are not Medicaid program payments) be included for purposes of counting which payments are deemed to have been paid to a hospital as part of the hospital-specific DSH limit. The commenter requested that CMS explicitly exclude the Section 1011 funds from the ''Verification 4'' requirement.

*Response:* We disagree with the commenter and instead are clarifying that all Medicaid payments must be considered in the calculation of revenues offsetting costs, as well as a portion of Section 1011 payments. Verification four specifically directs the auditor to ensure that, ''States included all payments under this title, including supplemental payments, in the calculation of hospital-specific DSH payment limits.'' This verification addresses the treatment of Medicaid payments and in particular, payments that are in excess of Medicaid cost. To alleviate any confusion, we separately address Section 1011 payments, which are made by the Federal government on behalf of undocumented and other specified aliens receiving emergency services required under Section 1867 of the Act. These payments do not meet the State or local government exclusion and must be treated as a payments received on behalf of uninsured individuals for purposes of determining a hospitals'-specific DSH limit.

The form associated with the reporting requirements has been modified to separately identify Section 1011 payments from other revenue sources.

7. Unduplicated Medicaid and Uninsured Counts

*Comment:* Numerous commenters stated it is feasible for States to report the unduplicated number of Medicaid eligible individuals, but not to report unduplicated uninsured patients. These commenters asserted that such information appears to serve no purpose relative to the requirements this rule is intended to enforce. The commenters believe this requirement to be unreasonable, unwarranted, and/or unnecessary, with no clear relationship between this data and DSH program and this reporting requirement should be eliminated.

*Response:* The regulation has been modified to remove the requirement to report unduplicated counts of both Medicaid and uninsured patients. The form associated with the reporting requirements has been modified to remove the Section addressing unduplicated Medicaid counts and unduplicated uninsured counts.

8. MIUR and LIUR Calculations

*Comment:* Many commenters asserted that the proposed rule would inappropriately limit the charity care component of the Low Income Utilization Rate (LIUR) DSH qualification measurement under Section 1923(b)(3) of the Act to only charity care rendered to the uninsured, who do not have third-party coverage for hospital services, thereby excluding charity care for the underinsured. They argued that the statute does not limit this ratio to services provided uninsured individuals. They pointed out that, while the lack of third-party coverage is an important factor in any hospital's charity care policy, it is not the only factor. They asserted that charity care is often appropriate, and should be recognized, when some third-party coverage exists, but it is inadequate

given the financial circumstances of the patient.

*Response:* We agree, and the regulation has been modified to maintain consistency with Section 1923(b) regarding the calculation of the LIUR. Specifically, CMS recognizes that hospital charity care policy may go beyond individuals with no source of third party coverage and may include underinsured individuals. For purposes of the LIUR only, individuals that qualify under a hospital's charity care policy may be included.

*Comment:* One commenter stated that this new annual reporting requirement should not be associated to the CMS 64 quarterly report. The commenter suggested that DSH reporting should be submitted directly to CMS on the same day that the required independent certified audit is submitted.

*Response:* We agree. CMS is not requiring States to submit either the annual report or the certified independent DSH audits in conjunction with the CMS 64 quarterly report. Instead, the annual report and the final audit must be submitted to CMS within 90 days of the completion of the audit. The submissions associated with Medicaid State plan rate year 2005 and 2006 are due no later than December 31, 2009. Each subsequent audit report beginning with Medicaid State plan rate year 2007 must be completed by September 30 of the year ending three years from the Medicaid State plan rate year at issue, and the submissions are due by the following December 31st. This means that the 2007 Medicaid State plan rate year annual report and audit report must be submitted to CMS by December 31, 2010.

*Comment:* A few commenters state that Federal regulations currently require that hospitals be given the option of qualifying for DSH based on either their Medicaid inpatient utilization rate or their low-income utilization rate, but do not require that hospitals submit information on both of these rates. They stated that the reporting requirements for MUIR and LIUR are not specifically required in the MMA, and do not appear to make a contribution to determining State compliance with the applicable hospital-specific DSH limitation, which is the objective of the proposed regulation according to the MMA. One commenter stated that this reporting requirement for MUIR and LIUR represents another attempt to adopt a substantive policy change in the context of these audit and reporting rules.

*Response:* The MMA imposes audit and reporting requirements on States regarding DSH payments to eligible hospitals. As part of this process, CMS must ensure if all hospitals receiving DSH payments under the Medicaid State plan actually qualify to receive such payments. Sections 1923(b)(1)(A) and (B) of the Act require that all hospitals with certain threshold MIUR or LIUR levels must be included by the State as DSH eligible hospitals. This is the minimum Federal standard. States have the option to use alternative qualifying criteria that are broader than the minimum Federal standards.

States that use only the LIUR or only the MIUR to determine DSH qualification should report on the statistic utilized in the approved Medicaid State plan for the Medicaid State plan rate year under audit. States using a broader methodology should report the statistic utilized in lieu of the MIUR or LIUR. There is no change in the MIUR or LIUR under this regulation. The statute calls for reporting and auditing of DSH payments, and this rule requires such reporting and auditing, consistent with all existing requirements and limitations associated with those payments. In an effort to provide States with uniform instructions, CMS provided detailed identification of the data elements necessary to comply with these statutory reporting and auditing requirements.

*Comment:* A few commenters noted that their State's DSH methodology defines Medicaid inpatient utilization differently than does 1923(b)(2). One commenter gave as an example a State that does not include dual eligible days in a hospital's Medicaid utilization rate for DSH purposes, while 1923(b)(2) appears to include these days. The commenter indicated that, using the State-defined Medicaid utilization rate for the eligibility determination, includes more hospitals as DSH providers and pays a higher DSH adjustment than is specified in 1923(c). Another commenter's State utilizes days attributable to dual eligibles to calculate the Medicaid Inpatient Utilization rate (MIUR). Some commenters asked that CMS clarify the standard to be used on whether days attributable to dual eligibles should be included in the calculation of the MIUR for the purposes of determining which hospitals are deemed to be disproportionate share hospitals.

*Response:* We have revised the regulation to make clear that States that use alternate broader qualifying criteria than the MIUR should report on the hospital's measurement on such criteria. With respect to the statutory MIUR, it is a calculation that includes all Medicaid eligible days. To the extent that an inpatient hospital day for a dually-eligible Medicare/Medicaid patient qualifies as a Medicaid day, that day may be included in the MIUR calculation. States have the option to use alternative qualifying criteria that are broader. States using a broader methodology should report that statistic in lieu of the MIUR or LIUR.

*Comment:* One commenter said that their State calculates each hospital's MIUR and LIUR for purposes of determining DSH eligibility. The MIUR used for a current year's DSH eligibility is based on data from prior years. The commenter asked for clarification as to whether the MIUR for reporting and audit purposes should be the MIUR used to determine the current year's DSH eligibility, or an MIUR calculated based on the hospitals' current year's operational data. One commenter further questioned whether a State that currently calculates DSH eligibility on a calendar year basis, must now calculate the Medicaid Inpatient Utilization Rate on a State fiscal year basis to comply with the reporting requirements.

*Response:* The data reported and used in the certified audit should be from the Medicaid State plan rate year. States will continue to have the flexibility to use time periods other than the Medicaid State plan rate year to estimate DSH qualification and DSH payments, but must provide for adjustments to ensure that final qualification and payments are based on actual data for the relevant time period. Consistent with that principle, the LIUR, MIUR or alternative DSH qualifying statistics must be reported in the audit using the actual hospital utilization, payment and cost data applicable to the Medicaid State plan rate year under audit. For instance, if the Medicaid State plan determines DSH qualification in a given year based on prior year Medicaid and/or low-income utilization data, the audit must report that qualifying statistic using actual Medicaid State plan rate year data to demonstrate that the hospital was eligible to receive DSH payments. CMS recognizes that States must use estimates to determine a hospital's DSH qualification and DSH payments in a given year. The regulation is intended to ensure that hospitals are qualified to receive DSH payments and that such payments do not exceed the hospital-specific DSH limit. The transition period, discussed in earlier comments, ensures that States may adjust those estimates prospectively to avoid any immediate adverse fiscal impact.

9. Medicaid Revenues Defined

*Comment:* A few commenters recognized the importance of the sum of Regular Medicaid Payments, Medicaid Managed Care Organization Payments and Enhanced/Supplemental Medicaid Payments in determining hospital eligibility for Medicaid DSH payments and in calculating the hospital-specific limits for such payments. However, the commenters do not understand why these figures need to be reported separately because those separate figures, in and of themselves, do not contribute to CMS's ability to determine the appropriateness of DSH payments and is not mandated by the MMA.

*Response:* The statute called for reporting of specific payments and data necessary to ensure the appropriateness those payments, and provides for States to obtain independent certified audits of such payments. The data elements we are requiring are those that we believe are necessary to determine the appropriateness of DSH payments, and to verify audit findings. In an effort to provide States with uniform instructions, CMS provided detailed identification of the data elements necessary to comply with Congressional instruction on such reporting and auditing.

To determine the eligible uncompensated care hospital-specific DSH limit and to ensure that all eligible costs under such limit are offset by total Medicaid payments made, the regulation requires a separate accounting of types of Medicaid payments. The separate reporting of each type of Medicaid payment creates a verification mechanism to ensure that all Medicaid payments are properly offset against the hospital-specific DSH limit. Regular Medicaid payment and supplemental Medicaid payment information is readily available to the State via the Medicaid Management Information System. Information regarding Medicaid managed care payments made to hospitals is available from hospital accounting systems.

*Comment:* A few commenters did not understand, based on the proposed regulation, whether the categories of ''Regular Medicaid payments'' and ''Medicaid managed care organization payments'' are mutually exclusive. Several commenters requested clarification of the phrase, ''regular Medicaid payments,'' stating it is a new term that would benefit from more explicit definition.

*Response:* We intended in the proposed rule that the terms regular Medicaid payment and Medicaid MCO payments would be mutually exclusive, but because the term ''regular'' was apparently confusing we are revising the regulatory language to be more specific. We viewed ''regular'' Medicaid payments as the fee-for-service (FFS) at the base rates that States set for Medicaid services offered through the approved Medicaid State plan. We also included as ''regular'' Medicaid payments under a FFS rate system any add-ons to rates that account for specific costs. We have now revised the regulation text to identify this category more specifically as IP/OP Medicaid fee-for-service (FFS) basic rate payments.

We distinguish as a separate reporting data element payments to each hospital from MCOs because those payments are derived from different data sources (hospital records). Medicaid MCO payments are payments from MCOs to hospitals for inpatient and outpatient services provided to Medicaid managed care enrollees. We also distinguish as a separate data element supplemental and/or enhanced Medicaid payments that are not part of regular FFS Medicaid rate structure but instead are additional reimbursement to providers above the basic service rate. Supplemental and/or enhanced Medicaid payments are not necessarily available to all participating Medicaid providers and may not be triggered by a claim for Medicaid services provided. A supplemental Medicaid payment may be based solely on qualifying criteria defined in the Medicaid State plan.

*Comment:* One commenter noted that the regulation specifies how Medicaid MCO payments to hospitals are treated, but does not appear to contemplate the treatment of payments from other managed care entities' that are not solely Medicaid MCOs. The regulations should clarify how all revenues from managed care entities for hospital services should be treated.

*Response:* Because the regulation specifically addresses Medicaid DSH payments and hospital-specific DSH limits, hospitals will be required to report only the MCO revenues associated with Medicaid inpatient and outpatient hospital services. Only the unreimbursed inpatient hospital and outpatient hospital costs associated with Medicaid managed care (for example, Medicaid shortfall) are eligible to be included in the hospital-specific DSH limit. To determine any eligible Medicaid shortfall, hospitals must include costs associated only with inpatient and outpatient hospital services provided to Medicaid managed care enrollees net of the inpatient and outpatient hospital payments made to the hospital from Medicaid MCOs.

10. Intergovernmental Transfers

*Comment:* One commenter noted that the proposed rule requirement of reporting transfer payments is not mandated by the MMA. A few commenters requested a definition of the term transfers (§ 447.299(c)(13)), which is undefined in existing Federal statute and regulation. One commenter requested definition and clarification of the phrase, ''as a condition of receiving any Medicaid payment or DSH payment.''

*Response:* We have removed this proposed data element because we agree that it is not appropriate in the context of this reporting and auditing obligation, but instead relates to concerns that are better addressed through other oversight procedures. In using the term ''transfer,'' we intended to reference intergovernmental transfer obligations that a DSH hospital may have under a State's Medicaid program. As explained in a response to a subsequent comment, intergovernmental transfer obligations are not considered costs eligible under the hospital-specific DSH limit.

11. Costs Defined

*Comment:* A few commenters requested a definition of cost indicating that some agencies grant States some leeway in the definition of costs.

*Response:* Uncompensated care costs eligible under the hospital-specific DSH limit were clearly articulated in the August 26, 2005 proposed regulation. That is, the uncompensated care cost eligible under the hospital-specific DSH limit include the unreimbursed costs of providing inpatient and outpatient hospital services to Medicaid eligible individuals and the unreimbursed costs of providing inpatient and outpatient hospital services to individuals with no source of third party reimbursement for the inpatient and outpatient hospital services they receive. Therefore, all costs for services that are within the definition of inpatient hospital services and outpatient hospital services that are furnished to Medicaid eligible individuals and to individuals with no source of third party reimbursement should be included in calculating the hospital-specific DSH limit. States do not have the flexibility to broaden or narrow the costs included in calculating the hospital-specific DSH limit, because the universe of costs is defined in the statute. States do have the flexibility to vary the level of DSH payment between individual hospitals as long as the payments are at or below the hospital-specific limit. And States are not required to make DSH payments that

cover all costs included in calculating the hospital-specific DSH limit.

*Comment:* One commenter noted a reference to the cost determination method via the Medicare cost report would be beneficial.

*Response:* CMS agrees that the same methods used in preparing the Medicare 2552–96 cost report should be applied in determining costs to be used in calculating the DSH hospital-specific limits. We believe that hospitals' Medicare cost report and audited financial statements and accounting records should contain the information necessary for reporting and auditing responsibilities, in combination with information provided by the States' Medicaid Management Information Systems (MMIS) and the approved Medicaid State plan governing the Medicaid payments made during the audit period.

It is important to note that, in using a cost-to-charge ratio in calculating costs, only the inpatient and outpatient hospital charges associated with individuals with no source of third party coverage for such services can be applied to the Medicare cost report for purposes of calculating the uninsured uncompensated care cost component of the hospital-specific DSH limit. Hospitals must also ensure that no duplication of such charges exist in their accounting records. This information must be made available to the auditor for certification.

CMS has developed a General DSH Audit and Reporting Protocol which will be available on the CMS Web site to assist States and auditors in using information from each source identified above to determine uncompensated care costs consistent with the statutory requirements.

*Comment:* A number of commenters asked for clarification of the requirement in the proposed rule that States should report ''separately'' the ''total annual cost'' or the ''total annual amount of uncompensated care costs,'' respectively, ''for furnishing inpatient hospital and outpatient hospital services to Medicaid eligible individuals and to individuals with no source of third party coverage for the hospital services they receive.'' The commenters suggested that CMS remove the word ''separately'' from §§ 447.299(c)(14) and 447.299(c)(15) and clarify that only one data item must be reported for both ''total cost of care'' and ''uncompensated care costs.''

*Response:* The reporting form has been modified to address many comments concerning the necessary data elements to fulfill the audit and reporting requirements. The data element referring to ''Total Annual Uncompensated Care Costs'' represents the total amount of unreimbursed care to be considered under the hospital-specific DSH limit. This figure is the result of summing ''Total Cost of Care Medicaid IP/OP Services'' and ''Total Cost of IP/OP for uninsured'' and then subtracting ''Total Medicaid IP/OP Payments'' and ''IP/OP Uninsured Revenues,'' and ''Total Applicable Section 1011 Payments''. The source of this information will be the hospital's Medicare 2552–96 cost reports, hospital audited financial statements and accounting records, and MMIS data.

*Comment:* Numerous commenters said that a review of the legislative history of the MMA DSH reporting and auditing requirements does not reveal that Congress raised any concerns about the calculation of uncompensated care costs, about how unreimbursed costs were determined for setting the hospital-specific DSH limit by the CMS or State Medicaid programs. Several commenters stated that as a procedural matter, CMS fails to acknowledge that it is changing the definition of a key term, uncompensated care. The new definition is simply included in the preamble and regulation text as though nothing is being substantively changed.

*Response:* We disagree with the premise of the commenters that the DSH reporting and auditing requirements do not indicate Congressional concern about the appropriateness of DSH payments. And we disagree that this rule changes the definition of uncompensated care that is counted in calculating the hospital-specific DSH limit.

Section 1923(g)(1)(A) of the Act specifics that DSH payments cannot exceed, ''the costs incurred during the year of furnishing hospital services (as determined by the Secretary and net of payments under this title, other than under this Section, and by uninsured patients) by the hospital to individuals who either are eligible for medical assistance under the Medicaid State plan or have no health insurance (or other source of third party coverage)''. This language plainly identifies the limited population, whose costs were to be included in the calculation, and specifies offset of revenues associated with those costs.

The reporting and auditing requirement, by their nature, indicate concern with the calculation of the hospital-specific limit. In an effort to provide States with uniform instructions, CMS provided detailed identification of the data elements necessary to comply with Congressional instruction on such reporting and auditing. The definitions of the data elements track the statutory language, and do not change the calculation that should have always been performed.

*Comment:* One commenter states that CMS proposes to redefine uncompensated care costs in a very narrow fashion for DSH reporting, yet for reporting uncompensated care in the Medicare cost report, hospitals are instructed to include bad debts and non-Medicaid indigent care plans. The commenter believes that a uniform definition should be in place for all hospital reporting.

*Response:* Medicare and Medicaid are separate programs. The Medicare program uses a different, broader, definition of uncompensated care than is authorized for purposes of the Medicaid DSH hospital-specific limit. It is important to note that the statutory provision at Section 1923(g)(1) of the Act does not use the term ''uncompensated care'' and we use it only because of its longstanding use in this context. The definition we have been using tracks the statutory requirements for the hospital-specific DSH limit.

*Comment:* One commenter noted that historically, there has been great difference in how uncompensated care costs have been calculated from State to State and asked if this rule would establish a uniform methodology among all States for calculating the uncompensated care costs for Medicaid eligible individuals and individuals with no source of third party coverage. One commenter stated CMS should clarify what amounts (revenue charges and costs) are to be included in uncompensated care.

*Response:* This regulation sets forth reporting and auditing requirements for DSH payments and necessarily will result in greater uniformity in State practices but this regulation does not change the underlying statutory requirements for DSH payments. In an effort to provide States with uniform instructions, CMS provided detailed identification of the data elements necessary to comply with Congressional instruction on such reporting and auditing.

*Comment:* One commenter said that public hospitals in their State typically screen uninsured patients to determine the extent of their ability to pay for services rendered. The determination generally results in an allowance that is applied to reduce the amount due from the uninsured patient. The commenter recommends a revision to clarify that discounts for the uninsured are not applied to reduce the hospital's uncompensated care costs. The full cost

should be recognized as uncompensated notwithstanding the discount or allowance process.

*Response:* We agree that the amount of calculations of uncompensated care should not be reduced by amounts that are not paid because of a provider discounted charge. The statute provides for costs of furnishing services to uninsured patients to be reduced only by the amount of payments received from or for those patients, except for payments for care to indigent patients from a State or unit of local government within a State. We have clarified the data elements in this final rule, and we believe they more clearly track those statutory elements. We note that hospitals may need to ensure that, to the extent that they determine costs based on a cost-to-charge ratio, the unreduced charge is used in the calculation.

*Comment:* One commenter noted that the ''payer discount'' exclusion is inappropriate with respect to both the uninsured and Medicaid beneficiaries. With respect to uninsured patients, no third party payer is involved. For services rendered to Medicaid patients, the difference between the Medicaid rates (or Medicaid managed care plan payments) and the costs of furnishing the services constitutes the Medicaid shortfall, that is a component of uncompensated care costs.

*Response:* As noted above, we agree that payment discounts extended to uninsured individuals should neither increase nor decrease uncompensated care, since offset is required only for actual revenues from or for these individuals. The reference in the proposed regulation was intended to refer to payment discounts extended to health insurers or other third party payers. We have clarified this language in the final rule.

To the extent that hospitals do not separately identify uncompensated care related to services provided to individuals with no source of third party coverage from uncompensated care costs not eligible under the hospital-specific DSH limits, hospitals will need to modify their accounting systems to do so.

*Comment:* A few commenters stated that contractual allowances and payer discounts for persons with 3rd party coverage are the only items that should not be permissible in this Section. They recommended that the definition of uncompensated care cost be modified to include all uncompensated care costs other than contractual allowances and third party insurance discounts given to plans other than indigent care plans.

*Response:* As enacted by OBRA 93, the hospital-specific DSH limit is comprised only of the uncompensated care costs of providing inpatient and outpatient hospital services to Medicaid individuals and to individuals with no source of third party coverage for the inpatient and outpatient hospitals services they received.

*Comment:* One commenter requested clarification of whether the requirement for verifying ''The extent to which hospitals in the State have reduced their uncompensated care costs to reflect the total amount of payment adjustments under this Section.'', and the new § 455.204(c)(1), should be read to require verification that obligations of the qualifying DSH hospital to fund the non-Federal share of a DSH payment or any other Medicaid payment are not included as uncompensated care costs for purposes of the hospital-specific DSH limit.

*Response:* The proposed first verification was based on the statutory language of Section 1923(j)(2)(A) of the Act. Since there is no statutory requirement that hospitals actually use DSH payments for uncompensated care, we are reading this verification to require examination of whether the DSH payments made to each hospital are retained by the hospital and are actually available to offset uncompensated care costs. We have encountered numerous instances in which Medicaid hospital providers are not permitted to retain Medicaid payments for normal hospital purposes. Instead the hospital is required to divert the funding either by returning it to the payor (either directly or indirectly) or is required to use the funding for another purpose. We have revised the wording of this verification to better reflect our reading of its meaning.

We confirm that intergovernmental transfers (IGTs) cannot be included as a cost for purposes of calculating the hospital-specific DSH limit. IGTs are not costs of providing health care services; they are a financing mechanism and should not be included in the calculation of the hospital-specific DSH limits. DSH payments are limited to the costs of providing inpatient and outpatient hospital services to Medicaid eligible individuals and individuals with no source of third party coverage.

*Comment:* One commenter stated that based on the accompanying discussion found in the **Federal Register**, the State interprets this provision to mean that any amount of funds, certified or transferred by or from a hospital or other governmental entity, that is used to claim Federal DSH funding, must be reported as a DSH payment to the hospital in the evaluation of the hospital-specific DSH limit.

*Response:* We agree with the reading that Medicaid hospital payments include the total computable federal and non-federal share payment amount, even when the non-federal share is not funded directly by the State Medicaid agency. Certified public expenditures (CPEs) and intergovernmental transfers (IGTs) are non-Federal share funding mechanisms utilized by States to share the cost of financing the Medicaid program with other local government entities, including governmentally operated health care providers. To the extent that governmentally operated health care providers are the source of the non-Federal share funding of a non-DSH Medicaid payment, such sources of non-Federal share become part of the total computable Medicaid payment received by the provider and non-DSH Medicaid payments are a revenue source that offsets costs for purposes of calculating the hospital-specific DSH limit. And to the extent that these mechanisms are used to finance the DSH payments themselves, the total DSH payment would include the total computable expenditure.

It should be noted that IGTs made by hospitals cannot be included as a cost of hospital services under the hospital-specific DSH limit. DSH payments are limited to the costs of providing inpatient and outpatient hospital services to Medicaid eligible individuals and individuals with no source of third part coverage. IGTs are not costs of providing health care services, they are a financing mechanism and should not be included in the calculation of the hospital-specific DSH limits.

CPEs are also a financing method but CPEs are based on actual costs incurred which are certified by a unit of government to represent a Medicaid payment. CPEs by a governmentally operated hospital that represent costs incurred for hospital services for Medicaid-eligible individuals can be included as costs in the hospital-specific limit calculation, but would be completely offset by the Medicaid payments that they represent. When the DSH methodology is based directly on payment for incurred costs of serving the uninsured, CPEs by a governmentally operated hospital may represent the DSH payment. In that instance, the CPE would also represent costs that could be included in the hospital-specific limit, but there would be no payment offset in the calculation. Instead, the total computable amount would be considered as a DSH payment

CPEs by a local government entity that is not a health care provider (when the entity has made a total computable Medicaid payment on behalf of the State

and under the authority of the approved Medicaid State plan) the hospital in receipt of such payment must consider the full amount of that payment as a Medicaid payment that offsets costs in the calculation of the hospital-specific limit.

*Comment:* Numerous commenters seek clarification that the same methodology for determining uncompensated care costs need not be used for every DSH hospital in the State. They asserted that CMS has previously recognized that any definition of ''allowable cost'' is acceptable, ''as long as the costs determined under such a definition do not exceed the amounts that would be allowable under the Medicare principles of cost reimbursement.'' The commenters indicated that, in some States, a variety of methodologies may be used to determine the uncompensated care costs for different categories of hospitals, such as public and private hospitals, or for particular hospitals. They suggested that using different methodologies for different hospitals is entirely justified, because not every hospital has the same accounting practices or incurs the same types of costs.

*Response:* States have considerable discretion to determine allowable inpatient and outpatient costs when determining payment rates under their Medicaid State plan, but Section 1923(g)(1) of the Act provides for a Federal limitation based on costs that must be calculated in accordance with Federal accounting standards. In accordance with this principle, the 1994 guidance provided State flexibility to define Medicaid costs for purposes of setting Medicaid payment rates. But this flexibility does not apply to calculation of hospital-specific DSH limits to the extent that State-defined costs exceed those permitted under Medicare cost principles.

Moreover, the hospital-specific limit is based on the costs incurred for furnishing ''hospital services'' and does not include costs incurred for services that are outside either the State or Federal definition of inpatient or outpatient hospital services. While States have some flexibility to define the scope of ''hospital services,'' States must use consistent definitions of ''hospital services.'' Hospitals may engage in any number of activities, or may furnish practitioner or other services to patients, that are not within the scope of ''hospital services.'' A State cannot include in calculating the hospital-specific DSH limit cost of services that are not defined under its Medicaid State plan as a Medicaid inpatient or outpatient hospital service.

*Comment:* One commenter noted that its State agency receives state legislative authority to make distribution to hospitals from general revenue. The State requests confirmation from CMS that these payments, unmatched by Federal funds, are excluded from the hospital's DSH limit calculations.

*Response:* Section 1923(g)(1)(A) of the Act specifies that, ''payments made to a hospital for services provided to indigent patients by a State or a unit of local government within a State, shall not be considered to be a source of third party payment.'' State or local only, (non-DSH) payments received through an appropriation to the hospital for the provision of indigent care and for which Federal matching funds are not claimed would not be considered a revenue offset for purposes of determining a hospital-specific DSH limit. If, however, the ''distributions to hospitals from general revenue'' represent DSH payments (or any other Medicaid payment) for which the State will claim Federal matching dollars through the use of certified public expenditures, the State must count the ''distributions'' as DSH payments (or any other Medicaid payments) for purposes of the audit and report.

*Comment:* One commenter requests CMS clarify that provider taxes are costs that may be included in a hospital's calculation of its uncompensated care costs.

*Response:* Existing Medicaid policy recognizes permissible health care taxes as an allowable cost for the purposes of Medicaid reimbursement. A portion of a permissible hospital tax may also be allocated to indigent care days as part of the hospital cost report step-down cost allocation process. Specifically, the portion of a permissible health care related tax allocated to the cost of providing inpatient and outpatient hospital services to patients with no source of third party coverage may be included in the hospital-specific DSH limit.

*Comment:* One commenter wants to assure hospitals' incurred costs of furnishing services to undocumented aliens are includable in the costs incurred by hospitals for furnishing services to individuals with no source of third party coverage for the services they receive.

*Response:* The costs of inpatient and outpatient hospital services provided to undocumented aliens with no source of third party coverage for the inpatient and outpatient hospital services they receive are eligible under the hospital-specific DSH limit. These costs must be offset by any payments received by the hospital by or on behalf of the individuals with no source of third party coverage for the inpatient and outpatient hospital services they receive, including the applicable portion of the funding under Section 1011 of the MMA for those Section 1011 eligible aliens with no source of third party coverage for the inpatient and outpatient hospital services they receive or any inpatient and outpatient services not considered eligible under Section 1011. It is important to note that inpatient and outpatient hospital costs related to Section 1011 eligible aliens with a source of third party coverage for the inpatient and outpatient hospital service they receive are not eligible under the hospital-specific DSH limit, as discussed previously.

*Comment:* Numerous commenters recommended that the language of verification #1 be revised to require that the total amount of claimed DSH expenditures for each hospital that qualifies for a DSH payment in the State is no more than the hospital's uncompensated care costs, exclusive of DSH payments.

*Response:* The commenters' recommendation appears to reflect the issue that is addressed in the second required verification. The proposed first verification was based on the statutory language of Section 1923(j)(2)(A) of the Act. Since there is no statutory requirement that hospitals actually use DSH payments for uncompensated care, we are reading this verification to require examination of whether the DSH payments made to each hospital are retained by the hospital and are actually available to offset uncompensated care costs. We have encountered numerous instances in which Medicaid hospital providers are not permitted to retain Medicaid payments for normal hospital purposes. Instead the hospital is required to divert the funding either by returning it to the payor (either directly or indirectly) or is required to use the funding for another purpose. We have revised the wording of this verification to better reflect our understanding.

*Comment:* A few commenters said that in order to ensure timely payments to providers, States should be allowed to continue to use prospective systems to determine uncompensated care costs.

*Response:* CMS recognizes that States must make prospective DSH payments and that they must estimate eligible hospital uncompensated care costs as part of that process. But, as indicated in numerous audit reports by the HHS Inspector General, such estimates often result in improper payments if not reconciled to actual uncompensated care costs in the rate year. The new statutory reporting and auditing

requirements make clear that such estimates must be reconciled to actual costs in order to apply the statutory hospital-specific limits. As described in responses to comments regarding audit requirements, CMS has clarified that the Medicaid State plan rate years 2005 through 2010 audit findings will be used only for purposes of assisting States in developing estimates for Medicaid State plan rate years 2011 through 2015. As discussed in subsequent comments and applicable regulation text, the 2005 and 2006 audit findings will be used solely to ensure prospective DSH payments do not exceed hospital-specific limits beginning with Medicaid State plan rate year 2011. No retroactive fiscal impact will occur because of the transitional period.

*Comment:* One commenter had a question about the proposed reporting form, requesting clarification on whether the definition of uncompensated care includes a description of the sources of data used in the calculation as well as a description of the methodology used to calculate uncompensated care cost by the State.

*Response:* CMS has created a General DSH Audit and Reporting Protocol to provide guidance to states, hospitals, and auditors in the completion of the DSH audit. The total eligible uncompensated care block contained in the reporting form should include, by hospital, the total amount of eligible uncompensated care. This value should be expressed by its dollar value, determined in accordance with the General DSH Audit and Reporting Protocol. This protocol provides general instructions regarding the types and sources of information to be provided to the State and its auditor as well as the calculations the auditor will make based on the data provided. The protocol will be available on the CMS Web site.

*Comment:* One commenter questioned whether CMS agrees with the method of calculating uncompensated care costs by using the ratio of cost to charges from the hospital's most recent ''as filed'' cost report and applies this ratio to a twelve-month period of uncompensated charges as reported by the hospital for purposes of completing the reporting form.

*Response:* The uncompensated care block contained in the reporting form should include, by hospital, the total amount of eligible uncompensated care actually provided during the Medicaid State plan rate year under audit. This value should be expressed by its dollar value and must be based on the actual costs incurred by a hospital and reflected on the Medicare cost report(s) for the period under audit.

CMS has created a General DSH Audit and Reporting Protocol to provide guidance to States, hospitals, and auditors in the completion of the DSH audit. This protocol provides general instructions regarding the types and sources of information to be provided to the State and its auditor as well as the calculations the auditor will make based on the data provided. The protocol will be available on the CMS Web site.

12. Physician Costs

*Comment:* Several commenters disagreed with the proposed exclusion of physician services from consideration as a cost of hospital services in calculating the hospital-specific DSH limits. They argued that inclusion of such costs is consistent with Federal statute, the legislative history of the statute, and the purpose of the Medicaid Disproportionate Share Hospital Program. Several commenters noted that States have previously relied on the description of ''cost of services'' contained in a 1994 letter to State Medicaid Directors, which stated that CMS ''would permit the State to use the definition of allowable costs in its State plan, or any other definition, as long as the costs determined under such a definition do not exceed the amounts that would be allowable under the Medicare principles of cost reimbursement.'' Several commenters stated that physician services in a hospital are inseparable from other services furnished to hospital patients. The commenters recommend allowing the uncompensated care costs of hospital-salaried physician services to be included in the calculation of the hospital-specific DSH limit. Many commenters cited correspondence with CMS regarding the inclusion of physician cost as a component of hospital services.

*Response:* The statute at Section 1923(g)(1) includes in the calculation of the hospital-specific DSH limit the unreimbursed costs of providing inpatient and outpatient ''hospital services'' furnished to specified populations (Medicaid-eligible and uninsured). Therefore, all costs included must be for services that meet a definition of ''hospital services.'' That is a term that is used elsewhere in the Medicaid statute, in the definition of ''medical assistance'' at Sections 1905(a)(1) and 1905(2)(A) of the Act, referring to inpatient and outpatient hospital services. Under normal principles of statutory construction and administrative practice, this term should be given a consistent meaning. Thus, we interpret this term under Section 1923(g)(1) of the Act to mean the same as it means under the approved Medicaid State plan description of inpatient hospital services and outpatient hospital services.

Physician services are generally not considered hospital service costs in either Medicare or Medicaid programs, and are recognized as separate costs in the Medicare hospital cost reporting process. Specifically, the physician service costs are generally identified as professional costs and are removed from inpatient and outpatient hospital costs as part of the hospital cost allocation step-down process. The Medicare 2552–96 cost report does not include services furnished by a physician. Physician services are, as a matter of routine, separately billed and reimbursed as a professional service and are not included as part of the inpatient hospital service benefit. Medicaid programs generally follow Medicare payment principles in this respect. Therefore, the uncompensated costs of those services generally cannot be included in the inpatient hospital component of the hospital-specific DSH limit.

In addition, under the Medicaid program, separately reimbursed physician professional services are generally not included in State definitions of outpatient hospital services, but are covered under a separate benefit category. Therefore, the inclusion of separately reimbursed Medicaid physician services in the outpatient hospital service component of the hospital-specific DSH limit would not be allowable because, under the statute, the DSH limit may only include inpatient and outpatient hospital services.

In sum, physician costs that are billed as physician professional services and reimbursed as such should not be considered in calculating the hospital-specific DSH limit, which is comprised only of the unreimbursed costs of providing inpatient and outpatient hospital services to Medicaid and uninsured individuals.

*Comment:* Many commenters said it was not the intent of Congress to exclude physician costs from DSH limits because Congress expressed the expectation that hospitals receiving DSH payments were responsible for assuring access to physician services, as articulated in the requirement that a DSH facility have at least two obstetricians on its medical staff.

*Response:* The commenters infer Congressional intent regarding what costs should be included within a

hospital-specific DSH cost limit by referencing a DSH qualification requirement and not the hospital-specific DSH limit requirements. Section 1923(d) specifies requirements for hospitals to qualify for DSH payments. The staff obstetrical requirements are part of the DSH qualification requirements.

Separate treatment of hospital services and professional services has been a longstanding practice that predates the hospital-specific DSH limit and was affirmed by Congress in enacting prospective payment systems for Medicare hospital services. We have to presume that Congress understood what it meant in using the term ''hospital services'' rather than a more open-ended term. In light of the limited DSH allocations, we read this term to indicate the limited purpose for which Congress elected to make Federal DSH funds available for responsibilities that it may have deemed to be State responsibilities. Since physician services are generally not considered hospital services and the costs of physician services are generally recognized as separate costs in the Medicare hospital cost reporting process, we do not believe that Congress intended to generally include these costs in the hospital-specific DSH limit calculation. To the extent that there are States that have consistent practices of including physician services as an integral part of hospital services for coverage and payment purposes, and does not provide for separate payment (either directly or through an add-on methodology), we would agree that this practice would be applicable in calculating the hospital-specific DSH limit.

*Comment:* One commenter noted that even Medicare recognizes physician services as hospital services.

*Response:* This is not correct. Physician services are not generally recognized as hospital service costs in the Medicare hospital cost reporting process. Most physician service costs are identified as professional costs and are removed from inpatient and outpatient hospital costs as part of the hospital cost allocation step-down process. To the extent that there may be some limited exceptions when a physician performs hospital service functions, these exceptions would also be recognized in calculating the hospital-specific DSH limit.

*Comment:* Numerous commenters stated that exclusion of physician costs from the hospital-specific DSH limit calculation appears to be announcing a new standard/policy, one that is a substantive change in longstanding DSH policy, that is not currently embodied in law, regulation or guidance and that is likely to produce substantial confusion. The commenters stated that this is the first time CMS has suggested that a hospital's legitimate physician costs may never be included in the DSH limit and that this represents a policy reversal by the agency.

*Response:* This regulation reflects the statutory requirements and existing law and policy. The statute provides for consideration only of the costs of hospital services and the treatment of physician service costs under this rule is consistent with that requirement, with the definition of hospital services generally used by CMS and by States in other contexts. The statute called for reporting and auditing of specific payments and the existing Congressional limitations associated with those payments. In an effort to provide States with uniform instructions, CMS provided detailed identification of the data elements necessary to comply with Congressional instruction on such auditing and reporting.

*Comment:* A few commenters stated it is inappropriate to address the treatment of physician services in the preamble to this regulation, in light of pending disputes. The commenters asserted that it is improper for the agency to change course unilaterally via one sentence in a preamble, and should not receive deference in any judicial appeals.

*Response:* This regulation reflects but does not modify existing law regarding the treatment of physician services in the calculation of the hospital-specific limit. CMS has had a consistent position on this issue, and the Departmental Appeals Board issued a decision on May 18, 2007 in one of the pending disputes cited by commenters, in which the Board upheld a disallowance on this basis. Moreover, even if this were regarded as a new or changed policy, the rulemaking process that has been undertaken is an appropriate method for its promulgation.

The issue is rooted in the language of the statute, which at Section 1923(g)(1) refers only to hospital services, and does not include physician services furnished in a hospital. Physician services are not generally regarded as part of hospital services, but are generally regarded as separate professional services. This treatment of physician services has been consistently applied since before the 1993 enactment of the hospital-specific DSH limit.

The data elements identified in the proposed regulation were necessary to ensure compliance with the direction of the statute and those elements represent longstanding CMS policy.

*Comment:* One commenter stated that their State's Medicaid outpatient payments to hospitals are ''bundled,'' in that the payment includes both a hospital and physician component. Medicaid MCO outpatient payments are similar. Hospitals are unable to separate out the physician-related component of outpatient rates. In order to appropriately match costs to payments for the DSH limit calculations, the commenter believes it is appropriate to include Medicaid outpatient costs related to hospital-based physicians in its DSH limit calculations.

*Response:* To the extent that a State consistently includes physician services as an integral part of outpatient hospital services and does not make a separate payment for physician services either directly or as an add-on to the hospital rate, we would agree that the State can use the same methodology for calculating the hospital-specific limit. We do not believe this is a customary practice.

With respect to MCO payments, payments by the State to the MCO are not relevant for purposes of the hospital-specific limit. The relevant data elements are hospital costs and revenues associated with inpatient and outpatient services provided to Medicaid MCO enrollees and payments received by the hospital from the MCO for those services. To the extent that the MCO payment combines payment for inpatient and outpatient hospital services with payment for other services, the hospital may need to allocate the revenues based on the ratio of charges for hospital services to total charges, or another reasonable allocation method.

*Comment:* Many commenters noted that the proposed rule does not prohibit the inclusion of physician costs in the case of salaried physicians employed by the hospital delivering services. If the physician costs are excluded in these circumstances, any hospital that directly employs physicians would be directly impacted by this rule.

*Response:* This rule does not establish any new principles for the treatment of physician service costs, but requires consistent use of existing hospital accounting principles applicable under Federally supported programs. As noted above, States and hospitals should use a consistent definition of hospital services. Under Medicare, it is not by itself relevant that a hospital pays the salary of a physician; physician services are generally not considered hospital service costs and are recognized as professional fees in the Medicare

hospital cost reporting process. Specifically, the physician service costs are identified as professional costs and are removed from inpatient and outpatient hospital costs as part of the hospital cost allocation step-down process.

In sum, physician costs that are billed as physician professional services and reimbursed as such are not included as hospital services in calculating the hospital-specific DSH limit.

*Comment:* Several commenters asked about the treatment of physician clinics and other clinic services. They indicated that physician clinics, in both hospital and office settings, focus on primary care to the underserved and function at a financial loss due to inadequate medical reimbursement rates. The commenters recommended that the costs of such clinics be included as hospital services under the hospital-specific DSH limit when services are furnished to Medicaid eligible and uninsured patients.

*Response:* As indicated above, hospitals and States should use a consistent treatment of physician and other provider-based clinics. All costs that are associated with services that are defined and reimbursed under the approved Medicaid State plan as inpatient hospital services and outpatient hospital services to Medicaid eligible individuals and to individuals with no source of third party coverage for such services may be included in calculating the hospital-specific DSH limit.

*Comment:* Numerous commenters stated that hospitals, especially critical access hospitals, incur costs to secure the services of physicians to serve the indigent patients, and these costs (fees, contractual agreements or salary costs) should be allowed in the establishment of hospital-specific DSH limits. The commenters indicated that this may be the only way to assure availability of physicians to serve uninsured individuals. They argued that physician costs should not be treated any differently than other costs used to treat the uninsured, particularly when they are incurred to meet EMTALA obligations. They urged that CMS consider expanding the definition of DSH-limit services to include all costs that a hospital incurs providing services to uninsured patients. Otherwise, the purposes of the DSH statute, to assist safety net hospitals and other hospitals to meet their costs of serving the uninsured, would be thwarted.

*Response:* Section 1923(g)(1)(A) of the Act does not authorize inclusion in the hospital-specific DSH limit of any costs associated with treating Medicaid-eligible and uninsured patients, but specifically authorizes inclusion only of costs of furnishing ''hospital services.'' We understand that there may be a variety of other costs involved in treating uninsured patients, but other costs were not included by Congress. As indicated above, hospitals and States should use a consistent treatment of physician and other provider-based clinics. All costs that are associated with services that are defined and reimbursed under the approved Medicaid State plan as inpatient hospital services and outpatient hospital services to Medicaid eligible individuals and to individuals with no source of third party coverage for such services may be included in calculating the hospital-specific DSH limit.

*Comment:* One commenter noted that the proposed regulation does not address how physician costs should be treated for DSH purposes for public teaching hospitals that have elected to receive cost-based reimbursement for their physicians as provided for at § 415.160.

*Response:* Regardless of the reimbursement methodology (cost reimbursement or prospective payment system), uncompensated care costs that may be included in calculating the hospital-specific DSH limit include only the unreimbursed costs of providing inpatient and outpatient hospital services to Medicaid eligible individuals and the unreimbursed costs of providing inpatient and outpatient hospital services to individuals with no source of third party reimbursement. Therefore, all costs defined and reimbursed under the approved Medicaid State plan as inpatient hospital services and outpatient hospital services to Medicaid eligible individuals and to individuals with no source of third party coverage for such services that remain uncompensated reimbursement are eligible under the hospital DSH limit.

*Comment:* Numerous commenters said that hospitals contract with doctors to perform administrative services such as a Medical Director. This is a direct payment from the hospital to the doctor for ''Part A'' services and not direct patient care. This portion of physician services should be included.

*Response:* Because this rule is not devoted to the treatment of physician services as hospital services, we are not going to address every potential arrangement in this rule. As discussed above, physician services are generally not regarded as part of hospital services, but are generally regarded as separate professional services. This treatment of physician services has been consistently applied since before the 1993 enactment of the hospital-specific DSH limit. There are some exceptions to this general principle, and this rule does not change either the general principle or the exceptions. States and hospitals should use a consistent definition of hospital services.

We note that, under Medicare, it is not by itself relevant that a hospital pays the salary of a physician; physician services are generally not considered hospital service costs and are recognized as professional fees in the Medicare hospital cost reporting process. There may be exceptions when a physician is not performing direct patient care and is instead performing general hospital administration functions. When the physician service costs are identified as professional costs, however, they are removed from inpatient and outpatient hospital costs as part of the hospital cost allocation step-down process.

13. Revenues Defined

*Comment:* One commenter was concerned that a State could lose FFP on its DSH payments to a hospital based on MCO payments that the State does not control. The commenter posed the hypothetical of an MCO, at its sole discretion, being a generous payer to a hospital, and potentially placing the State in jeopardy of losing FFP on DSH payments. The commenter indicated that this did not seem fair when the State does not control the MCO payment. The commenter urged that Medicaid MCO services should be excluded from the uncompensated care costs limit test.

*Response:* In every State, significant segments of the Medicaid population are served through MCOs. Notwithstanding that delivery system, the costs of serving that population and the revenues received for doing so remain Medicaid costs and revenues to the hospital. Under the statutory hospital-specific DSH limit, it is necessary to calculate the costs of furnishing services to the Medicaid population, including those served by MCOs, and offset those costs with payments received by the hospital for those services. Payments received by the MCO are a necessary part of that statutory calculation. To the extent that hospitals earn profits on Medicaid MCO business, this profit must be offset against other uncompensated costs in the same manner that any Medicaid FFS profits must be offset against other uncompensated costs. Overall, the calculation results in the net uncompensated care in serving the Medicaid and uninsured populations. Disregarding Medicaid MCO revenues

from the hospital-specific DSH limit overstates a hospital's uncompensated care in serving those populations.

*Comment:* Numerous commenters did not question the general purpose of this requirement, but questioned whether it was fair to limit DSH payments when the Medicaid shortfall is less than projected because of hospital cost controls. These commenters cited the situation in which basic Medicaid payments determined on a prospective basis and individual hospitals are able to control costs sufficiently to earn a profit on their Medicaid business. They argued that requiring that profit to be offset against uncompensated care costs would mean that a hospital that undertakes aggressive cost containment in the end would receive less in total Medicaid revenues than another hospital that forgoes cost containment (and therefore realizes no profit on its basic Medicaid payments) but incurs the same level of unreimbursed uninsured costs. The commenters urge CMS to modify its proposed regulations to provide that for purposes of applying the individual hospital DSH limit, a hospital's costs of serving Medicaid patients will be deemed to be no less than the base payment made to that hospital under a prospective payment system.

*Response:* Current Federal law expressly demands the offset of all payments under Title XIX other than DSH payments when determining a hospital-specific DSH cost limit. Section 1923(g) states that a DSH payment is inconsistent with the statute, ''if the payment adjustment exceeds the costs incurred during the year of furnishing hospital services (as determined by the Secretary and net of payments under this title, other than under this Section, and by uninsured patients) by the hospital to individuals who either are eligible for medical assistance under the Medicaid State plan or have no health insurance (or other source of third party coverage) for services provided during the year.'' Calculating certain Medicaid costs based on prospective payments received by a hospital does not accurately identify cost and could effectively overstate the hospital-specific DSH limit.

*Comment:* One commenter questioned whether it is the expectation that hospitals that receive DSH funds that are subsequently passed on to other entities show the gross DSH payment as revenue and the payment to the external entity as an expense.

*Response:* Payments to hospitals for which Federal matching is claimed are made for specified purposes; either to pay for covered services furnished by the hospital or to account for the costs of serving a disproportionate share of low income patients. To the extent that a hospital is required to pass a Medicaid payment on to another entity, that payment is no longer within those statutory purposes and would be unallowable. In other words, hospitals must retain 100 percent of the total computable DSH payments claimed by States. Any redirection of Medicaid payments (including DSH payments) is inconsistent with the Medicaid statute governing expenditures. For purposes of the hospital-specific limit, DSH payments are not recognized as revenues (because the limit applies to DSH payments, they are not part of the calculation themselves). Finally, non-Federal share obligations to which a hospital is obligated must be transferred prior to receipt of the DSH payment (or any other Medicaid payment) and cannot be included as a cost (expense) eligible under the hospital-specific DSH limit.

*Comment:* One commenter questioned whether indigent care revenue, as defined, will also include any revenue received by the individual hospital associated with liens (or other such remedies) placed upon an uninsured individual's property or assets? The commenter asked if such revenues (collection from liens and other remedies) would reduce the claimed uncompensated care costs for uninsured individuals during the period in which the revenue is realized (funds received)?

*Response:* The statutory authority under MMA instructed States to report and audit specific payments and specific costs. In order to accommodate the precise instruction from Congress, States must perform audits associated with defined periods of time and must identify the actual costs incurred and the actual payments received during that defined time period.

CMS received many comments regarding the treatment of revenues received by hospitals by or on behalf of individuals with no source of third party coverage. The comments indicated that often these ''self-pay'' revenues received in a given year could in fact be related to a prior period. Similarly, CMS received comments regarding the treatment of liens and collections which may occur after an audit is complete but relate to a prior period. Under either circumstance, the hospital would necessarily have received and booked the revenues in a subsequent period. Due to the inability to control these revenue streams and to foster administrative ease, audits should take into account these self-pay revenues (including liens and collections) during the year in which they are received, irrespective of whether such revenues are applicable to a prior period. In other words, the revenue adjustment would be measured during the audit of the Medicaid State plan rate year in which the revenues were received.

14. Timing

*Comment:* One commenter was concerned that the State is required to indicate the total annual DSH payments made in the audited SFY when DSH payments may be made by the State at a minimum of up to one year after the SFY being reported. The commenter indicated that obtaining the audited SFY DSH payments by the end of the following SFY is not possible for the State.

*Response:* The statutory authority instructed States to report and audit specific payments and specific costs. Consistent with that provision, States must perform audits associated with defined periods of time and must identify the actual costs incurred and payments received during that defined time period. In order for the audits to properly measure these elements and in consideration of the many comments related to retroactivity and timing issues associated with gathering the data necessary to identify the costs and revenues, CMS has made several revisions to the final rule including identifying that: (i) The Medicaid State plan rate year 2005 is the first time period subject to the audit; and, (ii) the deadline on reporting the audit findings has been extended to at least three full years after the close of the Medicaid State plan rate year subject to audit. Therefore, hospitals would have received all Medicaid and DSH payments associated with that Medicaid State plan rate year.

This three year period accommodates the one-year concern expressed in many comments regarding claims lags and is consistent with the varying cost report period and adjustments. It should be noted that, to the extent that a State makes a retroactive adjustment to non-DSH payments after the completion of the audit for that particular Medicaid State plan rate year, the hospital would necessarily have received and booked the revenues in a subsequent Medicaid State plan rate year. Under these circumstances, the revenue adjustment would be measured during the audit of the Medicaid State plan rate year in which the revenues were received.

*Comment:* Several commenters indicated the establishment of a State fiscal year reporting timeline may prove problematic because some States currently include in their annual DSH

data collections information from two or more State fiscal years, and then distribute DSH on a Federal fiscal year basis. State fiscal year reporting for DSH may also be inconsistent with a DSH methodology that involves selection of a base year and trending forward.

*Response:* The auditing and reporting requirements enacted under the MMA supersede prior DSH reporting requirements enacted under the Balanced Budget Act of 1997. This regulation does not require States to implement retrospective DSH methodologies or otherwise change basic approach to DSH payment used by the States. Nor would it require delay in making DSH payments consistent with the authority of the approved Medicaid State plan. CMS recognizes that States may need to estimate uncompensated care to determine DSH payments in an upcoming Medicaid State plan rate year. The regulation is intended to ensure that those estimates are based on the most current final data. Moreover, the regulation will ensure that CMS has the data necessary to determine whether the ultimate DSH payment was consistent with all statutory requirements. Because FFP is only available for proper DSH payments, some States may determine that a retrospective reconciliation is desirable. The transition period in the regulation ensures that States are not adversely impacted retrospectively by the availability of new data resulting from the statutory reporting and auditing requirements.

*Comment:* One commenter noted that the State reconciles outpatient hospital payments to 72% of cost and the reconciliations may take several years to finalize. How should those reconciliation payments/recoveries be reported?

*Response:* In consideration of the many comments related to retroactive adjustments and timing issues associated with gathering the data necessary to identify the costs and revenues, CMS has revised the final rule, in part, to identify that the deadline on reporting the audit findings has been extended to at least three full years after the close of the Medicaid State plan rate year subject to audit. By that time, hospitals would have received all Medicaid and DSH payments associated with that Medicaid State plan rate year. This three year period accommodates the one-year concern expressed in many comments regarding claims lags and is consistent with the varying hospital cost report periods and adjustments.

It should be noted that, to the extent that a State makes a retroactive adjustment to non-DSH payments, and that adjustment occurs after the completion of the audit for that particular Medicaid State plan rate year, the hospital would necessarily have received and booked the revenues in a subsequent Medicaid State plan rate year. Under these circumstances, the revenue adjustment would be measured during the audit of the Medicaid State plan rate year in which the revenues were received.

*Comment:* A few commenters indicated that several reporting requirements under the proposed rule will be of little use without the methodology to show how the reported data yielded DSH payments. The commenters suggested States could highlight the items requested in §§ 447.299(c)(6) through (c)(16) whenever they appear on the pages or worksheets. Putting the requested data in the context of a calculation should help CMS more quickly determine the appropriateness of payment adjustments, as required in the MMA, while simplifying the reporting requirements for the States.

*Response:* As we gain more experience, we intend to refine and improve the reporting forms. In this rule, we have focused on defining the minimum data elements that are required for analysis of DSH payments. We currently believe that these data elements will provide sufficient information to do so, when considered along with the approved Medicaid State plan and independent certified audits.

*Comment:* One commenter noted that the proposed rule requires that a State report the payment elements that can be used to determine each hospital's DSH limit payment. In order to avoid undue delays in disbursing needed DSH funds on a timely basis, the commenter suggests it should be acceptable for a State to identify the Medicaid payment amounts based on data collected for a recent prior period, with appropriate adjustments for expected changes between the data collection period and the DSH reporting period. The commenter also asked for clarification as to whether States will need to estimate DSH payments and then do a settlement, or whether DSH payments will need to be retrospective.

*Response:* This regulation is not intended to require States to implement retrospective DSH methodologies nor delay the making of DSH payments consistent with the authority of the approved Medicaid State plan. CMS recognizes that States must estimate uncompensated care to determine DSH payments in an upcoming year. The regulation will ensure, however that those estimates are based on the most current final data. Moreover, the regulation will ensure that CMS has data necessary to determine whether the ultimate DSH payment was consistent with all statutory requirements. Because FFP is only available for proper DSH payments, some States may determine that a retrospective reconciliation is desirable. The transition period in the regulation ensures that States are not adversely impacted retrospectively by the availability of new data resulting from the statutory reporting and auditing requirements.

*Comment:* A few commenters said some of these data elements are not available within the specified timeframes. They indicated that, while Medicaid related data is readily available directly to the State, data regarding Medicare payments and discharges and non-Medicaid/non-Medicare data are not readily available to the State in efficient formats and timeframes required by the proposed rule. Moreover, they said that the lag in hospital cost reporting provides States with a very small, possibly unmanageable, window of time to complete and submit the newly required independent certified audit.

*Response:* Under Section 1923(j) of the Act, States must perform audits associated with defined periods of time. In consideration of the many comments related to timing issues associated with gathering the data necessary to identify the costs and revenues, CMS has revised the final rule to include the following changes, which we believe will afford ample time to obtain final data and analyze that data.

In order to provide for some uniformity in the application of the report and audit requirements among the States, we have identified Medicaid State plan rate year 2005 as the first time period subject to the audit. This revision recognizes that fiscal periods used by hospitals, States and the Federal Government may vary. The Medicaid State plan rate year is a time period defined and used by each State to make DSH payments under the approved Medicaid State plan, and should be the base period for analysis and audit of DSH payments. The statute refers to the reporting and audit requirements applying to ''fiscal year 2004 and thereafter'', but we are specifying Medicaid State plan rate year 2005 because, in some States Medicaid State plan rate year 2004 may have begun prior to the beginning of Federal fiscal year 2004.

In recognition of potential delays in obtaining needed information, we have extended the period for ongoing report and audit submission until the end of

the Federal fiscal year that is at least three years after the close of the Medicaid State plan rate year. We believe that hospitals would have received most Medicaid, DSH payments, and other payments associated with that Medicaid State plan rate year. This three year period accommodates the concern expressed in many comments regarding claims lags and is consistent with the varying hospital cost report periods and adjustments. And we have provided an additional extension of the time period for the reports and audits for Medicaid State plan rate year 2005 and 2006 which may be concurrently completed by September 30, 2009.

It should be noted that, to the extent that a State makes a retroactive adjustment to the non-DSH payments after the completion of the audit for that particular Medicaid State plan rate year, the hospital would necessarily have received and booked the revenues in a subsequent Medicaid State plan rate year. Under these circumstances, the revenue adjustment would be measured during the audit of the Medicaid State plan rate year in which the revenues were received.

*Comment:* A few commenters would like clarification as to whether the independent auditor can base certification on the fact that Medicaid losses alone justify the DSH payment, thereby allowing the auditor to ignore uninsured uncompensated care costs in the certification. The commenters recommend for clarity sake that the proposed rule be amended to include a provision granting States the option to not report uninsured costs for some or all hospitals where Medicaid losses justify the DSH payment made.

*Response:* Most States do not make DSH payments based solely on Medicaid uncompensated care costs. But, as discussed previously, if a State does so, then the State may report only the Medicaid portion of uncompensated care for each hospital, if it obtains from the hospital a certification that the hospital also incurred uncompensated care for individuals who have no health insurance or other third party coverage. When we review certified audit reports submitted by States, we will consider whether more flexibility would be warranted, and we may address the issue in future reporting instructions.

15. Institutions for Mental Disease

*Comment:* One commenter noted that the proposed rule, under Verification 3, does not reference § 441.40, which provides a definition of an Institution for Mental Disease (IMD). This is problematic since the Social Security Act clearly establishes that IMDs are entitled to participate in Medicaid DSH programs.

*Response:* We agree with the suggestion that the reporting requirement should include identification of whether the DSH facility is an IMD; we have revised the regulation and reporting form to do so. An additional limit applies to the percentage of the total Federally determined DSH allotment for each State that can be used for payments to IMDs that otherwise qualify for DSH payments under the Medicaid State plan. Identification of whether a DSH facility is an IMD will assist CMS in assessing the appropriateness of the DSH payment.

The IMD limit does not supersede the hospital-specific limit that is the primary focus of the reporting and auditing requirements under this regulation. For purposes of the hospital-specific limit, reporting must take into consideration the Medicaid coverage limitations under Section 1905(a) of the Act, which excludes coverage for patients in an IMD who are under age 65, except for coverage of inpatient psychiatric hospital services for individuals under age 21. For Medicaid-eligible individuals under age 21, or over age 65, uncompensated care costs those eligible individuals would be reported as uncompensated costs for the Medicaid population. For the costs of services provided to those patients between the ages of 22 and 64 who are otherwise eligible for Medicaid, the treatment for the hospital-specific limit may vary based on State practices. Many States remove these individuals from eligibility rolls for administrative convenience (and must reinstate them if they are discharged from the IMD); if so, the costs should be reported as uncompensated care for the uninsured. States that do not remove the individuals from the Medicaid eligibility rolls should report the costs as uncompensated care for the Medicaid population. DSH payments made to IMDs are subject to the same audit and report requirements as all other DSH hospitals to which the State has made payments.

16. Ownership and Type of Hospital

*Comment:* A few commenters noted that reporting on the type of hospital, type of ownership and the classification of operator is not required under Section 1001 of the MMA. They questioned why CMS proposes such information to be necessary to comply with the reporting requirements included as uncompensated care.

*Response:* We agree. The regulation and reporting form have been modified to remove the requirement to report the ownership status of a hospital and type of hospital.

*C. Auditing*

1. General

*Comment:* Many commenters questioned the ability of the States to actually collect this information and have an independent audit completed within one year after the end of SFY 2005. One commenter said that demanding 2005 cost report data for SFY 2005 also means that most, if not all, of the cost report data forwarded to CMS will be as submitted by the hospitals because the States will not be able to review and audit the cost reports before the reporting deadline.

*Response:* The information required under the audit is readily available to hospitals and the State based on existing financial and cost reporting tools. As discussed above, we have revised the timing requirements to extend the length of time to submit required reports and audits to permit submission as late as the last day of the Federal fiscal year ending 3 years after the end of the Medicaid State plan rate year, with a special timing provision for the audits for 2005 and 2006, which will be due by December 31, 2009. We believe this accommodates most of these concerns. We also note that we expect that reports and audits will be based on the best available information. If audited Medicare cost reports are not available, the DSH report and audit may need to be based on Medicare cost reports as filed.

*Comment:* One commenter noted that most of the reporting requirements will require the hospital to report information directly to the State, and requested explanation of the State's due-diligence responsibility for confirmation/assurance of the completeness and accuracy of the data provided by the hospital?

*Response:* We expect that States will obtain needed information from the hospital's Medicare 2552–96 cost report, audited hospital financial statements, and other hospital accounting records, in combination with information provided by the States' Medicaid Management Information Systems.

Because these source documents are prepared for other purposes, no single document will contain the precise information needed for DSH reporting and auditing purposes. States will need to work with hospitals to develop a methodology that can be applied to these records to properly calculate uncompensated care costs incurred in furnishing hospital services for

individuals without health insurance or other third party coverage. This methodology will need to exclude costs from the calculation costs for services furnished to individuals with third party coverage, prisoners, duplicate accounts, individuals included in calculating the Medicaid shortfall, charges associated with elective procedures, and any professional charges. The methodology must operate in such a way as to provide the State's independent auditor confidence that the data is an accurate representation of the hospital's eligible uncompensated care charge and revenue data.

*Comment:* A few commenters questioned access to hospital records and other jurisdictional issues. Such access would need to be discussed, decided and clarified for the States. State auditors may not have jurisdiction to audit private hospitals.

*Response:* States already have authority to obtain the primary data sources needed to complete the DSH audit and the accompanying report. Information can be obtained from existing cost reports and financial information. These documents would include the Medicare 2552–96 cost report, audited hospital financial statements, and hospital accounting records. States and auditors also have access to information from the States' Medicaid Management Information Systems. We expect that States and auditors will need to work with hospitals to develop a methodology that can be applied to these records to properly calculate uncompensated care costs incurred in furnishing hospital services for individuals without health insurance or other third party coverage.

*Comment:* A few commenters noted that although hospitals submit the newly required S–10 Worksheet (S–10) for their Medicare cost reports, the information required by that Worksheet does not directly parallel the data required in the new reporting requirements. In addition, although both seek determinations of hospitals' total uncompensated care costs, they apply different methodologies for calculating such costs. Thus, DSH recipients will be confronted with making one set of calculations for their annual reports and another for their State's annual DSH report. If States perform calculations with the requested data to determine DSH payments, why not discard (c)(6) through (c)(16), and instead request a copy of DSH payment calculations for all hospitals in a particular fiscal year? Each hospital's payment calculation could appear on separate pages or worksheets.

*Response:* Worksheet S–10 is not part of the Medicare 2552–96 step-down process used to allocate inpatient and outpatient hospital costs. The cost allocation process utilized in the 2552–96 cost report is considered a key component of determining Medicaid and uninsured hospital costs for purposes of calculating the hospital-specific DSH limit. The Medicare 2552–96 cost report, in conjunction with hospital financial information, including hospital accounting records and Medicaid Management Information Systems data, may be used to determine uncompensated care costs for the calculation of the hospital-specific DSH limits. We expect these calculations to rely primarily on existing information, as outlined in the General DSH Audit and Reporting Protocol that will be available on the CMS Web site. We recognize, however, there may be situations in which the hospital may have to work with the State to develop new data or methodologies to allocate or adjust existing data.

*Comment:* A few commenters said that currently, there is no one source of data to meet the increased reporting requirements. The sources of data are from various data warehouses and under various State and hospital management systems. The likelihood that data will not be from consistent data sets is possible.

*Response:* We expect these calculations to rely primarily on existing information, as outlined in the General DSH Audit and Reporting Protocol available on the CMS Web site. We recognize, however, there may be situations in which the hospital may have to work with the State to develop new data or methodologies to allocate or adjust existing data. And it may be necessary for auditors to develop methods to test, verify the accuracy of, and reconcile data from different sources. CMS has developed a General DSH Audit and Reporting Protocol available on the CMS Web site that may assist States and auditors to utilize information from each source identified above and develop the methods under which costs and revenues will be determined.

*Comment:* One commenter noted that one State Medicaid agency annually surveys all hospitals near the beginning of its fiscal year and hospitals report their data for a twelve month period, but this period does not match the State fiscal year. Further, the commenter noted difficulties in analyzing the data because Federal DSH payments are provided on a Federal fiscal year, and at changing match percentages. Another commenter indicated that another State's DSH payment program operates on a Federal fiscal year basis, which provides consistency with Medicare hospital payment systems, the timing of changes in their Federal financial participation rate and with the timing of their DSH allotment. These commenters noted that the requirement in the proposed regulation for States to report and audit their DSH and enhanced payment programs on a State fiscal year basis will cause significant administrative burden and will not accurately reflect the basis upon which the State is making payments.

*Response:* We have modified the regulation to indicate the Medicaid State plan rate year as the period subject to the annual audit. The basis for this modification is recognition of varying fiscal periods between hospitals and States. The Medicaid State plan rate year is the period which each State has elected to use for purposes of DSH payments and other payments made in reference to annual limits.

In instances where the hospital financial and cost reporting periods differ from the Medicaid State plan rate year, States and auditors may need to review multiple audited hospital financial reports and cost reports to fully cover the Medicaid State plan rate year under audit. At most, two financial and/or cost reports should provide the appropriate data. The data may need to be allocated based on the months covered by the financial or cost reporting period that are included in the Medicaid State plan period under audit.

CMS has developed a General DSH Audit and Reporting Protocol which will be available on the CMS Web site that may assist States in using the information from each source identified above and developing the methods under which costs and revenues will be determined.

*Comment:* Several commenters said this would be a reporting burden on Critical Access Hospitals and will distract from needed resources to provide services to the uninsured. One commenter noted that a reporting burden exists because hospitals may not keep self-pay collection logs.

*Response:* The DSH audit will primarily rely on existing financial and cost reporting tools currently used by all hospitals participating in the Medicare program and therefore, should not generally divert resources necessary to provide services to the uninsured. These documents would include the Medicare 2552–96 cost report, audited hospital financial information, and hospital accounting records in combination with information provided by the States' Medicaid Management Information

Systems and the approved Medicaid State plan governing the Medicaid and DSH payments made during the audit period.

To the extent that hospitals do not separately identify uncompensated care related to services provided to individuals with no source of third party coverage from uncompensated care costs not eligible under the hospital-specific DSH limits, hospitals will need to modify their accounting systems to do so. Setting up an accounting category to aggregate charges and revenues associated with uninsured individuals receiving inpatient and/or outpatient services from a hospital should be an accounting system adjustment not far removed from the process of setting up an account for any other payer category.

For purposes of the initial audits, States and auditors may need to develop methodologies to analyze current audited financial information including hospital accounting records to properly segregate uncompensated costs.

*Comment:* A few commenters stated the regulation should provide more specificity about the level of precision expected in calculating the total cost of care. They noted that, due to the timing lag for reporting and auditing, some States use the hospital's latest available Medicare cost report to calculate that hospital's overall cost-to-charge ratio. In that instance, the commenters indicated that the State converts the Medicaid and uninsured charges to cost using the hospital's overall cost-to-charge ratio. The commenters also pointed out that relatively few hospitals have a cost reporting period that is the same as the State fiscal year and, therefore, there would be two cost reporting periods during a State fiscal year. The commenters asked if applying a hospital's latest available cost-to-charge ratio to that hospital's Federal fiscal year Medicaid and uninsured charges be an acceptable and reasonable method to calculate that total cost of care.

*Response:* We expect that State reports and audits will be based on the best available information. If audited Medicare cost reports are not available for each hospital, the DSH report and audit may need to be based on Medicare cost reports as filed. We note that hospitals must follow the cost reporting and apportionment process as prescribed by the Medicare 2552–96 cost report process. To the extent that these cost reports do not contain the precise information needed for the DSH calculation (for example, by not distinguishing the categories of uncompensated care costs that are needed), it may be necessary for hospitals to modify their accounting techniques. In those circumstances, for the initial audits, it will be necessary to review other source materials such as audited hospital financial records and other records, and to develop methodologies to determine the necessary information from such records. We expect States, independent auditors and hospitals to work cooperatively to develop such methodologies.

CMS has developed a General DSH Audit and Reporting Protocol which will be available on the CMS Web site that should assist States and auditors in utilizing information from each source identified above and developing methods to determine uncompensated costs of furnishing hospital services to the Medicaid and uninsured populations.

*Comment:* One commenter questioned how to identify, ''* * * costs incurred for furnishing those services provided to individuals with no source of third party coverage for the inpatient hospital and outpatient hospital services they receive.''

*Response:* CMS has developed a General Audit and Reporting Protocol to provide guidance to States, DSH hospitals and auditors in the completion of the DSH audit. This Protocol includes general instructions regarding the types of information to be provided by hospitals to the State and its auditor as well as the calculations the auditor will make based on the data provided. Specifically, the protocol details the process of using the Medicare 2552–96 cost report, hospital cost to charge ratios and hospital charges for inpatient and outpatient hospital services for which the recipient had no source of third party coverage. The protocol also details the process for determining eligible Medicaid uncompensated care for the Medicaid State plan rate year under audit. The protocol will be available on the CMS Web site.

*Comment:* One commenter noted that identifying uninsured patients is complicated by the restrictions on which uninsured patient accounts qualify (for example, if one cannot claim accounts denied due to medical necessity issues). This requires a painstaking and time-intensive process of reviewing each account history to identify the reason that an insurance company did not pay.

*Response:* To the extent that hospitals do not separately identify uncompensated care related to services provided to individuals with no source of third party coverage from uncompensated care costs not eligible under the hospital-specific DSH limits, hospitals will need to modify their accounting systems to do so. Setting up an accounting category to aggregate charges and revenues associated with uninsured individuals receiving inpatient and/or outpatient services from a hospital should be an accounting system adjustment not far removed from the process of setting up an account for any other payer category.

For purposes of the initial audits, States and auditors may need to develop methodologies to analyze current audited financial information, and hospital accounting records to properly segregate and identify DSH eligible uncompensated care costs.

*Comment:* One commenter noted that a State's Department of Social Services signed a Partnership Plan for the purpose of ''establishing a stable funding mechanism for the State's Medicaid program that embodies accountability while assuring the availability of financial resources to provide needed health care to the program's beneficiaries.'' The commenter noted that additional auditing and reporting requirements, as addressed in the proposed regulation, seem to be unduly burdensome and potentially costly to the State and the hospitals.

*Response:* Section 1923(j) of the Act contains audit and reporting requirements applicable to all States that make DSH payments. As part of this process, CMS must determine if all hospitals receiving DSH payments under the Medicaid State plan actually qualify to receive such payments and that actual DSH payments do not exceed the hospital-specific DSH limit for the same period.

To the extent that a State makes DSH payments within a Section 1115 waiver demonstration and/or a Partnership Plan, the State is not exempted from the rules surrounding DSH payments, particularly those at 1923(g) of the Act, and the audit and reporting requirements would still apply to that State.

It should be noted that the Partnership Plan primarily addresses funding of the Medicaid program, and is not relevant to the issue of whether particular payments are authorized under the approved Medicaid State plan and may be the basis for FFP under the Federal statute. Funding issues are not the subject of this regulation.

*Comment:* A few commenters suggested the creation of a $500,000 threshold of DSH payments before an in-depth audit pursuant to 42 CFR 455, new Subpart C is triggered. Many small hospitals have historically low DSH allotments, and the administrative costs

of the proposed DSH reporting and auditing requirements are disproportionately onerous. If this exemption is not possible, the commenters request that any State with a DSH allotment under $500,000 be allowed to use a hospital's independent auditor attestation to meet the audit requirements for hospital data used in DSH calculations. A few commenters suggested that CMS consider evaluating whether the cost associated with detailed audits are justified and whether an audit that reviews a sample of hospitals annually might be just as effective and considerably less costly. One commenter recommended that the requirement be to verify that the State's calculation formula provides for inclusion of only uncompensated care costs of furnishing inpatient and outpatient hospital services to Medicaid eligible individuals and individuals with no source of third party coverage.

*Response:* There is no statutory authorization for an exception to audit and reporting requirements with respect to hospitals that receive low DSH payments. The audit and reporting requirements under Section 1923(j) of the Act apply to all States that make DSH payments, with respect to each hospital receiving a DSH payment. The statute further requires that CMS obtain information sufficient to verify that such payments are appropriate.

Relying on a sample of cost reports and financial information will not ensure that each DSH payment is appropriate and does not exceed the hospital-specific DSH limit.

The data elements necessary for the State to complete the DSH audit and report should, in part, be information the State already gathers to administer the DSH program. The responsibility of the auditor is to measure DSH payments received by a hospital in a particular year against the eligible uncompensated care costs of that hospital in that same year as determined using the data provided in the cost, utilization and financial reporting documents described above.

Finally, auditing a State's overall DSH payment methodology will not ensure that DSH payments to each hospital do not exceed the statutorily required hospital-specific DSH limit.

*Comment:* Commenting State Medicaid offices stated that the Medicaid program already represents a huge audit task for their offices, and that adding the additional responsibility of auditing hospital data for each hospital receiving a DSH payment would be an extremely large amount of additional work that would be nearly impossible to fit within required time frames. One commenter said that unless this requirement can be met through the acceptance of evidentiary documentation from the qualifying hospitals, further verification can only be made by the auditors' actual observation of the hospitals' records. The commenter complained that sending auditors to physically visit every qualifying hospital is onerous and expensive and the commenter questioned whether it is CMS' intent to require this extensive a drill-down.

*Response:* Section 1923(j) of the Act instructs States to audit and report specific payments and specific costs. The responsibility of the auditor is to measure DSH payments received by a hospital in a particular year against the uncompensated care costs for the Medicaid and uninsured populations incurred by that hospital in that same year. The auditor must follow accepted audit standards and develop sufficient confidence in the data to certify the results.

CMS has developed a General DSH Audit and Reporting Protocol to provide guidance to States, DSH hospitals and auditors in the completion of the DSH audit. This protocol provides general instructions regarding the types of information to be provided to the State and its auditor as well as the calculations the auditor will make based on the data provided. The Protocol will be available on the CMS Web site.

*Comment:* Several commenters noted that a reconciliation that must be completed no later than one year after the completion of each State's fiscal year will place a substantial burden on hospitals. They asserted that this would mean that hospitals will have to provide the State with uncompensated care data for FY 2005 before it is required for the FY 2007 DSH computation. They further indicated that this is not practical, because uninsured patients are difficult to identify until all collection efforts with other payers have been pursued, which can take several years.

*Response:* As discussed above, we have revised the timing requirements to extend the length of time to submit required reports and audits to permit submission as late as the last day of the Federal fiscal year ending 3 years after the end of the Medicaid State plan rate year, with a special timing provision for the audits for 2005 and 2006, which will be due by December 31, 2009. We believe this accommodates most of these concerns. We also note that we expect that reports and audits will be based on the best available information. If audited Medicare cost reports are not available, the DSH report and audit may need to be based on Medicare cost reports as filed.

*Comment:* A few commenters said that CMS should not impose unnecessary administrative burdens that will raise costs for * * * hospitals and States (that ultimately will be shared by the Federal Government) that result neither in improved quality or access nor in any measurable gain in accuracy or efficiency, particularly at this time when Congress and the Administration are intently focused on reining in Medicaid expenditures. They argued that diversion of scarce hospital resources from other productive activities to achieve, at best, only marginal gains in accuracy of the uncompensated care cost calculation should be reconsidered. The increased costs outweighing the benefit of the reconciliation mandate.

*Response:* Section 1923(g)(1)(A) of the Act specifies that DSH payments cannot exceed a hospital-specific limit. Section 1923(j) of the Act, as added by the MMA, instructed States to audit and report DSH payments made by States and compare those payments to the uncompensated care costs as set forth in that hospital-specific DSH limit. This regulation implements those statutory audit and report requirements and is not a discretionary agency action.

We expect that States and auditors will rely on existing financial and cost reporting processes currently used by all hospitals participating in the Medicare program and therefore should not create an undue burden on states and hospitals in reporting compliance with Federal Medicaid law.

CMS has developed a General Audit and Reporting Protocol to provide guidance to States, DSH hospitals and auditors in the completion of the DSH audit. This protocol provides general instructions regarding the types of information to be provided to the State and its auditor as well as the calculations the auditor will make based on the data provided. The Protocol will be available on the CMS Web site.

*Comment:* One commenter noted that neither the MMA nor the proposed rule clearly state if the independent auditor is providing an opinion on whether the State's calculation formula includes ''Only uncompensated care costs of furnishing inpatient and outpatient hospital services to Medicaid eligible individuals and individuals with no source of third party coverage * * *'', or whether the intent is for the independent auditor to perform an indepth annual audit of the hospitals records and cost reports in order to verify the hospital reporting processes as well as audit the State's methodology.

One commenter questions whether the requirement is that each State hire an auditor to look at each hospital's uninsured calculations.

*Response:* Section 1923(j) of the Act, as added by the MMA requires States to audit and report on hospital-specific DSH payments and this rule makes clear that this obligation includes specific cost data. The responsibility of the auditor is to measure DSH payments received by a hospital in a particular year against the eligible uncompensated care costs of that hospital in that same year.

States and auditors will need to obtain data from hospitals and may need to work with hospitals to develop new data or methodologies to allocate or adjust existing data. And it may be necessary for auditors to develop methods to test, verify the accuracy of, and reconcile data from different sources. This audit function is not the same as the function of the hospital's own auditors, however, and would not involve a review of the hospital's financial controls and internal reporting procedures. But the auditors must review the overall methodology for accumulating data to ensure that the resulting data reflects the required elements. In other words, the independent auditors must review the methodology for arriving at hospital-specific data, and must have confidence that the data accurately represents the hospital's eligible uncompensated care costs consistent with the statutory criteria.

*Comment:* One commenter said that in their State hospital representatives are required to sign a survey of data for DSH purposes, in order to certify that the data is accurate and in accordance with hospital records. There is a requirement that hospitals maintain the supporting documentation for potential audits. The commenter asked if this process was sufficient or whether all the supporting documentation needed to be housed at the Medicaid agency.

*Response:* Section 1923(j) of the Act requires audit and report of hospital-specific DSH payments and hospital-specific uncompensated care costs. While survey data submitted by the hospital may be an important source of information, the auditors may need to examine the methodology followed to arrive at that survey data, and may need to develop methods to test, verify the accuracy of, and reconcile data from different sources. One ultimate responsibility of the auditor is to compare DSH payments received by a hospital in a particular year with the actual eligible uncompensated care costs incurred by the hospital in that same year. Unreviewed survey data is not sufficient to satisfy the statutory instruction of the MMA.

CMS has developed a General DSH Audit and Reporting Protocol to provide guidance to States, DSH hospitals and auditors in the completion of the DSH audit. This protocol provides general instructions regarding the types of information to be provided to the State and its auditor as well as the calculations the auditor will make based on the data provided. The Protocol will be available on the CMS Web site.

*Comment:* Many commenters stated that the auditing requirements are costly and burdensome to both the hospitals and the State, creating another source of disincentive to hospital participation. The commenters request CMS be mindful of the additional financial costs that hospitals would incur and compensate hospitals accordingly.

*Response:* CMS believes that audits will rely primarily on documents already available to hospitals, and thus the audit data burden will neither be significant nor costly. CMS also believes that it is unlikely that a hospital will decline to receive Medicaid DSH payments merely because they must provide information to the State to verify that DSH payments do not exceed the hospital's DSH eligible uncompensated care costs.

*Comment:* One commenter asked whether the ''independent audit'' is a financial audit, or an audit of agreed-upon procedures. The commenter indicated that, if it is an audit of agreed-upon procedures, it would be helpful if audit program and procedures clarification were provided by CMS.

*Response:* The purpose of the audit is to ensure that States make DSH payments under their Medicaid program that are in compliance with Section 1923 of the Act. The nature of the audit encompasses both program and financial elements making it impossible to label as a traditional financial or programmatic/governmental audit.

The audit review of the State's Medicaid program is limited to ensuring that DSH payments are consistent with the approved Medicaid State plan and Federal statutory limits. The DSH audit will rely in part on financial, accounting and cost report data provided by hospitals. This data should be subject to generally accepted accounting principles, and auditors may need to verify the methodology used for calculating such data. These financial elements will demonstrate that Federal payments were claimed in compliance with Federal statutes.

*Comment:* One commenter's opinion about the most practical manner in which the State could meet this regulation is to require hospitals to expand their current financial audits to include the appropriate hospital-related compliance issues and have their uncompensated care data audited as part of their annual financial statement audit. Auditors of the Medicaid program (as part of the State's Single Audit) could then rely on these audited certifications and evaluate each State's DSH payment calculations and other information being reported by the State to the Secretary.

*Response:* The statute places audit and reporting requirements upon States, and these regulations reflect those requirements. These regulations do not impede States from developing procedures to meet these requirements that place particular burdens on hospitals receiving DSH payments. For example, States may establish procedures for hospitals to provide detailed audited data that can be relied on by the independent certified DSH auditors. We do not agree that these procedures can completely substitute for an independent certified audit obtained by the State itself. Nor do we agree that the State's single audit can substitute for the DSH audit responsibility under Section 1923(j) of the Act. The purpose of the State's single audit is different from the DSH audit responsibility, and we read the statute to require a distinct, focused review of DSH payments.

*Comment:* Several commenters recommend that CMS accept the current audit processes of their State. One commenter said that hospitals in the State that are currently required to complete annual certified independent audits of their uncompensated care data are only required to perform audits using generally accepted accounting principles and strongly recommended that the definition be changed so that audits may be performed under those principles already in place for a hospital's audited financial data. The hospitals of some States already independently certify uncompensated care data submitted to the State and submit these audited financial statements along with their annual cost reports. The information in the cost reports comes from the hospitals' accounting systems that have been independently audited. Another commenter recommended that CMS exempt States with satisfactory independent certification programs already in place from this provision.

*Response:* The statute places audit and reporting requirements upon States, and these regulations reflect those requirements. These regulations do not

impede States from developing procedures to meet these requirements that place particular burdens on hospitals receiving DSH payments. For example, States may establish procedures for hospitals to provide detailed audited data that can be relied on by the independent certified DSH auditors. We do not agree that these procedures can completely substitute for an independent certified audit obtained by the State itself. Nor do we agree that the State's single audit can substitute for the DSH audit responsibility under Section 1923(j) of the Act. The purpose of the State's single audit is different from the DSH audit responsibility, and we read the statute to require a distinct, focused review of DSH payments.

*Comment:* Numerous commenters noted that the proposed requirement that the audit must be conducted pursuant to the government auditing standards is unduly burdensome. Most auditors in the private sector use generally accepted accounting principles (''GAAP'') to audit hospitals' financial data. Thus, the independent auditors involved in performing hospital audits and who use the GAAP standards to do these audits may not even be familiar with the generally accepted government auditing standards. In any case, it is inefficient to require these auditors to perform another audit of the same data using different auditing standards. At a minimum, States or hospitals should be allowed to use either the GAAP standards or the government auditing standards in meeting the audit requirements.

*Response:* Generally Accepted Government Auditing Standards (GAGAS) are the principles governing audits conducted of government organizations, programs activities, functions or funds. In general, government audits are either performance audits or financial audits. In either type, the focus is on the government entity, its management of a program and/or the financial management and reporting systems associated with that program.

The fact that there are some differences between GAGAS and GAAP, however, is a further reason why hospital audit efforts and the DSH audit have separate focuses and require separate analyses.

The DSH audit and report is a statutorily required component in the administration of the Medicaid program. The purpose of the audit is to ensure that States make DSH payments under their Medicaid program that are in compliance with Section 1923 of the Social Security Act. The audit does not encompass the review of the State's Medicaid program, it simply ensures that one portion of the program is conducted in line with Federal statutory limits. In addition, the DSH audit will rely on financial and cost report data provided by hospitals that are subject to generally accepted accounting principles as part of their primary reporting function.

*Comment:* One commenter said some auditors may find that base year figures cannot be verified to the extent necessary to provide a valid base because data or audit trails not previously necessary, are now required.

*Response:* States and auditors will need to obtain data from hospitals and may need to work with hospitals to develop new data or methodologies to allocate or adjust existing data. And it may be necessary for auditors to develop methods to test, verify the accuracy of, and reconcile data from different sources.

*Comment:* One commenter noted that the proposed rule appears to have greatly expanded the required scope (of Section 1923(j)(2)(E)) by making the State responsible for retaining documentation of patient-specific data. Assuming that CMS does not intend to place such a reporting burden on the States, the commenter requested that CMS clarify that the documentation requirement for hospital-reported data is limited to collecting, documenting and retaining State data and does not include documentation for data that a hospital might otherwise have available.

*Response:* States and auditors will need to work with hospitals to determine the extent to which original patient-specific source data is required and needs to be retained by the State.

2. Timing of Payments Under Review

*Comment:* A few commenters questioned whether DSH payments made by a State after SFY 2005 for dates of services prior to SFY 2005 are subject to the new auditing and reporting requirements. They noted that, currently, a few States make DSH payments after receipt of settled cost report from the Medicare fiscal intermediary and applies the DSH allotment based on dates of service. For example, one State made its DSH payment in SFY 2003 for dates of service in 2000 (using the 2000 Federal DSH allotment and settled Medicare cost reports).

*Response:* Unless otherwise specified in a State plan, the year in which payment is contemplated and accrues (even when subject to adjustment) is the DSH rate year to which it applies. Many States have provisions that provide for DSH payments based on prior year data, but that does not mean that those payments are prior year payments. (In the cited example, if that was the case, then the effect of any change in the DSH payment methodology would take three years to result in payment changes.) Each State should be aware of the Medicaid State plan rate year for which a DSH payment is made.

*Comment:* A few commenters said while Medicaid related data is readily available directly to the State, data regarding Medicare payments and discharges and non-Medicaid/non-Medicare data is not readily available to the State in efficient formats and timeframes required by the proposed rule.

*Response:* The commenter specifically questions the availability of non-Medicaid hospital data necessary to complete the audit. The only non-Medicaid related data relevant for the DSH audit would be the inpatient and outpatient hospital charges to individuals with no source of third party coverage. This information is available in hospital accounting records. Since the deadline for reporting the audit findings has been extended to at least three full years after the close of the Medicaid State plan rate year subject to audit, hospitals would have necessarily included this charge data in their as-filed Medicare cost reports.

*Comment:* One commenter noted it would avoid misunderstanding if CMS clarified whether the required data element refers to gross revenue (full charges for services) or net revenue (expected collections after revenue adjustments.)

*Response:* Uncompensated care costs under the hospital-specific DSH limit are calculated by reducing costs incurred in furnishing hospital services to the Medicaid and uninsured populations, reduced by revenues received under Medicaid (not including DSH payments) and further reduced by payments received from or on behalf of the uninsured population (not including payments made by a State or local government for services to indigent patients).

*Comment:* Many commenters recognized that the proposed regulations are effective for SFY 2005 and stated it is inappropriate to require an audit for SFY 2005, when the rule outlining the required data to be audited had only been proposed two months after the close of SFY 2005 (August 26, 2005). The commenters urged a prospective application of these requirements effective for the first State fiscal year that begins after the date the

final rule is issued, to allow sufficient time for respondents to identify data being required and processes to accumulate such data. A few commenters said the proposed regulation is impossible for both States and hospitals from an operational standpoint because this methodology uses actual costs and payments, and because of the deadlines for the audits and reports, neither Medicaid payments nor audited cost information are available. Numerous commenters stated that should CMS require an independent audit, it would be virtually impossible for States to meet the one-year filing deadline.

*Response:* The statutory provision at Section 1923(j) of the Act requires audits and reports for fiscal year 2004, but we are implementing this provision prospectively with Medicaid State plan rate year 2005, because that is the first Medicaid State plan rate year that necessarily begins in or after Federal fiscal year 2004. With that clarification, and because audits are prospective activities, we do not believe this rule has any retroactive effect. Moreover, as discussed above, CMS has modified the regulation to address the timing concerns expressed by these commenters. The regulation has been modified to:

1. Identify the Medicaid State plan rate year 2005 as the first time period subject to the audit requirement.

2. Extend the time period for submission of completed audit reports to the last day of the Federal fiscal year (FFY) ending three years from the Medicaid State plan rate year under audit. This means that the 2007 Medicaid State plan rate year must be audited by the last day of FFY 2010.

3. Provide for a special transition time period for concurrent completion of Medicaid State plan rate year 2005 and 2006 audits by September 30, 2009.

4. Provide for submission of each audit report within 90 days of the completion of the audit.

5. Provide for a transition period for reliance on audit findings, so that audit findings will not be given weight until Medicaid State plan rate year 2011 and thereafter in calculating uncompensated care cost estimates and associated DSH payments.

*Comment:* Many commenters said that this requirement could not be met if the regulations required a retrospective audit, because final settlement of hospitals' cost reports is typically contingent upon completion by a Medicare intermediary of audits that can take several years. One commenter noted that the requirement that the certified audit be completed one year after the close of the fiscal year is unattainable because the majority of the data required can only be derived from the Medicaid cost report, which is submitted no sooner than five months after the end of the fiscal year. Given the detail involved in the audit, the commenters indicated that there will not be enough time to receive cost reports, review and settle the reports, and provide data to the auditor, who would need to certify this tentatively settled cost report data for each of the States' DSH providers. One commenter stated that the regulation should be clarified to permit the required report to be based on a hospital's as-filed cost report, and time should be allowed for States to collect the additional data needed to meet the reporting requirements. One commenter said the hospitals in the State accumulate and report costs based on the hospital's fiscal year utilizing the audited Medicare cost report (HCFA–2552–96) which is generally not available before 21 months after the hospital's year end. Moreover, the commenter indicated that such reports do not use the same fiscal year as the SFY, and thus the cost information is not available on a SFY basis. The commenters also indicated that timing issues are also complicated by the fact that Medicaid claims may be submitted by hospitals to the State up to one year after the date of service.

*Response:* We discussed above the revisions made to address comments on timing issues and extend the time frames for reporting and auditing requirements. We expect that reports and audits will be based on the best available information. If audited Medicare cost reports are not available, the DSH report and audit may need to be based on Medicare cost reports as filed. We recognize that, in many instances, hospital financial and cost report periods will differ from the Medicaid State plan rate year. In these instances, States and auditors may need to use multiple audited financial reports and hospital cost reports (CMS 2552–96, finalized when available or as-filed) to fully document the appropriateness of DSH payments for the Medicaid State plan rate year under audit. The data would then be allocated based on the months covered by the financial or cost reporting period that are within the Medicaid State plan period under audit. For instance, if a Medicaid State plan rate year runs from July 1, 2004 through June 30, 2005, but a DSH hospital receiving payments under the Medicaid State plan operates its financial and cost reporting based on a calendar year, the State and auditors may need to use information from financial and cost reports for calendar years 2004 and 2005. Costs and revenues of serving the Medicaid and uninsured populations would be allocated from each financial and cost reporting period, in this case half from each report, to determine the data for Medicaid State plan rate year 2005.

*Comment:* One commenter said that due to delays in receiving settled cost reports from Medicare Intermediaries, a State may distribute more than one year of DSH payments to hospitals in a given State Fiscal Year. The commenter asks for confirmation that the State should submit a separate Annual DSH Report for each year of DSH payments, regardless of the date of DSH payment.

*Response:* The DSH Audit must be performed and reported to CMS on an annual basis, which should reflect the basis for all DSH payments made for the Medicaid State plan rate year, even if the DSH payment for that period is made in a subsequent year.

*Comment:* A few commenters questioned whether a detailed audit manual should be prepared by CMS in order to assure compliance with the rule when promulgated and to avoid disputes after payments have been made.

*Response:* CMS has developed a General DSH Audit and Reporting Protocol to provide guidance to States, DSH hospitals and auditors in the completion of the DSH audit. This Protocol includes general instructions regarding the types of information to be provided by hospitals to the State and its auditor as well as the calculations the auditor will make based on the data provided. The Protocol will be available on the CMS Web site.

3. Audit Objective and Data Sources

*Comment:* Several commenters expressed their opposition to the audit aspect of the proposed regulation. While recognizing the need for audits, the commenters believe that the audits should fulfill only the following three objectives: determine whether individual States are following their own formulas for the calculation of DSH payments and hospital-specific DSH payment limits; verify the accuracy of States' calculations; and determine whether individual States are making good-faith efforts to make those calculations in compliance with Federal guidelines. The commenters believe the proposed regulation exceeds these three objectives. The commenters hope that CMS will instruct auditors that there are, in fact, various ways for States to make these calculations while

remaining in compliance with Federal guidelines.

*Response:* Section 1923(j) of the Act requires that States audit actual DSH payments made under the approved Medicaid State plan against actual eligible uncompensated hospital costs in the same time period. Hence, the audit requirement necessarily will measure whether DSH payments made under the formulas in the approved Medicaid State plan are within the hospital-specific DSH payment limits as calculated by the State. The Medicaid State plan includes the reimbursement methodologies States utilize to make Medicaid DSH payments. While States typically include a provision within the Medicaid State plan that such payments will not exceed each qualifying hospital's DSH limit, such reimbursement methodologies do not identify cost components that are necessary for calculation of the hospital-specific DSH limits. Instead, States often for payment purposes rely on survey data reported by DSH hospitals to calculate hospital-specific DSH limit, data which is not typically audited by States to ensure compliance with the statutory limits on DSH payments.

While CMS recognizes that States must use estimates to determine DSH payments in a given Medicaid State plan rate year, Section 1923(j) of the Act requires confirmation that such payments do not exceed the cost limitations imposed by Congress under the Omnibus Budget Reconciliation Act of 1993.

*Comment:* A few commenters suggested the regulation should clarify the source for the information to be provided for the audit, particularly as it pertains to the payments made for the services. The commenters specifically asked whether the information should be on discharges during a State fiscal year (Medicare pays based on discharges), admissions during a State fiscal year (some States pay based on admissions), or actual payments made during the State fiscal year regardless of when the services were provided.

*Response:* Section 1923(j) of the Act requires states to report and audit hospital-specific DSH payments and hospital-specific uncompensated care costs. To meet this requirement, States must perform audits associated with defined periods of time and must identify the actual costs incurred and payments received during that defined time period.

As noted previously, we expect that States and auditors will obtain information whenever possible from existing sources. States and auditors should use consistent practices in their reports and audits. Because each State uses different hospital payment methodologies, there is no national rule on whether, for example, admissions or discharges should be used to measure whether services were furnished within a Medicaid State plan rate year. The same methodology should be used to measure uncompensated care costs as is used in determining payments under the Medicaid State plan.

CMS has developed a General DSH Audit and Reporting Protocol will be available on the CMS Web site to assist States and auditors in developing methodologies to use existing sources of information to determine uncompensated care costs in furnishing hospital services to the Medicaid and uninsured populations.

*Comment:* A few commenters stated they currently have no way of verifying payments to hospitals by Medicaid managed care organizations for inpatient and outpatient hospital services furnished to Medicaid eligible individuals because payments to hospitals are paid directly by the managed care plans. The commenters indicated that States have no first hand knowledge, and no claims documentation regarding these payments. The commenters questioned whether CMS would accept the use of self-reported hospital financial information that references these payments in total for purposes of the Annual DSH Reports.

*Response:* There are three specific types of revenues that must be included in the audit to which the State conducting the audit will not have direct access. They are: (1) Medicaid and DSH payments received by the hospital from a State other than the State in which the hospital is located; (2) Medicaid MCO payments; and, (3) uninsured payments. The State must rely on hospital audited financial statements and hospital accounting records for this information. The State's Medicaid Management Information System has the most central and current information for in-State Medicaid fee-for-service inpatient and outpatient hospital payments, Medicaid supplemental and enhanced payments and DSH payments and will be the source of such payment.

In addition, hospital cost information is available only from a reporting DSH hospital. The State and CMS must rely on hospital Medicare 2552–96 cost reports to provide this information.

*Comment:* One commenter requested CMS clarify that it is acceptable to report data for a recent prior period, with appropriate adjustments for expected changes between the data collection period and the DSH reporting period.

*Response:* We read the report and audit requirements to call for actual data, rather than estimated data. To accommodate the delays in obtaining data, we have extended the deadlines for submission of the reports and audits. While CMS recognizes that States must use estimates to determine initial DSH payments in a given Medicaid State plan rate year, Section 1923(j) of the Act requires confirmation that such payments do not exceed the cost limitations imposed by Congress under the Omnibus Budget Reconciliation Act of 1993. We do not believe estimates are sufficient to meet this requirement.

*Comment:* One commenter questioned the ramifications of reporting costs and payments in out-of-State and border hospitals, and asked whether the audit team would be responsible for DSH amounts for only hospitals in the State or for all hospitals (in State and out of State) that received Medicaid DSH dollars from that State. The commenter suggested that, in order to avoid duplicate payments, CMS should outline a methodology to be utilized when auditing hospitals that receive DSH payments from more than one State.

*Response:* A State is required to audit DSH payments and eligible uncompensated care costs for only those DSH hospitals that are located within the State. This method will allow the auditor to recognize DSH payments received by a hospital from other States in addition to the DSH payments received by that hospital under the ''home-State's'' approved Medicaid State plan.

For States that make DSH payments to hospitals located in other States, the State must include in the reporting requirements the DSH payments made to hospitals located outside of the State, but would not be required to audit those out-of-State DSH hospital's total DSH payments/total eligible uncompensated care costs. This method will ensure that no DSH hospital is audited more than one time per year for purposes of the DSH auditing and reporting requirements under the MMA.

*Comment:* Many commenters noted that the DSH program has allowed hospitals to extend access to healthcare for many poor and uninsured individuals. They noted that the new requirements include significant administrative expenses and responsibilities to both the States and hospitals. Several State Medicaid Agencies were concerned that a likely outcome will be that hospitals decline to participate in the DSH program,

resulting in a decline in the delivery of healthcare services to the uninsured citizens and the patients treated from some Indian Reservations.

*Response:* CMS does not believe that the audit data burden will be significant since the audit relies on documents already available to hospitals. CMS also believes that it is unlikely a hospital will decline to receive Medicaid DSH payments for uncompensated care simply because the hospital must provide information to the State to assist in the verification that DSH payments do not exceed the hospital's eligible uncompensated care costs as required by Federal law.

The State is responsible for the administration of its Medicaid program and the successful completion of the DSH audit as part of that administration. Costs associated with the audit are eligible for Federal administrative matching funds.

*Comment:* Many commenters stated it would be extremely labor intensive and an excessive reporting burden for (DSH) hospitals to match payments received from individuals to payments received for individuals for which there was no third party coverage because it does not currently do that automatically.

*Response:* To the extent that hospitals do not separately identify uncompensated care related to services provided to individuals with no source of third party coverage for the inpatient and outpatient hospital services they receive from uncompensated care costs not eligible under the hospital-specific DSH limits, hospitals will need to modify their accounting systems prospectively to do so. Setting up an accounting category to aggregate charges and revenues associated with uninsured individuals receiving inpatient and/or outpatient services from a hospital should be an accounting system adjustment not far removed from the process of setting up an account for any other payer category.

For purposes of the initial audits, States and auditors may need to develop methodologies to analyze current audited hospital financial statements and hospital accounting records to properly segregate uncompensated costs.

*Comment:* Many commenters have stated that it is unclear who must pay for the audit.

*Response:* The DSH audit and report is a necessary element in the administration of the Medicaid program. The cost of the audit is the responsibility of the State and can be matched by the Federal Government as a Medicaid administrative cost of the State.

*Comment:* Several commenters noted the proposed requirement for the independent certified audits is unduly burdensome. Several States have had in place for a number of years a requirement that hospitals submit certified public audit or certifications of hospitals' uncompensated care data. This is followed by the single State audit of State's DSH program which tests and verifies all of the elements that are currently required by the DSH state plan and State law requirements. To impose an additional layer of auditing at considerable expense to States is unnecessary.

*Response:* Section 1923(j) of the Act requires States to audit actual DSH payments made under the approved Medicaid State plan against actual eligible uncompensated hospital costs in the same time period. Hence, the audit requirement will necessarily measure whether payments made under the formulas in the approved Medicaid State plan are within the hospital-specific DSH payment limits as calculated by the State. The certification required in the regulation is a certification of the audit performed to determine compliance with the hospital-specific limitations imposed by Section 1923 of the Act.

While the DSH audit will rely on existing financial and cost reporting tools currently used by all hospitals participating in the Medicare program including audited hospital financial statements, hospital accounting records and the Medicare 2552–96 cost report, these source documents simply provide data to the auditor. Certification of these source documents is not sufficient to ensure that DSH payments do not exceed the hospital-specific limits and would not allow CMS to carry out the intent of the law which was to ensure that each DSH hospital will not exceed its hospital-specific limit. The independent certified audit will verify that the DSH payments authorized under the approved Medicaid State plan are within the hospital-specific DSH limits defined under Federal law.

*Comment:* Several commenters requested clarification regarding who is responsible for obtaining the independent audit and ensuring the requirements are met. For example, it could be presumed that these audit requirements are the responsibility of the State's auditor, the State Medicaid program's auditor, the Medicaid agency's staff or their agent, or the hospital's auditor.

A few commenters said it is not clear what constitutes ''independent,'' and propose that CMS consider ''independent audit'' to mean an audit independent of the hospital that does not require the State to contract with a private-sector auditing firm to complete and certify. One commenter questioned whether the terms in the rule stating that the audit must be independent and certified presumes that a certified public accountant or comparable professional must perform the audit or is the State allowed to engage the services of a contractor with different skill sets as long as the auditor is independent? One commenter questioned whether ''independent audit'' means that a State may employ its current outside auditors to conduct audit and reporting requirements required by the proposed regulations, recognizing that audit programs will be modified to meet the additional auditing and reporting requirements demanded?

*Response:* The term ''independent'' means that the Single State Audit Agency or any other CPA firm that operates independently from either the Medicaid agency (or other agency making Medicaid payments) or the subject hospital(s) may perform the DSH audit. States may not rely on non-CPA firms, fiscal intermediaries, independent certification programs currently in place to audit uncompensated care costs, nor expand audits of hospital financial statements to obtain audit certification of the hospital-specific DSH limits.

Section 1923(j) of the Act requires States to report and audit specific payments and specific costs. The responsibility of the auditor is to measure DSH payments received by a hospital in a particular year against the eligible uncompensated care costs of that hospital in that same year. Certification means that the independent auditor engaged by the State reviews the criteria of the Federal audit regulation and completes the verification, calculations and report under the professional rules and generally accepted standards of audit practice. This certification would include a review of the State's audit protocol to ensure that the Federal regulation is satisfied, an opinion for each verification detailed in the regulation, a determination of whether or not the State made DSH payments that exceeded any hospital's specific DSH limit in the Medicaid State plan rate year under audit. The certification should also identify any data issues or other caveats that the auditor identifies as impacting the results of the audit.

*Comment:* Several commenters believe the most practical manner in which the State could meet this audit regulation is by requiring hospitals to have their uncompensated care data

audited as part of their annual financial statement audit. Auditors of the Medicaid program (as part of the State's Single Audit) could then rely on these audited certifications and evaluate each State's DSH payment calculations and other information being reported by the State to the Secretary. Numerous commenters stated it would be more efficient and less burdensome for the individual hospitals to make the required verifications for their own financial data. Most hospitals already have their financial information reviewed and certified by an independent auditor, so the auditor could complete these verifications as part of the standard audit process. One commenter stated it is not clear if audit procedures applied in any other audits the hospital has undergone would be sufficient to rely upon in this verification. One commenter suggests that data submitted by a hospital which has had its own independent audit be considered ''certified'' for the independent audit requirements of this rule.

*Response:* States may not rely on independent certification programs currently in place to audit uncompensated care costs nor expand audits of hospital financial statements to obtain audit certification of the hospital-specific DSH limits. Section 1923(j) of the Act MMA imposes audit and reporting requirements on States. CMS must determine if all hospitals receiving DSH payments under the Medicaid State plan actually qualify to receive such payments and that actual DSH payments do not exceed the hospital-specific limit for the same period. The certification required in the regulation is a certification of the audit performed to determine compliance with Section 1923 of the Social Security Act.

While the DSH audit will rely on existing financial and cost reporting tools currently used by all hospitals participating in the Medicare program including audited hospital financial statements, hospital accounting records, and the Medicare 2552–96 hospital cost report, these source documents simply provide data to the auditor. Certification of source documents or uncompensated care cost programs is not sufficient to ensure that DSH payments do not exceed the hospital-specific limits and would not allow CMS to carry out the intent of the law which was to ensure that each DSH hospital will not exceed its hospital-specific limits.

*Comment:* Several commenters indicated that most of the requirements outlined in the proposed regulations require data that will be obtained from hospital cost reports. The commenters questioned whether the States will be responsible for completing individual hospital audits in greater detail prior to completing the DSH report. One commenter questioned whether having the data audited by an independent audit firm engaged by the DSH hospitals would satisfy the independent audit requirement, or whether States would be required to audit the data?

*Response:* We anticipate that the audit will rely primarily on already available documents. The State and auditors can use data extracted from existing hospital cost and financial reporting tools supplemented with State generated data from the State's Medicaid Management Information System. The data elements necessary for the State to complete the DSH audit and report should, in part, be information the State already gathers to administer the DSH program.

States and auditors will need to obtain data from hospitals and may need to work with hospitals to develop new data or methodologies to allocate or adjust existing data. And it may be necessary for auditors to develop methods to test, verify the accuracy of, and reconcile data from different sources. This audit function is not the same as the function of the hospital's own auditors, however, and would not involve a review of the hospital's financial controls and internal reporting procedures. But the auditors must review the overall methodology for accumulating data to ensure that the resulting data reflects the required elements. In other words, the independent auditors must review the methodology for arriving at hospital-specific data, and must have confidence that the data accurately represents the hospital's eligible uncompensated care costs consistent with the statutory criteria.

*Comment:* A few commenters indicated that many States have invested an increasing amount of time and expense managing Federal audits and presumed the increased audit requirements would be at the States' expense.

*Response:* CMS does not believe the audit data burden will be that significant since the audit may rely primarily on already available documents. The State and auditors can use data extracted from existing hospital cost and financial reporting tools supplemented with State generated data from the State's Medicaid Management Information System. The data elements necessary for the State to complete the DSH audit and report should, in part, be information the State already gathers to administer the DSH program. The State would incur additional cost associated with engaging an auditor but that cost is eligible for Federal administrative matching funds.

*Comment:* One commenter stated that using an independent auditor would add administrative costs to the Medicaid program. The State requests CMS to confirm if DSH funds can be used to fund the cost of the audit, and if the State can claim FFP at the DSH matching rate.

*Response:* State costs of the audit are administrative costs of the Medicaid program, and not DSH costs. The DSH program was established by Congress to help offset uncompensated inpatient and outpatient care provided by hospitals to Medicaid individuals and the uninsured. States may not access Federal DSH funding for purposes other than reimbursing hospitals for unreimbursed inpatient and outpatient services provided to Medicaid individuals and individuals with no source of third party coverage for the inpatient and outpatient hospital services they received.

The DSH audit and report is a necessary element in the administration of the Medicaid program. The State is responsible for the successful completion of the DSH audit as part of that administration. Costs associated with the audit are eligible for Federal administrative matching funds.

*Comment:* Numerous commenters noted that the proposed rule does not address how the audits will be paid for and there is a concern that the State Medicaid programs will pass on these additional costs to DSH hospitals. The commenters recommended that CMS state affirmatively that the cost of the audits should not be passed on to hospitals. A few commenters noted that since the cost of auditing each DSH hospital's records to satisfy the new audit requirements will be substantial and recommended it be funded by a special appropriation to the States for such purpose. Many commenters recommended that CMS reconsider its conclusion that the regulation would not have a significant economic impact and should undertake appropriate analyses under Executive Order 12866 and the regulatory impact analysis to consider how the burden on hospitals could be lessened.

*Response:* We still do not believe that this regulation will impose a significant impact. The final rule allows the DSH audits to be part of a hospital's existing annual financial. If this is the case, the costs to the hospital should be minimal since the annual hospital financial audit is already a requirement. States are responsible for the administration of their Medicaid programs and the

successful completion of the DSH audit as part of that administration.

*Comment:* Numerous commenters indicated significant confusion regarding the mechanics of compliance with the requirement for States to have DSH payment programs independently audited annually and to submit those certifications annually to the DHHS Secretary. The commenters requested further guidance and explicit details of standards and procedures required by CMS.

*Response:* As a condition of continued Federal DSH funding, pursuant to § 455.204, States will need to be in compliance with audit and reporting requirements. CMS has developed a General DSH Audit and Reporting Protocol which will be available on the CMS Web site to assist States and auditors in utilizing information from each source identified above and the methods under which costs and revenues will be determined. In addition, an auditing and reporting schedule is described in earlier responses to comments and is also included in the final regulation.

*Comment:* A few commenters noted that their States have experienced numerous difficulties when contracting with external auditing firms. Subjecting each hospital's DSH data to another audit at the State level would be an extremely time-consuming and very expensive process for the State would not add any value to the auditing process.

*Response:* The DSH audit and report is a necessary element in the administration of the Medicaid program. The State is responsible for the successful completion of the DSH audit as part of that administration. Costs associated with the audit are eligible for Federal administrative matching funds.

The term ''independent'' means that the Single State Audit Agency or any other CPA firm that operates independently from the Medicaid agency and the subject hospitals may perform the DSH audit. States may not rely on non-CPA firms, fiscal intermediaries acting as agents for a State's Medicaid program, independent certification programs currently in place to audit uncompensated care costs, nor expand hospital financial statements to obtain audit certification of the hospital-specific DSH limits.

States may use Medicaid agency auditors to gather the data and perform initial data analysis for the DSH audit. However, the audit must be certified by an independent auditor as described above.

*Comment:* One commenter questioned whether it is CMS' intent to prevent an independent CPA firm, contracted by a State to audit Medicaid cost reports on the State's behalf, from being able to audit that same state's DSH program through the independence requirements of the Government Auditing Standards. If so, the commenter questioned if any contract with a State's Medicaid agency would impair the independence of a CPA firm in performing the DSH audit required in the rule.

*Response:* The intent of the requirement that States use independent auditors to certify the DSH audit is to provide a quality end product based on consistently applied auditing standards to produce unbiased findings. An independent auditor must operate independently from the Medicaid agency and the subject hospitals. The fact that a CPA firm contracts with the Medicaid agency to audit Medicaid cost reports does not disqualify that firm from being considered independent and therefore qualified to perform the DSH audit as long as the contract permits the auditor to exercise independent judgment.

*Comment:* Many commenters questioned whether the State audit agency would be appropriate for a certified independent audit according to generally accepted government auditing standards. If an independent audit of each facility is required, the commenters asked if State Medicaid program auditors would be considered independent to perform the hospital portion of the work.

*Response:* The term ''independent'' means that the Single State Audit Agency or any other CPA firm that operates independently from the Medicaid agency or subject hospitals is eligible to perform the DSH audit. States may not rely on non-CPA firms, fiscal intermediaries acting as Agents for a State's Medicaid program, independent certification programs currently in place to audit uncompensated care costs, nor expand hospital financial statements to obtain audit certification of the hospital-specific DSH limits.

States may use Medicaid agency auditors to gather the data and perform initial data analysis for the DSH audit. However, the audit must be certified by an independent auditor as described above.

*Comment:* A few commenters stated that the financial effectiveness of the audits would be enhanced if the Medicare fiscal intermediaries were available to do the audits. Intermediaries provide services at a lower cost than private accounting firms. Time world be saved because the intermediaries have all the necessary information. This may also be helpful to States that require a lengthy procurement bidding process.

*Response:* States may contract with Medicare fiscal intermediaries to the extent that the Medicare fiscal intermediary meets the definition of an independent CPA firm and operates under a contract that ensures independent judgment. The term ''independent'' means that the Single State Audit Agency or any other CPA firm operates independently from the Medicaid agency or subject hospitals.

*Comment:* One commenter questioned whether it would be appropriate for the State's Auditor General's office to perform the independent audit of DSH Payments using the Generally Accepted Government Auditing Standards.

*Response:* The term ''independent'' means that the Single State Audit Agency or any other CPA firm that operates independently from the Medicaid agency or subject hospital may be qualified to perform the DSH audit.

Generally Accepted Government Auditing Standards are the principles governing audits conducted of government organizations, programs activities, functions or funds. In general, government audits are either performance audits or financial audits. In either type, the focus is on the government entity, its management of a program and/or the financial management and reporting systems associated with that program.

The DSH audit and report is a necessary part of the administration of the Medicaid program. The purpose of the audit is to ensure that States make DSH payments under their Medicaid program that are in compliance with Section 1923 of the Act. The audit does not encompass the review of the State's overall Medicaid program, it simply ensures that one portion of the program is conducted in line with Federal statutory limits. In addition, the DSH audit will rely on financial and cost report data provided by hospitals that are subject to generally accepted accounting principles as part of their primary reporting function.

*Comment:* Many commenters expressed concern for the financial stability of disproportionate share hospitals and States and their requirement for finality, with respect to prior year DSH payment determinations. They asserted that allowing States to make good-faith efforts to estimate hospital-specific DSH payment limits, so long as States are using the most recently available data, would help prevent situations in which States would need to attempt to take back past DSH payments to hospitals—a situation

that would be especially burdensome for the very kinds of hospitals that DSH payments are intended to help. One commenter stated that the new rules impose an extremely heavy penalty on certain small hospitals. That commenter indicated that it would be unlikely that these hospitals could repay any amounts to the Medicaid program from current operating income.

*Response:* We recognize that States must use estimates to determine DSH payments in a given year. The regulation will provide information that will help ensure that the actual DSH payment made by States based on those estimates do not exceed the actual eligible uncompensated costs under the hospital-specific DSH limit. The transition period included in this regulation ensures that States will have time to adjust those estimates prospectively.

*Comment:* Numerous commenters did not see how the verification requirement could be completed without an additional annual cost report for an annual period that differs from its established fiscal year cost reporting period and an additional audit that would tie the hospital costs to the State year-end versus hospital year end and DSH payments with the same year actual uncompensated care costs. They asserted that the verification requirement is an extraordinary unreasonable and completely unnecessary administrative and economic burden on hospitals and States due to time-consuming, costly, and often duplicative audits. Many critical access hospitals do not have the excess manpower and resources to accomplish this additional audit. In many States, it disturbs an effective and efficient system that already meets Federal standards for program integrity.

*Response:* The DSH audit will rely on existing financial and cost reporting tools currently used by all hospitals participating in the Medicare program. We expect that State reports and audits will be based on the best available information. If audited Medicare cost reports are not available for each hospital, the DSH report and audit may need to be based on Medicare cost reports as filed. CMS does not believe that the audit data burden will be significant since the audit relies on documents already available to hospitals.

*Comment:* Many commenters noted that it would be an administrative burden to perform retrospective reviews and adjust each year's DSH payments. Therefore, the commenters request that CMS audit the data used by the State to determine the prospective DSH payments paid during the State fiscal year based upon the CMS approved DSH State plan payment methodology to determine the actual uncompensated care costs in the same audited SFY.

*Response:* Section 1923(j) of the Act imposes audit and reporting requirements on all States that make DSH payments to all DSH eligible hospitals within the State. As part of this process, CMS must determine if all hospitals receiving DSH payments under the Medicaid State plan actually qualify to receive such payments and that actual DSH payments made do not exceed the hospital-specific DSH limit for the same period.

DSH payments are limited by Federal law to each qualifying hospital's specific eligible uncompensated care cost in a given year. Auditing a State's DSH payment methodology will not ensure that DSH payments actually made by States do not exceed the statutorily required hospital-specific DSH limit. Verifying cost elements within a DSH payment methodology would not allow CMS to carry out the intent of the law which was to ensure that each DSH hospital will not exceed its hospital-specific DSH limit.

*Comment:* One commenter said Verification 3 would be a burden on the State. Another commenter stated that the requirements in Verification 3 would dictate significant additional work by the independent auditor (and added cost to the State and Federal governments) for unnecessary data analysis.

*Response:* CMS does not believe that Verification 3 in the regulation will create significant additional work for the independent auditor nor the States. The auditor engaged by a State to complete the DSH audit must rely on information provided by the State and DSH hospitals. This information will be based on existing financial and cost reporting tools as well as information provided by the State's Medicaid Management Information System and the existing approved Medicaid State plan. DSH hospitals must provide the State with hospital-specific cost and revenue data, including backup documentation, so that independent auditor may utilize in developing audit report. The State must provide the auditor with information pertaining to the Medicaid State plan DSH payment methodologies and the methodology utilized by the State uses to estimate the hospital-specific DSH limits.

CMS has developed a General DSH Audit and Reporting Protocol to provide guidance to States, DSH hospitals and auditors in the completion of the DSH audit. This Protocol includes general instructions regarding the types of information to be provided by hospitals to the State and its auditor as well as the calculations the auditor will make based on the data provided. The Protocol will be available on the CMS Web site.

The DSH audit and report is a necessary element in the administration of the Medicaid program. The cost of the audit is the responsibility of the State and can be matched by the Federal government as a Medicaid administrative cost of the State.

*Comment:* One commenter questioned whether it is CMS' intent that the term ''appropriate'' indicates documentation that has been verified and/or audited. The vagueness of the term may also make it difficult for an independent auditor to provide an opinion. As an alternative, and assuming that all other requirements will be clearly defined, the commenter recommends that CMS consider an alternative that a State employs a methodology for calculating the hospital-specific DSH limit that is permissible under Federal rules.

*Response:* The statutory process requires examination of whether all hospitals receiving DSH payments under the Medicaid State plan actually qualify to receive such payments and whether actual DSH payments made are within the hospital-specific DSH limit for the same period. DSH payments are limited by Federal law to each qualifying hospital's specific eligible uncompensated care cost limit. Several audits by the Inspector General have highlighted the need for greater scrutiny and have indicated that calculations performed by State agencies or hospitals are not reliable.

Concerning the degree of data verification required, States and auditors will need to obtain data from hospitals and may need to work with hospitals to develop new data or methodologies to allocate or adjust existing data. And it may be necessary for auditors to develop methods to test, verify the accuracy of, and reconcile data from different sources. This audit function is not the same as the function of the hospital's own auditors, however, and would not involve a review of the hospital's financial controls and internal reporting procedures. But the auditors must review the overall methodology for accumulating data to ensure that the resulting data reflects the required elements. In other words, the independent auditors must review the methodology for arriving at hospital-specific data, and must have confidence that the data accurately represents the hospital's eligible uncompensated care costs consistent with the statutory criteria.

*Comment:* A few commenters are concerned that the reporting requirements, as stated in the proposed regulation, suggest that there is only one way to calculate DSH payments and hospital-specific DSH payment limits when, in reality, Federal guidelines give States some leeway in making these calculations. The commenters are concerned that auditors will interpret their mandate very literally. One commenter said the State may find itself disagreeing with its auditor over the definitions of certain requirements and methodologies. Without additional CMS clarification, the auditor may revert to a reasonableness test when clarification is lacking, which may not meet the objectives of CMS in promulgating these rules.

*Response:* We agree that States may have some flexibility in interpreting the payment provisions under their State plan, and we expect that auditors will consult with the State agency on such interpretative issues. The calculation of the hospital-specific limits is less discretionary; DSH payments are limited by Federal law to each qualifying hospital's specific uncompensated care costs incurred in furnishing hospital services to the Medicaid and uninsured populations.

*Comment:* A few commenters said this rule would adversely affect access to health care for all children, not just Medicaid beneficiaries. Hospitals may be forced to close programs or clinics in order to cover revenue losses and access to care for all children, not just Medicaid beneficiaries would be limited. Children and their families would be forced to seek care in emergency rooms, which is a more expensive visit for Medicaid and will invariably result in ever more crowded emergency rooms.

*Response:* DSH payments are a way to provide additional funding to hospitals that serve a disproportionate share of low income patients, but the statute limits DSH payments to each hospital to the total uncompensated care costs in serving the Medicaid and uninsured populations. Since these limitations have been in place since 1993, CMS does not believe that any hospital could reasonably have relied on receiving funding above that level. CMS recognizes that States must use estimates to determine DSH payments in a given year. The information available through the reporting and auditing program under this regulation will assist States in ensuring that those estimates do not generate DSH payments that exceed the hospital-specific DSH limit.

*Comment:* One commenter believes the independent audit requirements should be included in the existing framework for audits of Federal programs under the Single Audit Act and include the five items requiring verification in the OMB Circular A–133 Compliance Supplement. One commenter suggested revision of OMB Circular A–133 Compliance Supplement to require the State Medicaid program's auditor test this reporting requirement by ensuring the Medicaid program received the information and audit assurances from the hospitals, accumulated the information, and properly reported the results to the Centers for Medicare and Medicaid Services.

*Response:* The DSH audit and report is a necessary element in the administration of the Medicaid program. The purpose of the audit is to ensure that States make DSH payments under their Medicaid program that are in compliance with Section 1923 of the Social Security Act. DSH payments are a small portion of a State's Medicaid program and the OMB Circular A–133 direction is far larger in scope than this audit.

It would be inappropriate to make the requested revisions to OMB Circular A–133 as OMB Circular A–133 specifically exempts Medicaid payments made by the State because these Medicaid payments are not considered to be ''federal awards expended under this Section [Section 205, Basis for Determining Federal Awards Expended]''. In addition, Subpart E also indicates that the scope of the A–133 Audit shall cover the entire operations of the auditee or a department, agency or other organizational unit.

It should be noted that the Single State Audit Agency qualifies as operating independently from the Medicaid Agency and, therefore, could perform the DSH audit albeit separate from the Single State Audit Act.

*Comment:* One commenter requests confirmation that the audit would be a Program Performance Audit of the State as defined in Government Auditing Standards, July 1999, Chapter 2, and as such would not require verification by a Certified Public Accounting firm as in the case of financial audits that lead to the expression of an opinion as defined in Chapter 3. One commenter noted that requiring the audits of the States to be performed under Generally Accepted Government Auditing Standards (GAGAS) will ensure that the reports are accurate and can be relied upon by third party users. One commenter stated that there are three sets of standards within GAGAS: Financial Audits, Attestation Engagements, and Performance Audits and questioned which set of standards would apply to the independent audit of DSH payments.

*Response:* The standards in GAGAS generally exceed the scope and objectives of the DSH audit and report. GAGAS rules govern the audits of government organizations, programs activities, functions or funds. In general, government audits are either performance audits, attestation engagements or financial audits.

In financial and performance audits, the focus is on the government entity, its management of a program and/or the financial management and reporting systems associated with that program. The DSH audit and report is a review of a segment of the Medicaid program and therefore does not fall within the scope of a performance or financial audit under GAGAS rules.

Attestation engagements may take a narrower focus (less than full program review) and, therefore, may seem to more directly fit with the scope of the DSH audit and report. However, attestation agreements under GAGAS rules include standards beyond non-governmental attestation agreements and these additional standards exceed the scope of the DSH audit and report.

The DSH audit and report is a necessary part of the administration of the Medicaid program. The purpose of the audit is to ensure that States make DSH payments under their Medicaid program that are in compliance with Section 1923 of the Social Security Act. The audit does not encompass the review of the State's Medicaid program, it simply ensures that one portion of the program is conducted in compliance with Federal statutory limits. In addition, the DSH audit will rely on financial and cost report data provided by hospitals that are subject to generally accepted accounting principles as part of their primary reporting function.

4. Section 1115 Demonstrations

*Comment:* One commenter believes the proposed rule as presently drafted will have a significant impact on hospitals if an exemption is not provided. The State has operated its DSH program for a number of years in strict accordance with the prescriptive terms negotiated between the State and CMS.

*Response:* The MMA imposes audit and reporting requirements on all States that make DSH payments. As part of this process, CMS must determine if all hospitals receiving DSH payments under the Medicaid State plan actually qualify to receive such payments and that actual DSH payments do not exceed

the hospital-specific DHS limit for that same period. To the extent that a State makes DSH payments under a waiver demonstration, the State is not exempted from the rules surrounding DSH payments, particularly those at 1923(g) of the Act, and the audit and reporting requirements would still apply to that State.

*Comment:* Several commenters had questions regarding how States that operate their Medicaid programs under Federal waivers would do their Medicaid DSH reporting. The commenters suggest the regulation should specify that the DSH reporting and audit requirements do not apply to States that do not make DSH payments or are not required to comply with DSH requirements pursuant to Federal waivers of DSH requirements. The commenters urge CMS to exempt States with 1115 waivers from this rule if the waivers are based on certified public expenditures (CPEs) for Medicaid and DSH payments. One commenter stated that the recent implementation of the State's 1115 waiver completely changes the way DSH payments are calculated for the State's hospitals, therefore, this audit requirement would be duplicative.

*Response:* These DSH audit and reporting requirements apply to States with Section 1115 demonstrations to the extent that the waiver list associated with the demonstration does not explicitly waive the State from compliance with Section 1923 of the Act. The DSH audit and reporting time frames for States with DSH programs and Section 1115 demonstrations are subject to the same time frames as those States without 1115 demonstrations. The only exception would be if a State has a demonstration project under Section 1115 that includes a waiver of the requirements of Section 1923 so that the State does not make Medicaid DSH payments at all. In that instance, since there are no DSH payments, the DSH audit and reporting requirements would not apply.

5. Time Period Subject to DSH Audit and Report

*Comment:* One commenter asked for clarification of the treatment of DSH payments when a State makes a portion of the fiscal year's DSH payments after the end of its fiscal year. One commenter asked whether, when DSH payments are made on an accrual accounting basis and adjusted after the report has been filed, whether the State must file a corrected report. Several commenters indicated that dissatisfied hospitals have the ability to appeal their payments, a process that could extend the period of time before the final payment is known. They asked how to report regular Medicaid rate payments that are not known at the end of any given State fiscal year. One commenter said that many States allow Medicaid providers up to a year to submit claims following the date of service. As such, the commenter indicated that there is often a significant lag in payments to Medicaid hospitals and uncompensated care figures would be overstated if only cost incurred and payments received during a SFY are considered.

*Response:* Since the deadline for reporting the audit findings has been extended to at least three full years after the close of the Medicaid State plan rate year subject to audit, hospitals would have received all Medicaid and DSH payments associated with that Medicaid State plan rate year. This two-year period accommodates the one-year concern expressed in many comments regarding claim lags and is consistent with the varying hospital cost reporting periods and adjustments and accommodates DSH payments made from different allotment years.

It should be noted that, to the extent that a State makes a retroactive adjustment to non-DSH payments after the completion of the audit for that particular Medicaid State plan rate year, the hospital would necessarily have received and booked the revenues in a subsequent Medicaid State plan rate year. Under these circumstances, the revenue adjustments would be measured during the audit of the Medicaid State plan rate year in which the revenues were received.

The treatment of post-audit Medicaid payments, including regular Medicaid rate payments, supplemental and enhanced payments, Medicaid managed care payments, DSH, and ''self-pay'' revenues and other collections including liens would be treated as revenues applicable to the Medicaid State plan rate year in which they are received.

*Comment:* Several commenters noted that the State is required to indicate the Medicaid Managed Care Organization Payments paid to the hospital for the SFY being reported. Claims may be submitted to the Medicaid Managed Care Organization (MCO) for payment up to one year after the date of service. Therefore, payments made by the MCO for claims with date of service in the SFY may be submitted up to a year after the service date by the hospital. The payments would not be available before 12 months after the SFY at a minimum. Obtaining the amount paid by the MCO for the SFY being reported is not possible by the end of the SFY.

*Response:* Based on the modifications to the audit and reporting deadlines and the Medicaid two-year timely filing claim limit, there should not be a significant adjustment to Medicaid payments that would warrant a corrected report. To the extent that such an adjustment to Medicaid payments occurs, no corrected audit or report is necessary. To the extent that a State makes a retroactive adjustment to non-DSH payments after the completion of the audit for that particular Medicaid State plan rate year, the hospital would necessarily have received and booked the revenues in a subsequent Medicaid State plan rate year. Under these circumstances, the revenue adjustments would be measured during the audit of the Medicaid State plan rate year in which the revenues were received.

6. Verification I—Proper Reduction to Uncompensated Care Cost

*Comment:* Several commenters believe that different parts of the regulation define ''uncompensated care costs'' differently, and they should be modified and made consistent. The commenters provided suggested changes in an effort to eliminate a contradiction between the definitions, contained in §§ 447.299(c)(15) and 455.204(c). Several commenters believe that Verification #1 requires each hospital receiving DSH payments reduce its uncompensated care costs by the amount of DSH payments received in any given year. The commenters argued that the statute clearly defines the DSH limit so that DSH payments should not be offset against the hospital specific limits. They noted that the language of Section 1923(j) only requires the auditors to verify '''the extent to which'' the costs have been reduced. Thus, if costs have not been reduced at all, the auditor would verify that fact and the audit requirement would be met. The regulatory language should be revised to be consistent with the statutory requirement. Other commenters stated that the proposed rule requires an audit verification that each disproportionate share hospital in the State has reduced its uncompensated care costs in order to reflect the total amount of claimed DSH expenditures. They are not clear how a hospital can demonstrate this, as costs generally are not reduced by expenditures. One commenter recognizes that CMS likely based its formulation of the verification requirement on the statutory language, which contains similarly confusing terminology, requiring the audit to verify ''the extent to which hospitals in the State have reduced their

uncompensated care costs to reflect the total amount of claimed expenditures made under [the Medicaid DSH statute].'' The commenter suggests that a more useful interpretation of this statutory language would be to require verification that DSH payments have not exceeded uncompensated care costs.

*Response:* The purpose of the statute is for States to audit actual DSH payments made under the approved Medicaid State plan against actual eligible uncompensated hospital costs for the same time period. In reviewing the meaning of the statutory language, we have determined that verification 1 is designed to ensure that hospitals are able to fully retain the DSH payments made to them for the uncompensated cost of providing inpatient and outpatient hospital services to Medicaid beneficiaries and individuals with no source of third party coverage net of all Medicaid payments received and payments by or on behalf of individuals with no source of third party coverage for the services they received. We have revised the regulation text to make this clearer.

7. Verification 2—Calculation of Eligible Uncompensated Care Cost, Prospective Estimates Versus Reconciled Cost

*Comment:* Many commenters indicated that for States that determine the individual hospital DSH limit prospectively, the one-year filing requirement may be attainable (at least after these rules take effect) if the requirement is only to validate the accuracy of the prospective calculation. But for those States that do base the determination on current year costs, a report based on a final audit of hospital cost reports could not be submitted within one year. Final settlement of hospitals' cost reports is typically contingent upon completion by a Medicare intermediary of audits—a process that can take several years. CMS should allow these States additional time to submit the audit certifications, so these certifications can be based on the final settled cost report. Alternatively, CMS could clarify the rule to permit the required report to be based on a hospital's as-filed cost report. If necessary, there could be later reconciling adjustment after the cost report is finally settled and an audit certification can be made.

*Response:* CMS recognizes that States may need to use estimates to determine DSH payments made by States to individual qualifying hospitals in an upcoming Medicaid State plan rate year. Section 1923(j) of the Act requires States to report and audit hospital-specific DSH payments and hospital-specific uncompensated care costs. To meet this requirement, States must perform audits associated with defined periods of time and must identify the actual costs incurred and payments received during that defined time period. To respond to comments on the practicality of audit timing, we have modified the time frame for the audit and reporting requirements as discussed above. We also note that we expect that reports and audits will be based on the best available information. If audited Medicare cost reports are not available, the DSH report and audit may need to be based on Medicare cost reports as filed.

*Comment:* Numerous States indicated that if the audit requirement is simply to verify the manner in which the DSH limit was applied prospectively, the one-year timeline may be realistic for years subsequent to the adoption of a final regulation for States using prospective methods, and hospitals with fiscal years different than the State's should not present as much of a concern, because the prospectively determined limit would have been calculated based on cost reports for earlier time periods. Accordingly, the commenters request that CMS clarify that the proposed regulations are not intended to disturb the use of prospective calculations to apply the individual hospital DSH limit.

*Response:* This regulation is not intended to require States to implement retrospective DSH methodologies. CMS recognizes that States may need to use estimates to determine DSH payments in an upcoming Medicaid State plan rate year. However, Section 1923(j) of the Act requires confirmation that DSH payments made by States to individual qualifying hospitals do not exceed the actual cost limitation imposed by Congress.

Based on the revisions to the auditing and reporting timeframes, which, in part, requires the Medicaid State Plan rate year 2005 and 2006 audits to be completed no later than the last day of Federal fiscal year 2009, it is feasible for the audit to measure eligible uncompensated care costs incurred against the DSH payments received in a given time frame. The transition period included in the final regulation ensures that States may adjust those estimates prospectively to avoid any immediate adverse fiscal impact and to ensure that future DSH payments do not exceed the hospital-specific DSH limits.

*Comment:* Several commenters noted that there is no current law requiring that DSH payments made in a fiscal year correspond to costs from that same fiscal year. In addition, CMS has never before imposed a reconciliation requirement. A few commenters stated Section 1923(g) of the Act does not require that the OBRA 1993 limits be recalculated and reapplied to reflect subsequently available year-of-service data.

*Response:* Section 1923(j) of the Act requires States to report and audit specific payments and specific costs. These reports must assess compliance with the statutory hospital-specific limitations on the level of DSH payments to which qualifying hospitals were entitled. Section 1923(g)(1)(A) specifies that DSH payments cannot exceed, ''the costs incurred during the year of furnishing hospital services (as determined by the Secretary and net of payments under this title, other than under this Section, and by uninsured patients * * *)''. The goal of the regulation is to audit DSH payments made under the authority of the Medicaid State plan and to ensure that States do not make DSH payments that exceed the hospital-specific cost limit defined under the Omnibus Budget Reconciliation Act of 1993.

CMS recognizes that States may need to use estimates to determine DSH payments in an upcoming Medicaid State plan rate year. However, the statute requires confirmation that DSH payments do not exceed the actual cost limitation imposed by Congress.

*Comment:* Numerous commenters stated that the DSH reporting and auditing requirements contained in MMA were intended only to ensure compliance with the DSH requirements, not to change the DSH requirements themselves. They asserted that nothing in the statute either requires or encourages a change in CMS's longstanding policy that DSH payments can be based on a prospective estimate of a hospital's uncompensated care costs. They argued that the statute does not require that payments be based on actual audited costs and nothing in the statute requires CMS to impose this dramatic shift in policy. This approach allows for adjustment during future years for reconciling DSH payments to actual costs. Numerous commenters said that CMS has always acknowledged that the law permits States to base their DSH payments on a prospective estimate of a hospital's uncompensated care costs for a given year, derived from the hospital's costs in prior years, and many if not most States utilize this approach. A few commenters noted that CMS has allowed States flexibility to use estimates of current year uncompensated costs. One commenter stated the statute provides that a DSH payment adjustment ''during a fiscal

year'' is considered non-compliant with the limit if the adjustment exceeds the uncompensated costs for Medicaid and uninsured patients incurred ''during the year'' and that CMS appears to be basing this burdensome reconciliation requirement solely on this language. The commenter believes that while the provision does limit current year payments to current year costs, nothing in the language mandates the use of actual audited costs. Indeed, the commenter indicated that reliable estimates based on audited prior year data will produce sufficient controls on the DSH payments and fulfill Congress' intent of limiting DSH expenditures on a hospital-specific basis.

*Response:* Section 1923(g)(1)(A) of the Act specifies that DSH payments cannot exceed, ''the costs incurred during the year of furnishing hospital services (as determined by the Secretary and net of payments under this title, other than under this Section, and by uninsured patients * * *)''. The goal of the regulation is to audit DSH payments made under the authority of the Medicaid State plan and to ensure that States do not make DSH payments that exceed the hospital-specific cost limit defined under the Omnibus Budget Reconciliation Act of 1993.

Section 1923(j) of the Act expressly requires States to report and audit specific payments and specific costs. As part of this process, CMS must obtain all information necessary to determine if all hospitals receiving DSH payments under the authority of the approved Medicaid State plan actually qualify to receive such payments and that actual DSH payments made by States do not exceed the hospital-specific limit for the same period. DSH payments are limited by Federal law to each qualifying hospital's specific eligible uncompensated care cost limit.

CMS recognizes that States may need to use estimates to determine DSH payments in an upcoming Medicaid State plan rate year. However, the statute requires confirmation that DSH payments do not exceed the actual cost limitation imposed by Congress. CMS has modified the regulation to include a transition period to ensure that States may adjust those estimates prospectively to avoid any immediate adverse fiscal impact and to ensure that future DSH payments do not exceed the hospital-specific DSH limits.

Auditing actual payments made in a given year against estimated hospital uncompensated care costs in that same year would not ensure that DSH payments did not exceed actual uncompensated care costs. Several Inspector General audits attest to the discrepancies in the results. In fact, measuring the difference between DSH payments and estimates of uncompensated care costs would never produce a true determination of whether or not DSH payments in a given year exceeded the Congressionally defined cost limit for that year.

*Comment:* Numerous commenters indicated that States cannot determine the actual uncompensated care costs prior to or during the year that DSH payments are made. The commenters stated that this could prevent States from making prospective estimates of Medicaid shortfalls and uninsured costs. The commenters recommend that States be allowed to continue to utilize historical information to perform prospective DSH limit calculations.

*Response:* CMS recognizes that States may need to use estimates to determine DSH payments in an upcoming Medicaid State plan rate year. However, CMS does not have authority to authorize payments that exceed statutory hospital-specific limits and those limits are based on actual uncompensated care costs. The goal of the regulation is to audit DSH payments made under the authority of the Medicaid State plan and to ensure that States do not make DSH payments that exceed those statutory hospital-specific cost limits. The information necessary for such confirmation is readily available to hospitals and the State based on existing financial and cost reporting tools.

*Comment:* Many commenters noted that the proposed methodology would be inconsistent with their approved Medicaid State plan and conflicts with past CMS guidance and practice. They indicate that a retrospective audit to determine the accuracy of the estimates used to determine uncompensated care costs based on the approved prospective methodology would require changing the State plan. They ask how this audit should be conducted by States that already have CMS approval for use of prospective methodologies, not to mention that a retroactive audit could significantly affect already approved programs.

*Response:* This regulation is not intended to require States to implement retrospective DSH methodologies. CMS recognizes that States may need to use estimates to determine DSH payments in an upcoming Medicaid State plan rate year. However, CMS cannot authorize DSH payments that exceed the limitations imposed by Congress. States will have to determine how to best ensure that prospective DSH methodologies do not result in payments that exceed those limitations, either by revising those methodologies or by providing for reconciliation of prospective payments with those limits. CMS as always is available to offer technical assistance to States in developing such methodologies.

CMS has modified the regulation to include a transition period to ensure that States may adjust prospective estimates to avoid any immediate adverse fiscal impact.

8. Fiscal Impact—Effect on Federal Financial Participation

*Comment:* A few commenters questioned whether CMS will withhold Federal Financial Participation from the States until its Independent Audit of DSH Payments is completed and filed with CMS.

*Response:* The final regulation defines the time periods applicable to the auditing and reporting of DSH payments. These deadlines provide sufficient time for States to comply with the statute. The final regulation also provides that Federal financial participation for DSH payments is not available to any State that has not submitted its required audits and reports.

*Comment:* A few commenters said that the proposed regulation states the penalty for failure to provide the required information by the stipulated deadline but does not address the question of whether or not CMS will require States to return DSH funds if the information collected is unsatisfactory to CMS.

*Response:* The goal of the regulation is to audit DSH payments made under the authority of the Medicaid State plan and to ensure that States do not make DSH payments that exceed the hospital-specific cost limit defined in Section 1923(g) of the Act. CMS has modified the regulation to include a transition period to ensure that States have an opportunity to refine audit and reporting practices and determine the impact on the State DSH methodologies. The final regulation provides that Federal financial participation for DSH payments is not available to any State that has not submitted its required audits and reports. However, CMS intends to work with States to ensure that the audits and reports meet all statutory and regulatory requirements.

*Comment:* A few commenters asked for clarification on the actions that may be taken against States if States are not found to be in compliance with all verifications required as part of the audit (§ 455.204(c)).

*Response:* The final regulation defines the time periods applicable to the auditing and reporting of DSH

payments. These deadlines provide sufficient time for States to comply with the statute. The final regulation also provides that Federal financial participation in DSH payments is not available to any State that has not submitted its required audits and reports. As mentioned above, CMS intends to work with States to ensure that the audits and reports meet all statutory and regulatory requirements.

*Comment:* A few commenters said the proposed regulation is silent on the question of post-audit adjustments. In some cases, audits will reveal actual costs that were not included in the estimated uncompensated care costs provided. In such cases, provided there are funds remaining in the State's DSH allotment or other money available for such purposes, the commenters recommended that States should be permitted to compensate hospitals.

*Response:* CMS has modified the regulation to lengthen the time frame for preparation of the required report and audit, and to include a transition period to ensure that States have time to refine their audit processes. The instance of post audit adjustments will be significantly lessened as a result.

9. Verification Three—Data Sources Used in Calculation of Eligible Uncompensated Care Costs

*Comment:* Many commenters requested clarity on the mechanics of reconciliation. Although the MMA requires an annual certified public audit, the proposed rule is unclear about how the audit will reconcile DSH payments and the hospitals' calculation of actual compensated care. Hospitals submit accurate data on Medicaid and uncompensated care at a point in time. Data can change over time as claims and payment appeals are settled.

*Response:* We believe that the three-year period allotted for completion of the audit accommodates these concerns. Sufficient time is available to ensure that necessary cost reports and other financial data are available to make these determinations. This accommodates the concern expressed in many comments regarding claims lags and is consistent with the varying hospital cost report periods and adjustments. CMS has developed a General DSH Audit and Reporting Protocol to provide guidance to States, DSH hospitals and auditors in the completion of the DSH audit. This protocol provides general instructions regarding the calculations the auditor will make based on the data provided.

10. Verification Four—Proper Accounting of Medicaid and Uninsured Revenues

*Comment:* A few commenters noted that the audit and reporting requirements are unnecessary in several States where the federal DSH allocation to the States has consistently fallen short of the State's aggregate DSH limit by at least $200 million in each of the past five years.

*Response:* The Statewide aggregate DSH allotment is only one of the limitations on DSH payments. The audit and reporting requirements also concern hospital-specific limitations, which involve review of specific payments and specific costs by individual hospital. The goal of the audit and report is to ensure that DSH payments made by States under the authority of the approved Medicaid State plan do not exceed the hospital-specific uncompensated care cost limit as required by Section 1923(g) of the Act. Irrespective of a State's aggregate DSH allotment, or overall levels of uncompensated care, a DSH hospital may not receive more in DSH payments than the individual hospital's eligible uncompensated care costs.

*Comment:* A few commenters stated that the financial exposure for the Federal government through the use of estimated rather than reconciled data is not significant, as total DSH expenditures are limited by the Statewide DSH allotment. The benefit obtained through the reconciliation mandate is therefore far outweighed by its costs.

*Response:* As discussed above, the Statewide DSH allotment and hospital-specific limitations are separate and distinct. Section 1923(g)(1)(A) of the Act specifies that DSH payments cannot exceed, ''the costs incurred during the year of furnishing hospital services (as determined by the Secretary and net of payments under this title, other than under this Section, and by uninsured patients * * *)''. Section 1923(j) of the Act and this regulation require States to audit DSH payments made under the authority of the Medicaid State plan and to ensure that States do not make DSH payments that exceed this hospital-specific cost limit.

The data elements necessary for the State to complete the DSH audit and report should, in part, be information the State already gathers to administer the DSH program. Thus, CMS believes that the burden on the State will not be substantial. The State will have some additional cost associated with engaging an auditor but that cost is eligible for Federal administrative matching funds.

*Comment:* Numerous commenters expressed concern about the proposed rule because adoption would greatly reduce the DSH payments to hospitals. Such a reduction would eliminate some of the future services hospitals provide. The largest burden would be on the impoverished communities since many of those people could not travel to receive those services elsewhere.

*Response:* Hospitals should not realize a significant reduction in DSH payments based on the audit and reporting requirements. Moreover, any reduction would simply be the result of ensuring that limited State DSH funds are used appropriately and meet the requirements of the Medicaid statute. This rule will help to ensure that Medicaid DSH payments appropriately recognize allowable unreimbursed Medicaid and uninsured uncompensated care costs. The DSH law was enacted to recognize needs of hospitals that serve a disproportionate number of Medicaid and low-income patients. In 1993, Congress imposed hospital-specific limitations on the level of DSH payments to which qualifying hospitals were entitled. Section 1923(g)(1)(A) specifies that DSH payments cannot exceed, ''the costs incurred during the year of furnishing hospital services (as determined by the Secretary and net of payments under this title, other than under this Section, and by uninsured patients * * *)''. Congress clearly identified the DSH limit as specific to the costs incurred for providing certain hospital services to Medicaid individuals and individuals with no source of third party coverage.

*Comment:* Several commenters expressed concern that the results of audits may be used to attempt to take back money from States and/or hospitals for failing to meet standards that they never knew existed, long after hospital's fiscal year is over. If the State would be required to return DSH money to the Federal Government, this would necessitate the return of DSH money to the State by hospitals. This would be extremely burdensome for hospitals, which undoubtedly would already have spent that money serving their low-income and uninsured patients. One commenter said that after-the-fact exposure is untenable for States with balanced budget requirements.

*Response:* CMS has modified the regulation to include a transition period to ensure that States may adjust uncompensated care estimates prospectively to avoid any immediate adverse fiscal impact and to assist States in ensuring that future DSH payments do not exceed the hospital-specific DSH limit. To permit States an opportunity to

develop and refine audit procedures, audit findings from Medicaid State plan rate year 2005–2010 will be limited to use for the purpose of estimating prospective hospital-specific uncompensated care cost limits in order to make actual DSH payments in the upcoming Medicaid State plan rate years. CMS is not requiring retroactive collection for Medicaid State plan rate years that have already passed. By using that time to improve State DSH payment methodologies, States may avoid circumstances in which DSH payments that exceed Federal statutory limits must be recouped from hospitals. CMS will also be available to provide necessary technical assistance to States to ensure proper implementation of these requirements.

*Comment:* One commenter said that their State plan permitted DSH payments to DSH-eligible, out-of-State hospitals that service the State's Medicaid recipients. The commenter requested clarity regarding the State's responsibility in terms of hospital-specific DSH limit calculations and auditing and reporting requirements insofar as these out-of-State hospitals are concerned.

*Response:* A State is required to audit payments and costs for only those DSH hospitals that are located within the State. This method will allow the auditor to recognize DSH payments received from other States in addition to the DSH payments received by that hospital under the ''home-State's'' approved Medicaid State plan.

For States that make DSH payments to hospitals in other States, the State must include in the reporting requirements the DSH payments made to hospitals located outside of the State but would not be required to audit those out-of-State DSH hospital's total DSH payments/total eligible uncompensated care costs. This method will ensure that no DSH hospital is audited more than one time per year for purposes of the DSH auditing and reporting requirements under Section 1923(j) of the Act.

*Comment:* A few commenters asked whether CMS will require States to include in the report information on patients from another State.

*Response:* The goal of the audit and report is to ensure that DSH payments made by States under the authority of the approved Medicaid State plan do not exceed the hospital-specific cost limit. In order to do this, all applicable revenues must be offset against all eligible costs. For purposes of determining the hospital-specific DSH limit, revenues would include all Medicaid payments made to hospitals for providing inpatient and outpatient hospital services to Medicaid individuals (irrespective of the State in which the individual is eligible) and all payments made by or on behalf of patients with no source of third party coverage for the inpatient and outpatient hospital services they received. For purposes of the DSH audit and to determine whether hospital-specific cost limits have been exceeded, all DSH payments made by States and received by a hospital would need to be offset against the determined eligible uncompensated care cost limit.

Any Medicaid payments received by a hospital from any Medicaid agency (in state or out of state) should be counted as revenue offsets against total incurred Medicaid costs. Any DSH payments received by a hospital from any Medicaid agency (in state or out of state) must be counted as an offset against uncompensated care for purposes of the DSH audit and ensuring that the hospital-specific DSH limit is not exceeded.

*Comment:* One commenter requested instructions for reporting information to CMS related to DSH payments on an annual basis. Annual reporting requirements also contain specific reporting requirements related to DSH payments. The commenter asked for clarification as to whether the proposed rules supersede the reporting requirements detailed in the March 26, 2004, **Federal Register** Notice [CMS–2062–N].

*Response:* All DSH reporting requirements published under CMS–2062–N are superseded by Section 1923(j) of the Act and this implementing regulation.

*Comment:* A few commenters noted the proposed § 447.299(c)(8) incorrectly refers to Section 1923(g) instead of referring to the entire Section 1923.

*Response:* The regulation has been modified to reflect the correct statutory citation.

*Comment:* A few commenters noted that the Reporting form was not included with the proposed rules and requested a copy of the example Reporting form.

*Response:* A modified Reporting form is included in this regulation.

*Comment:* One commenter noted that in FY 2003, total Federal DSH allotments to States totaled just under $9 billion. The commenter requests copies of any audit findings and/or programs associated with CMS' historic and ongoing efforts to audit and/or verify the figures used by States to justify Federal funds.

*Response:* The commenter may request information consistent with the authority of the Freedom of Information Act.

*Comment:* One commenter noted CMS has not pointed to any systematic findings that call into question the reasonableness of approved methodologies.

*Response:* The statutory authority under MMA instructed States to report and audit specific payments and specific costs. This rule does not call into question the reasonableness of approved methodologies; it simply implements the statutory reporting and auditing requirements to determine whether DSH payments were proper with respect to the specific DSH hospitals that were paid.

*C. Regulatory Impact*

*Comment:* Several commenters stated that there would be a significant burden on the States for the reporting requirement in terms of time and effort to prepare and submit the required information and that CMS' estimate of the time needed for the proposed § 447.299(c) reporting requirements is underestimated. One commenter questioned whether this estimate is based upon an assumption by CMS that States have historically been collecting and verifying the information required in the report to CMS. The commenter requested that CMS provide details on how this estimate was calculated.

*Response:* CMS believes that since the audit relies on documents already available to hospitals that the audit data burden will neither be significant nor costly. The reporting of each year's audit findings will be achieved through the completion of a one-page Reporting form. The elements necessary for this report will be extrapolated from the data and analysis performed by the auditor and will be based on existing source documentation.

*Comment:* One commenter noted that if a State utilizes different criteria for qualifying hospitals as a DSH than the Medicaid Inpatient Utilization Rate or the Low-Income Utilization Rate, then these two calculations would be unnecessary. The commenter asserted that requiring a State to calculate and submit the Medicaid Inpatient Utilization Rate and Low-Income Utilization Rate calculations would be an additional burden. The commenter asked if CMS considered this added effort in the estimate of States' time and effort to prepare and submit the required information.

*Response:* Section 1923(j) of the Act imposes audit and reporting requirements on States regarding payments to DSH eligible hospitals. As part of this process, CMS must

determine if all hospitals receiving DSH payments under the Medicaid State plan actually qualify to receive such payments. Sections 1923(b)(1)(A) and (B) of the Act require that all hospitals meeting the Medicaid Inpatient Utilization Rate (MIUR) or the Low Income Utilization Rate (LIUR) calculated therein are deemed DSH hospitals. This is the minimum Federal standard. States have the right to use alternative qualifying criteria that are broader. States that use only the LIUR or only the MIUR to determine DSH qualification should report on the statistic utilized in the approved Medicaid State plan for the Medicaid State plan rate year under audit. State using a broader methodology should use that statistic in lieu of the MIUR or LIUR.

We believe that since the audit relies on documents already available to hospitals that the audit data burden will neither be significant nor costly. The reporting of each year's audit findings will be achieved through the completion of a one page Reporting form. The elements necessary for this report will be extrapolated from the data and analysis performed by the auditor and will be based on existing source documentation.

*Comment:* A few commenters believe that the information collection burden is significant, that in many cases the information requested is ambiguous or inaccurate and there are likely more efficacious means of implementing the statutory requirements, for instance, by more closely tracking the S–10 categories. The commenters urge CMS to revise the regulation to reduce the paperwork burden associated with the new audit and reporting requirements and avoid imposing unnecessary additional administrative costs on States and hospital providers by considering less burdensome means of collecting necessary information.

*Response:* Hospitals will be required to provide the State with data extracted from existing cost and financial reporting tools as well as copies of the source documents. The State must provide these data as well as Medicaid Management Information Systems and Medicaid State plan information to the auditor. The source documents would include the Medicare 2552–96 cost report, audited hospital financial statements and hospital accounting records in combination with information provided by the State's MMIS.

We believe that since the audit relies on documents already available to hospitals that the audit data burden will neither be significant nor costly. The reporting of each year's audit findings will be achieved through the completion of a one page Reporting form. The elements necessary for this report will be extrapolated from the data and analysis performed by the auditor and will be based on existing source documentation.

Worksheet S–10 is not part of the Medicare 2552–96 step-down process used to allocate inpatient and hospital outpatient costs. The cost allocation process utilized in the Medicare 2552–96 cost report is considered a key component of determining Medicaid and uninsured hospital costs.

*Comment:* One commenter said that while collection activities in response to audit requirements are exempt from the Paperwork Reduction Act, CMS should acknowledge that the new substantive requirements that it is announcing in the form of audit standards will impose independent new paperwork burdens on States separate and apart from the response to the audits. For example, CMS' proposal that the audits verify that DSH payments do not exceed actual year costs will impose a massive new DSH reconciliation requirement on States so that the audits do not conclude that they have exceeded the hospital-specific DSH limits. Therefore, the commenters believe CMS should evaluate the paperwork burden associated with new standards announced as part of the audit requirements as well as the reporting requirements.

*Response:* The goal of the regulation is to audit DSH payments made under the authority of the Medicaid State plan and to ensure that States do not make DSH payments that exceed the hospital-specific cost limit defined under Section 1923(g) of the Act. The information necessary for such confirmation is readily available to hospitals and the State based on existing financial and cost reporting tools. The reporting of each year's audit findings will be achieved through the completion of a one page Reporting form. The elements necessary for this report will be based on existing source documentation.

*Comment:* Several commenters noted that the proposed rules will have a significant economic impact and therefore, the Regulatory Flexibility Act (RFA) requires CMS to analyze options for regulatory relief of small businesses, such as hospitals. The newly announced DSH requirements contained in the proposed rule and discussed throughout this comment letter may result in decreased DSH funding for some hospitals, jeopardizing their ability to provide broad access to services for the uninsured and underinsured.

*Response:* CMS believes that this rule would not have a significant economic impact on a substantial number of small entities. The regulation requires States to audit and report DSH payments made to DSH eligible hospitals in a given Medicaid State plan rate year. Hospitals will only be required to provide data to States from existing primary source documents such as the Medicare 2552–96 cost report, audited hospital financials, and hospital accounting records. The regulation also includes a transition period to ensure that no immediate fiscal impact is realized by States or hospitals.

*Comment:* Many commenters noted that the cost for hospital audits can reach $50,000 or higher per hospital and therefore contended that the estimate clearly suggests the economic impact of this one audit requirement will meet the test of a major rule under the Regulatory Flexibility Act.

*Response:* Although the State will have some additional cost associated with engaging an auditor, but that cost is eligible for Federal administrative matching funds. The DSH audit and report is a necessary element in the administration of the Medicaid program to ensure that hospital-specific DSH limits are not exceeded by DSH payments made under the approved Medicaid State plan for a given year.

Hospitals should not incur additional costs as they will be required to provide the State with data extracted from existing hospital cost and financial reporting tools supplemented with State generated data from the State's Medicaid Management Information System.

## IV. Changes to the Proposed Rule

As explained in our responses to comments, we have made the following revisions to the DSH Auditing and Reporting regulations published in the August 26, 2005 Proposed Rule:

### *A. Reporting Requirements*

1. Audit Year and Submission Dates Defined

CMS has modified the regulation at § 447.299(c) to address concerns regarding the inability to complete the audit and report within a year from the end of SFY 2005. The regulation has been modified to identify the Medicaid State plan rate year 2005 as the first time period subject to the audit. The basis for this modification is recognition of varying fiscal periods between hospitals and States. The Medicaid State plan rate year is the one uniform time period under which all States must estimate uncompensated costs in order

to make DSH payments under the approved Medicaid State plan. The regulation has also been modified to identify that each audit report must be submitted to CMS within 90 days of the completion of the independent certified audit. The reports associated with Medicaid State plan rate years 2005 and 2006 are due no later than December 31, 2009. Each subsequent audit report is due no later than December 31st of the FFY ending three years after the Medicaid State plan rate year under audit.

2. Report Data Elements

CMS has modified the regulation at § 447.299(c) to address many comments concerning the necessary data elements to fulfill the audit and reporting requirements. Specifically, the regulation has been modified to remove the following data elements:

1. Medicare provider number.
2. Medicaid provider number.
3. Type of hospital.
4. Type of hospital ownership.
5. Transfers.
6. Medicaid eligible and uninsured individuals.

In addition, the regulation at § 447.299(c) has been modified to add or clarify the following data elements which are necessary to fulfill the auditing and reporting requirements:

1. Identification of facilities that are Institutes for Mental Disease (IMD) receiving DSH payments;
2. Identification of out-of-state hospitals receiving DSH payments;
3. State estimate of hospital-specific DSH limit;
4. Medicaid inpatient utilization rate (if applicable);
5. Low-income utilization rate (if applicable);
6. State-defined DSH eligibility statistic (if applicable);
7. Total inpatient and outpatient Medicaid payments;
8. Total inpatient and outpatient Medicaid cost of care;
9. Total Medicaid inpatient and outpatient uncompensated care;
10. Total inpatient and outpatient uninsured and self-pay revenues;
11. Total applicable Section 1011 payments received by the hospital;
12. Total inpatient and outpatient uninsured cost of care;
13. Total inpatient and outpatient uninsured uncompensated care;
14. Total eligible inpatient and outpatient uncompensated care.

The Reporting form has also been modified to reflect these modifications.

*B. Audit Requirements*

1. Definitions

CMS has modified the regulation at § 455.201 to clarify the definition of independent certified audit to mean that the Single State Audit Agency or any other CPE firm that operates independently from the Medicaid agency is eligible to perform the DSH audit and to define Medicaid State plan rate year as the time period subject to the audit. The definition of State fiscal year has been removed.

2. Certified Independent Audit Requirements

Based on many comments regarding the potential immediate adverse fiscal impact of the DSH audit on States, CMS has modified the regulation at § 455.204(a) to indicate conditions related to the audit that States must meet in order to receive Federal disproportionate share hospital payments. A transition period related to audit findings for Medicaid State plan rate year 2005 through 2010 is included in this Section. Instructions regarding audit findings and their applicability to Medicaid State plan rate year 2011 forward are also included. The modifications are as follows:

- Transition period. Findings of the 2005 and 2006 Medicaid State plan rate year audit and report will be available to States during their SFY 2010. These findings must be taken into consideration for Medicaid State plan rate year 2011 uncompensated care cost estimates and associated DSH payments.
- Audit findings associated with Medicaid State plan rate years 2007 through 2010 must be similarly considered for Medicaid State plan rate years 2012 through 2015. Findings from Medicaid State plan rate year 2005–2010 will be used only for the purpose of determining prospective hospital-specific eligible uncompensated care cost limits and associated DSH payments.
- DSH payments that exceed the hospital-specific eligible uncompensated care cost limit related to Medicaid State plan rate year 2011 must be returned to the Federal government or redistributed by States to other qualifying hospitals.

In response to many public comments regarding the inability of States to complete the audit within one year of the end of the State fiscal year, CMS has modified the regulation at § 455.204(b) to indicate a new time period for the submission of the independent certified audit. The new time period is as follows:

- Identify that the Medicaid State plan rate year 2005 and 2006 audits must be completed no later than the last day of Federal fiscal year 2009. Each subsequent audit beginning with Medicaid State plan rate year 2007 must be completed by the last day of the Federal fiscal year ending three years from the Medicaid State plan rate year under audit. Therefore, for the 2007 Medicaid State plan rate year, the audit must be completed by the last day of Federal fiscal year 2010.

The regulation was modified at 455.204(c) to include a new Section identifying the primary sources and source documents from which States will draw data necessary to complete the independent certified audit. These documents are identified as:

- The approved Medicaid State plan for the State plan rate year under audit.
- State Medicaid Management Information System payment and utilization data.
- The Medicare 2552–96 cost report or subsequent Medicare defined hospital cost report tool.
- DSH hospital audited financial statements and hospital accounting records.

The regulation was modified to redesignate § 455.204(c) as § 455.204(d)(1) through (6) to accommodate the new § 455.204(c).

In addition, CMS developed a General DSH Auditing and Reporting Protocol to provide States with guidance on the completion of the DSH Audit and Report. This protocol will be available on the CMS Web site.

## V. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 30-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

Therefore, we are soliciting public comment on each of these issues for the following information collection requirements discussed below.

*Section 447.299 Reporting Requirements*

Paragraph (c) of this Section requires the States to submit to CMS information for each DSH for the most recently-completed fiscal year beginning with the first full State fiscal year (SFY) after the enactment of Section 1001(d) of the MMA, which for all States will begin with their respective SFY 2005 and each subsequent SFY. This paragraph presents the information to be submitted.

The burden associated with this requirement is the time and effort for the States to prepare and submit the required information. We estimate that it will take each State approximately 30 minutes to prepare and submit the information for each of its DSHs. On average, each State has approximately 75 DSHs. Therefore, we estimate it will take 38 hours per State to comply for a total of 1,976 annual hours. The burden for this requirement is currently approved under OMB # 0938–0746 with an expiration date of August 31, 2011.

*Section 455.204 Condition for Federal Financial Participation*

In summary, this Section states what information must be included in the audit report and submitted to CMS.

The PRA exempts the information collection activities referenced in this Section. In particular, 5 CFR 1320.4 excludes collection activities during the conduct of administrative actions, investigations, or audits involving an agency against specific individuals or entities.

As required by Section 3504(h) of the Paperwork Reduction Act of 1995, we have submitted a copy of this final regulation to OMB for its review of these information collection requirements described above.

If you comment on these information collection and recordkeeping requirements, please mail copies directly to the following:

Centers for Medicare & Medicaid Services, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attn.: Melissa Musotto, CMS–2198–F, Room C5–14–03, 7500 Security Boulevard, Baltimore, MD 21244–1850.

Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, Attn.: Katherine T. Astrich, CMS Desk Officer, CMS–2198–F, *Katherine_T._Astrich@omb.eop.gov*. Fax (202) 395–6974.

## VI. Regulatory Impact Analysis

We have examined the impact of this rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), Section 1102(b) of the Social Security Act, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), and Executive Order 13132 on Federalism, and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Order 12866, as amended, directs agencies to asses all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). This rule does not reach the economic threshold and thus is not considered a major rule.

The RFA requires agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations and government agencies. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $7 million to $34.5 million in any 1 year. Individuals and States are not included in the definition of a small entity. We are not preparing an analysis for the RFA because the Secretary has determined and we certify that this rule would not have a significant economic impact on a substantial number of small entities. This rule will directly affect States.

In addition, Section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of Section 604 of the RFA. For purposes of Section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a metropolitan statistical area and has fewer than 100 beds. Therefore, the Secretary has determined and we certify that this final rule will not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act (UMRA) of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2008 that threshold level is approximately $130 million. Since this rule would not mandate spending on State, local, or tribal governments in the aggregate, or by the private sector of $130 million or more in any 1 year, the requirements of the UMRA are not applicable.

Based upon the parameters of this rule and comments received, we do not believe the costs incurred by States will be significant. The final rule allows the DSH audits to be part of a hospital's annual financial audit (for example, the auditors would follow the DSH limit protocol provided in the regulation), which means a portion of the audit costs could actually be borne by the hospitals and not the States. Based upon comments received, it appears that most States want to incorporate the DSH audit into the annual hospital financial audits. If that is the case, the costs to the hospital should be minimal as well since the annual hospital financial audit is already a requirement.

It is further unknown if any States will contract with an independent accounting firm to conduct the audit. While there would be a contracting cost to the State, it is unknown what that cost would be and we believe it unlikely that States will avail themselves of this option. The final rule does allow for the use of the Single State Auditor to perform the DSH audit and if that is done, CMS would match the State audit costs at the 50 percent administrative matching rate.

Regardless of the mechanism for conducting the DSH audit, the auditor will be using existing documentation (for example, hospital cost reports, hospital accounting records, and MMIS) and apply the methodology provided by this rule, which should result in nominal costs.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs of State and local governments, preempts State law, or otherwise has Federalism implications. Since this rule would not impose any costs on State or local governments, preempt State law, or otherwise have Federalism implications, the requirements of E.O. 13132 are not applicable.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

**List of Subjects**

*42 CFR Part 447*

Accounting, Administrative practice and procedure, Drugs, Grant programs—health, Health facilities, Health professions, Medicaid, Reporting and recordkeeping requirements, and Rural areas.

*42 CFR Part 455*

Fraud, Grant programs—health, Health facilities, Health professions, Investigations, Medicaid, and Reporting and recordkeeping requirements.

■ The Centers for Medicare & Medicaid Services amends 42 CFR chapter IV as follows:

## PART 447—PAYMENTS FOR SERVICES

■ 1. The authority citation for part 447 continues to read as follows:

**Authority:** Sec 1102 of the Social Security Act (42 U.S.C. 1302).

■ 2. Section 447.299 is amended by—
■ A. Redesignating existing paragraphs (c) and (d) as paragraphs (d) and (e).
■ B. Adding a new paragraph (c) to read as set forth below.

**§ 447.299 Reporting requirements.**

* * * * *

(c) Beginning with each State's Medicaid State plan rate year 2005, for each Medicaid State plan rate year, the State must submit to CMS, at the same time as it submits the completed audit required under § 455.204, the following information for each DSH hospital to which the State made a DSH payment in order to permit verification of the appropriateness of such payments:

(1) *Hospital name.* The name of the hospital that received a DSH payment from the State, identifying facilities that are institutes for mental disease (IMDs) and facilities that are located out-of-state.

(2) *Estimate of hospital-specific DSH limit.* The State's estimate of eligible uncompensated care for the hospital receiving a DSH payment for the year under audit based on the State's methodology for determining such limit.

(3) *Medicaid inpatient utilization rate.* The hospital's Medicaid inpatient utilization rate, as defined in Section 1923(b)(2) of the Act, if the State does not use alternative qualification criteria described in paragraph (c)(5) of this section.

(4) *Low income utilization rate.* The hospital's low income utilization rate, as defined in Section 1923(b)(3) of the Act if the State does not use alternative qualification criteria described in paragraph (c)(5) of this section.

(5) *State defined DSH qualification criteria.* If the State uses an alternate broader DSH qualification methodology as authorized in Section 1923(b)(4) of the Act, the value of the statistic and the methodology used to determine that statistic.

(6) *IP/OP Medicaid fee-for-service (FFS) basic rate payments.* The total annual amount paid to the hospital under the State plan, including Medicaid FFS rate adjustments, but not including DSH payments or supplemental/enhanced Medicaid payments, for inpatient and outpatient services furnished to Medicaid eligible individuals.

(7) *IP/OP Medicaid managed care organization payments.* The total annual amount paid to the hospital by Medicaid managed care organizations for inpatient hospital and outpatient hospital services furnished to Medicaid eligible individuals.

(8) *Supplemental/enhanced Medicaid IP/OP payments.* Indicate the total annual amount of supplemental/enhanced Medicaid payments made to the hospital under the State plan. These amounts do not include DSH payments, regular Medicaid FFS rate payments, and Medicaid managed care organization payments.

(9) *Total Medicaid IP/OP Payments.* Provide the total sum of items identified in § 447.299(c)(6), (7) and (8).

(10) *Total Cost of Care for Medicaid IP/OP Services.* The total annual costs incurred by each hospital for furnishing inpatient hospital and outpatient hospital services to Medicaid eligible individuals.

(11) *Total Medicaid Uncompensated Care.* The total amount of uncompensated care attributable to Medicaid inpatient and outpatient services. The amount should be the result of subtracting the amount identified in § 447.299(c)(9) from the amount identified in § 447.299(c)(10). The uncompensated care costs of providing Medicaid physician services cannot be included in this amount.

(12) *Uninsured IP/OP revenue.* Total annual payments received by the hospital by or on behalf of individuals with no source of third party coverage for inpatient and outpatient hospital services they receive. This amount does not include payments made by a State or units of local government, for services furnished to indigent patients.

(13) *Total Applicable Section 1011 Payments.* Federal Section 1011 payments for uncompensated inpatient and outpatient hospital services provided to Section 1011 eligible aliens with no source of third party coverage for the inpatient and outpatient hospital services they receive.

(14) *Total cost of IP/OP care for the uninsured.* Indicate the total costs incurred for furnishing inpatient hospital and outpatient hospital services to individuals with no source of third party coverage for the hospital services they receive.

(15) *Total uninsured IP/OP uncompensated care costs.* Total annual amount of uncompensated IP/OP care for furnishing inpatient hospital and outpatient hospital services to Medicaid eligible individuals and to individuals with no source of third party coverage for the hospital services they receive. The amount should be the result of subtracting paragraphs (c)(12) and (c)(13), from paragraph (c)(14) of this section. The uncompensated care costs of providing physician services to the uninsured cannot be included in this amount. The uninsured uncompensated amount also cannot include amounts associated with unpaid co-pays or deductibles for individuals with third party coverage for the inpatient and/or outpatient hospital services they receive or any other unreimbursed costs associated with inpatient and/or outpatient hospital services provided to individuals with those services in their third party coverage benefit package. Nor does uncompensated care costs include bad debt or payer discounts related to services furnished to individuals who have health insurance or other third party payer.

(16) *Total annual uncompensated care costs.* The total annual uncompensated care cost equals the total cost of care for furnishing inpatient hospital and outpatient hospital services to Medicaid eligible individuals and to individuals with no source of third party coverage for the hospital services they receive less the sum of regular Medicaid FFS rate payments, Medicaid managed care organization payments, supplemental/enhanced Medicaid payments, uninsured revenues, and Section 1011 payments for inpatient and outpatient hospital services. This should equal the sum of paragraphs (c)(11) and (c)(15) subtracted from the sum of paragraphs (c)(9), (c)(12) and (c)(13) of this Section.

(17) *Disproportionate share hospital payments.* Indicate total annual payment adjustments made to the hospital under Section 1923 of the Act.

(18) States must report DSH payments made to all hospitals under the authority of the approved Medicaid State plan. This includes both in-State and out-of-State hospitals. For out-of-State hospitals, States must report, at a minimum, the information identified in

§ 447.299(c)(1) through (c)(6), (c)(8), (c)(9) and (c)(17).

* * * * *

## PART 455—PROGRAM INTEGRITY: MEDICAID

■ 1. The authority citation for part 455 continues to read as follows:

**Authority:** Sec 1102 of the Social Security Act (42 U.S.C. 1302).

■ 2. Add new subpart D to read as follows:

### Subpart D—Independent Certified Audit of State Disproportionate Share Hospital Payment Adjustments

Sec.
455.300 Purpose.
455.301 Definitions.
455.304 Condition for Federal financial participation (FFP).

## Subpart D—Independent Certified Audit of State Disproportionate Share Hospital Payment Adjustments

### § 455.300 Purpose.

This subpart implements Section 1923(j)(2) of the Act.

### § 455.301 Definitions.

For the purposes of this subpart—

*Independent certified audit* means an audit that is conducted by an auditor that operates independently from the Medicaid agency or subject hospitals and is eligible to perform the DSH audit. Certification means that the independent auditor engaged by the State reviews the criteria of the Federal audit regulation and completes the verification, calculations and report under the professional rules and generally accepted standards of audit practice. This certification would include a review of the State's audit protocol to ensure that the Federal regulation is satisfied, an opinion for each verification detailed in the regulation, and a determination of whether or not the State made DSH payments that exceeded any hospital's specific DSH limit in the Medicaid State plan rate year under audit. The certification should also identify any data issues or other caveats that the auditor identified as impacting the results of the audit.

*Medicaid State Plan Rate Year* means the 12-month period defined by a State's approved Medicaid State plan in which the State estimates eligible uncompensated care costs and determines corresponding disproportionate share hospital payments as well as all other Medicaid payment rates. The period usually corresponds with the State's fiscal year or the Federal fiscal year but can correspond to any 12-month period defined by the State as the Medicaid State plan rate year.

### § 455.304 Condition for Federal financial participation (FFP).

(a) *General rule.* (1) The State must submit an independent certified audit to CMS for each completed Medicaid State plan rate year, consistent with the requirements in this subpart, to receive Federal payments under Section 1903(a)(1) of the Act based on State expenditures for disproportionate share hospital (DSH) payments for Medicaid State plan rate years subsequent to the date the audit is due, except as provided in paragraph (e) of this section.

(2) FFP is not available in expenditures for DSH payments that are found in the independent certified audit to exceed the hospital-specific eligible uncompensated care cost limit, except as provided in paragraph (e) of this section.

(b) *Timing.* For Medicaid State plan rate years 2005 and 2006, a State must submit to CMS an independent certified audit report no later than the last day of calendar year 2009. Each subsequent audit beginning with Medicaid State plan rate year 2007 must be completed by the last day of the Federal fiscal year ending three years from the end of the Medicaid State plan rate year under audit. Completed audit reports must be submitted to CMS no later than 90 days after completion. Post-audit adjustments based on claims for the Medicaid State plan rate year paid subsequent to the audit date, if any, must be submitted in the quarter the claim was paid.

(c) *Documentation.* In order to complete the independent certified audit, States must use the following data sources:

(1) Approved Medicaid State plan for the Medicaid State plan rate year under audit.

(2) Payment and utilization information from the State's Medicaid Management Information System.

(3) The Medicare 2552–96 hospital cost report(s) applicable to the Medicaid State plan rate year under audit. If the Medicare 2552–96 is superseded by an alternate Medicare developed cost reporting tool during an audit year, that tool must be used for the Medicaid State plan rate year under audit.

(4) Audited hospital financial statements and hospital accounting records.

(d) *Specific requirements.* The independent certified audit report must verify the following:

(1) *Verification 1:* Each hospital that qualifies for a DSH payment in the State is allowed to retain that payment so that the payment is available to offset its uncompensated care costs for furnishing inpatient hospital and outpatient hospital services during the Medicaid State plan rate year to Medicaid eligible individuals and individuals with no source of third party coverage for the services in order to reflect the total amount of claimed DSH expenditures.

(2) *Verification 2:* DSH payments made to each qualifying hospital comply with the hospital-specific DSH payment limit. For each audited Medicaid State plan rate year, the DSH payments made in that audited Medicaid State plan rate year must be measured against the actual uncompensated care cost in that same audited Medicaid State plan rate year.

(3) *Verification 3:* Only uncompensated care costs of furnishing inpatient and outpatient hospital services to Medicaid eligible individuals and individuals with no third party coverage for the inpatient and outpatient hospital services they received as described in Section 1923(g)(1)(A) of the Act are eligible for inclusion in the calculation of the hospital-specific disproportionate share limit payment limit, as described in Section 1923(g)(1)(A) of the Act.

(4) *Verification 4:* For purposes of this hospital-specific limit calculation, any Medicaid payments (including regular Medicaid fee-for-service rate payments, supplemental/enhanced Medicaid payments, and Medicaid managed care organization payments) made to a disproportionate share hospital for furnishing inpatient hospital and outpatient hospital services to Medicaid eligible individuals, which are in excess of the Medicaid incurred costs of such services, are applied against the uncompensated care costs of furnishing inpatient hospital and outpatient hospital services to individuals with no source of third party coverage for such services.

(5) *Verification 5:* Any information and records of all of its inpatient and outpatient hospital service costs under the Medicaid program; claimed expenditures under the Medicaid program; uninsured inpatient and outpatient hospital service costs in determining payment adjustments under this Section; and any payments made on behalf of the uninsured from payment adjustments under this Section has been separately documented and retained by the State.

(6) *Verification 6:* The information specified in paragraph (d)(5) of this Section includes a description of the methodology for calculating each hospital's payment limit under Section 1923(g)(1) of the Act. Included in the description of the methodology, the

audit report must specify how the State defines incurred inpatient hospital and outpatient hospital costs for furnishing inpatient hospital and outpatient hospital services to Medicaid eligible individuals and individuals with no source of third party coverage for the inpatient hospital and outpatient hospital services they received.

(e) *Transition Provisions:* To ensure a period for developing and refining reporting and auditing techniques, findings of State reports and audits for Medicaid State Plan years 2005–2010 will not be given weight except to the extent that the findings draw into question the reasonableness of State uncompensated care cost estimates used for calculations of prospective DSH payments for Medicaid State plan year 2011 and thereafter.

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

Dated: September 25, 2008.

**Kerry Weems,**

*Acting Administrator, Centers for Medicare & Medicaid Services.*

Approved: October 29, 2008.

**Michael O. Leavitt,**

*Secretary.*

**Editorial Note:** This document was received in the Office of the Federal Register on Friday, December 12, 2008.

[FR Doc. E8–30000 Filed 12–18–08; 8:45 am]

**BILLING CODE 4120–01–P**


Federal Register

**Friday,**

**December 19, 2008**

## Part IV

# Environmental Protection Agency

**40 CFR Part 261**

**Expansion of RCRA Comparable Fuel Exclusion; Final Rule**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 261**

**[EPA–HQ–RCRA–2005–0017; FRL–8753–4]**

**RIN 2050–AG24**

## Expansion of RCRA Comparable Fuel Exclusion

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

**ACTION:** Final rule.

**SUMMARY:** This final action adds a new exclusion to the rules implementing subtitle C of the Resource Conservation and Recovery Act (RCRA). The rule already provides exclusions for comparable fuels and synthesis gas. These fuels are energy-rich hazardous secondary materials which would otherwise be hazardous wastes, but which have the same hazardous constituent concentrations as fossil fuels that would be burned in their place. EPA is establishing a new category of excluded fuel that has its own set of conditions, some of which overlap with the comparable fuels exclusion. These newly excluded hazardous secondary materials are called ''emission-comparable fuel'' (ECF). ECF is a hazardous secondary material that, when generated, is handled in such a way that it is not discarded in any phase of management, but rather is handled as a valuable commodity. ECF meets all of the hazardous constituent specifications (over 160) for comparable fuel, with the exception of those for oxygenates and hydrocarbons (constituents which contribute energy value to the fuel). The rule specifies conditions on burning ECF which assure that emissions from industrial boilers burning ECF are comparable to emissions from industrial boilers burning fuel oil. The ECF exclusion also includes conditions for tanks and containers storing ECF to assure that discard does not occur.

**DATES:** This final rule is effective January 20, 2009.

**ADDRESSES:** The official public docket is identified by Docket ID No. EPA–HQ–RCRA–2005–0017. 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.*, Confidential Business Information (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 RCRA Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the RCRA Docket is (202) 566–0270.

**FOR FURTHER INFORMATION CONTACT:** Mary Jackson, Hazardous Waste Minimization and Management Division, Office of Solid Waste, Mailcode: 5302P, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 308–8453; fax number: (703) 308–8433; e-mail address: *jackson.mary@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

### General Information

*A. Does This Action Apply to Me?*

Categories and entities potentially affected by this action include:

| Category | NAICS code | SIC code | Examples of potentially regulated entities |
|---|---|---|---|
| Any industry that generates or combusts hazardous waste as defined in the final rule. | 562 | 49 | Waste Management and Remediation Services. |
| | 327 | 32 | Non-mettalic Mineral Products Manufacturing. |
| | 325 | 28 | Chemical Manufacturing. |
| | 324 | 29 | Petroleum and Coal Products Manufacturing. |
| | 331 | 33 | Primary Metals Manufacturing. |
| | 333 | 38 | Machinery Manufacturing. |
| | 326 | 306 | Plastic and Rubber Products Manufacturing. |
| | 488, 561 | 49 | Administration and Support Services. |
| | 421 | 50 | Scrap and waste materials. |
| | 422 | 51 | Wholesale Trade, Non-durable Goods, N.E.C. |
| | 512, 541, 812 | 73 | Business Services, N.E.C. |
| | 512, 514, 541, 711 | 89 | Services, N.E.C. |
| | 924 | 95 | Air, Water and Solid Waste Management. |
| | 336 | 37 | Transportation Equipment Manufacturing. |
| | 928 | 97 | National Security. |
| | 334 | 35 | Computer and Electronic Products Manufacturing. |
| | 339 | 38 | Miscellaneous Manufacturing. |

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be impacted by this action. This table lists examples of the types of entities EPA is aware could potentially be regulated by this action. Other types of entities not listed could also be affected. To determine whether your facility, company, business, organization, etc., is affected by this action, you should examine the applicability criteria in this rule. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

*B. Docket Copying Costs*

You may copy a maximum of 100 pages from any regulatory docket at no charge. Additional copies are 15 cents/page.

*C. How Do I Obtain a Copy of This Document and Other Related Information?*

In addition to being available in the docket, an electronic copy of this rule will also be available on the Worldwide Web (WWW). Following the Administrator's signature, a copy of this document will be posted on the WWW at *http://www.epa.gov/hwcmact.* This Web site also provides other information related to the NESHAP (National Emission Standards for Hazardous Air Pollutants) for hazardous waste combustors.

*D. Index of Contents*

The information presented in this preamble is organized as follows:

## Part One: Background

### I. Statutory Authority

These regulations are promulgated under the authority of sections 1004 and 2002 of the Solid Waste Disposal Act of 1970, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), 42 U.S.C. 6903 and 6912.

### II. Background

*A. What Is the Intent of the Rule?*

Section 261.38 states that hazardous secondary materials (*i.e.*, spent materials, sludges and byproducts) which have fuel value and whose hazardous constituent levels are comparable to those found in fuel oil that could be burned in their place are not solid wastes, and hence not hazardous wastes. These materials are called comparable fuels. This rule adds an additional group of materials to the exclusions in section 261.38. These materials are hazardous secondary materials that, as generated, are not discarded, but are treated as valuable commodities through all phases of management through operation of conditions on their storage and burning, and based on their substantial physical identity with fuel oil. These hazardous secondary materials must meet all of the hazardous constituent specifications for comparable fuel except those for oxygenates and hydrocarbons, constituents with high energy content [1] that contribute to the energy value of these materials. These excluded fuels are termed ''emission-comparable fuel'' (''ECF'') because the emissions from an industrial boiler burning these hazardous secondary materials are comparable to the emissions from an industrial boiler burning fuel oil, the fossil fuel for which ECF would often substitute.[2] In other words, ECF and fuel oil are comparable from an emissions standpoint, although the concentrations of oxygenates and hydrocarbons may be higher in the ECF than in fuel oil.

EPA wishes to make clear the basic fact pattern regarding the generation and management of ECF in order to establish the fact situation to which the rule applies. The rule applies to hazardous secondary materials which are not discarded in the first instance. ECF must meet the specifications established for hazardous constituents in comparable fuels, except with respect to hydrocarbons and oxygenates—constituents which provide substantial fuel value. These emission-comparable fuels must meet the specifications for those hazardous constituents, as well as the specifications for minimum heating value and maximum viscosity, as generated. Hazardous secondary materials may not undergo processing to destroy or otherwise remove the hazardous constituents to meet the specifications, or to meet the heating value or viscosity specifications (*i.e.*, such materials, by definition, cannot be ECF). Based on limited current practice for those materials currently classified as comparable fuels under existing § 261.38, EPA expects most ECF to be used on-site.[3] ECF would be used and stored under largely the same conditions as would the virgin fuel—fuel oil—which would often be displaced by ECF.

Under these circumstances, the rule excludes ECF from being a solid waste, *i.e.*, determines that ECF is not discarded, from its point of generation. Throughout its management cycle, ECF is subject to conditions which provide objective assurance that discard has not occurred. These include conditions on tank and container storage, drawn largely from conditions applicable to containers and tanks storing fuel oil and organic product and by-products, which conditions assure containment, spill prevention, and minimization of fugitive air emissions. Transport conditions are the same as for all other hazardous materials, including product fuels. Conditions on burning (again drawn largely from standard practices for assuring that industrial boilers operate efficiently) assure that emissions of hazardous constituents which may be present in different concentrations than fuel oil would be no different than the emissions if the same boiler burned fuel oil. The combination of ECF's substantial physical identity with fuel oil, and identical emission profiles with fuel oil, assures that ECF is not discarded when burned. For all of these reasons, EPA is taking the position that ECF may reasonably be classified as a non-discarded fuel product.

Based on the quantity of hazardous secondary materials eligible for this exclusion, the total quantity of hazardous secondary materials excluded from the RCRA hazardous waste regulations is expected to increase substantially. Specifically, we estimate that approximately 13,000 tons per year of hazardous secondary materials are currently excluded under the existing comparable fuel exclusion, while we

[1] The hydrocarbons and oxygenates listed in Table 1 to § 261.38 have a heating value in the range generally of 10,000 Btu/lb to 18,000 Btu/lb. See USEPA, ''Final Technical Support Document for the Expansion of the Comparable Fuels Exclusion,'' November 2008, Table 2–1. Fuel oil typically has a heating value of approximately 19,300 Btu/lb.

[2] Fuel oil is a common, but not predominant, fuel for industrial boilers.

[3] All comparable fuel currently excluded under § 261.38 is burned on-site (*i.e.*, at the site of generation), according to a survey conducted by the American Chemistry Council. See EPA Docket No. EPA–HQ–RCRA–2005–0017–0003. In addition, we estimate that 19 of the 34 burners projected to use ECF will burn on-site ECF which they generate themselves. See discussion in Part Six of this preamble.

project that up to an additional 118,500 tons per year may be excluded under the ECF exclusion.

These additional hazardous secondary materials can now be used as fuel without imposing regulatory costs on generators, primarily the manufacturing sector. However, the expanded comparable fuel exclusion is not likely to increase the amount of hazardous secondary materials used as fuel because these high Btu materials, even though not currently excluded from RCRA, are currently used in industrial furnaces and incinerators for their fuel value. Put another way, it is likely that the same amount of energy will be recovered from these hazardous secondary materials whether they are classified as wastes or non-wastes, and the same amount of fossil fuel would be displaced. Nonetheless, continuing to regulate these hazardous secondary materials as hazardous wastes would: (1) Impose costs on a material which can legitimately be classified as a non-discarded product, rather than as a waste; and (2) preclude the opportunity to market the materials as boiler fuels, given that use is currently constrained to a relatively small universe of RCRA-permitted burners.

*B. Who Will Be Affected by This Rule?*

Entities that generate, burn, and store ECF are potentially affected by this rule. The basic structure of the exclusion is that ECF is not a solid (and hazardous) waste as generated, and hence is not subject to subtitle C regulation. Thus, entities managing hazardous secondary materials classified as hazardous waste fuels under current rules can manage these fuels without being subject to full subtitle C regulation so long as they satisfy the conditions on ECF set out in this rule. Burners, which are limited to certain industrial boilers (including utility boilers) can burn ECF provided the boilers meet prescribed design and operating conditions, as discussed below in Part II, Section III.B.[4] These entities will benefit from lower operating costs because of lower (or eliminated) waste management fees and because these hazardous secondary materials will substitute for fuels which would otherwise be purchased.

Commercial hazardous waste combustors that are currently managing hazardous waste fuels that qualify as ECF, on the other hand, might find themselves unable to continue to charge hazardous waste management fees for the excluded hazardous secondary materials. Consequently, commercial hazardous waste combustors might lose the waste management revenues for burning ECF, and, if they choose to no longer burn the material, may need to meet their heat input requirements by using other waste fuels or fossil fuels.

*C. What Is the Relationship Between This Rule and the Existing Exclusion for Comparable Fuel?*

On June 19, 1998 (63 FR 33782 and § 261.38), EPA promulgated standards to exclude from the definition of solid waste certain hazardous secondary material fuels that meet specification levels for hazardous constituents and physical properties that affect burning which are comparable to the same levels in fossil fuels (typically fuel oil). EPA's goal was to ensure that these excluded fuels, which are so similar in composition to commercial fuels, are properly classified as non-discarded products, not as wastes.

During the ten years that the comparable fuel exclusion has been part of the hazardous waste regulations, several stakeholders have pointed out that there are many hazardous secondary materials currently classified as hazardous wastes which have fuel value, and which have substantially the same composition as fossil fuels, but which do not satisfy the terms of the exclusion. Independently, in 2003, EPA began examining the effectiveness of the current comparable fuel program as part of an effort to promote the energy conservation component of the Resource Conservation Challenge [5] to determine whether other hazardous secondary materials currently classified as hazardous wastes could be appropriately excluded as comparable fuel.[6]

As part of this effort, EPA contacted the American Chemistry Council (ACC) in early 2003 to determine how much waste is currently excluded as comparable fuel and whether there were additional quantities of other high Btu hazardous secondary materials that could potentially be considered comparable fuel. As a result of ensuing discussions, we proposed in June 2007 to expand the exclusion for comparable fuel to establish a new category of excluded fuel—ECF. 72 FR 33284 (June 15, 2007). In this notice, we are responding to public comments on the proposed rule, summarizing changes to the proposed rule, and promulgating a final rule.

**Part Two: Summary of the Final Rule**

**I. What Is ECF?**

ECF is a hazardous secondary material which is excluded from the RCRA hazardous waste regulations if it meets prescribed specifications and conditions respecting its storage and burning. These conditions assure that ECF is not ''part of the waste disposal problem.'' *American Mining Congress* v. *EPA*, 907 F. 2d 1179, 1186 (DC Cir. 1990) citing *American Mining Congress* v. *EPA*, 824 F. 2d 1177, 1186 (DC Cir. 1987). The ECF fuel specifications (§ 261.38(a)(2)) are the same as those that are applicable to comparable fuel, except the specifications in Table 1 to § 261.38 for hydrocarbons and for oxygenates do not apply, and the minimum heating value specification is 8,000 Btu/lb. The exclusion applies from the point of generation of the ECF.

ECF must meet the specifications as generated. Hazardous secondary materials may not be treated by blending or other means to meet the specifications, including the minimum heating value and maximum viscosity specifications. ECF product may, however, be commingled with other fuels to facilitate handling and storage, provided that the ECF continues to meet the specifications.[7]

**II. What Are the Storage Conditions for ECF?**

ECF may be stored in tanks and containers under conditions that prevent releases of hazardous secondary materials to the environment. The storage conditions are adopted from a collection of requirements for storage of fuel oil and other materials: discharge prevention requirements adopted from the Spill Prevention, Control, and Countermeasure (SPCC) requirements for oil storage facilities; containment and emergency procedure requirements adopted from the hazardous waste storage requirements, and fugitive air emission controls adopted from several NESHAP (National Emission Standards for Hazardous Air Pollutants) for organic products, by-products, and feedstocks. See § 261.38(c)(1). The final rule also provides alternative storage

[4] Under the final rule, ECF can also be burned in hazardous waste combustors operating under a RCRA permit. See discussion in Part Two, Section III.A of the preamble.

[5] See *http://www.epa.gov/epaoswer/osw/conserve/strat-plan/strat-plan.htm#rccplan.*

[6] As noted above, the same amount of energy is recovered from excluded fuels whether they are burned in units subject to subtitle C rules, or in industrial boilers.

[7] Please note that the proposal included a conforming amendment adding a reference to ECF to § 261.38(a)(5), a provision addressing treatment of hazardous constituents to meet the hazardous constituent specifications. 72 FR at 33324. EPA has no information that this practice occurs, did not estimate any costs for the practice in assessing compliance costs for the proposed or final rule, and received no comment on the issue. EPA is consequently not finalizing the proposal to amend this provision.

conditions, however, that are adopted solely from the controls for hazardous waste storage facilities. See § 261.38(e). We provide these alternative storage conditions for the convenience of owners and operators because: (1) They provide equivalent protection of human health and the environment; (2) they are less complex than the suite of conditions that are adopted from requirements for fossil fuels and other products; and (3) facilities that are currently storing hazardous waste that becomes ECF under the exclusion are already complying with these conditions.

The storage conditions adopted from the collection of SPCC provisions, hazardous waste provisions, and NESHAP provisions are discussed below in Section II.A. The alternative storage conditions adopted solely from the hazardous waste storage requirements are discussed below in Section II.B.

*A. What Are the Conditions for Storage?*

1. Discharge Prevention Conditions That Are Adopted From SPCC Requirements

We are adopting particular SPCC provisions under 40 CFR Part 112 that pertain to discharge prevention for oils managed at onshore facilities: §§ 112.2, 112.3(d), 112.3(e), 112.5(a), 112.5(b), 112.7, and 112.8. See § 261.38(c)(1)(iii). These provisions require compliance with the SPCC Plan requirements for discharge prevention, other than those pertaining to containment. See § 261.38(c)(1)(iii).

2. Containment Conditions That Are Adopted From Hazardous Waste Storage Requirements

We are adopting the hazardous waste provisions for containment for storage units: (1) For tanks, § 264.193 (b) and (c), § 264.193(d)(1) through (d)(3), and § 264.193 (e) and (f); and (2) for containers, § 264.175(b).

For tanks, the adopted provisions are those for engineered secondary containment and for leak detection. Engineered secondary containment means the use of an external liner, vault, or double-walled tank. See § 261.38(c)(1)(iv)(A).

For containers, the adopted provisions are those for a containment system comprised of a base underlying the containers which is free of cracks or gaps and is sufficiently impervious to contain leaks, spills, and accumulated precipitation until the collected material is detected and removed. The containment system must be designed to contain 10% of the volume of containers or the volume of the largest container, whichever is greater. See § 261.38(c)(1)(iv)(B).

3. Emergency Procedure Conditions That Are Adopted From Hazardous Waste Storage Requirements

We are adopting provisions from hazardous waste storage requirements for preparedness and prevention, emergency procedures, and response to leaks or spills. See § 261.38(c)(v).

The following conditions ensure preparedness and prevention: (1) You must provide the emergency equipment required by adopted § 264.32(a) though (d); (2) you must test and maintain equipment related to emergency procedures; (3) you must ensure access to communications or alarm systems by facility personnel; and (4) you must make arrangements with local authorities as required by adopted § 264.37(a).

The following conditions establish emergency procedures: (1) An emergency coordinator must be available at all times; and (2) the emergency coordinator must manage imminent or actual emergency situations according to the provisions of § 261.38(c)(1)(v)(B)(*2*).

To address a response to leaks or spills from tank systems, and the disposition of leaking or unfit-for-use tank systems, the provisions of § 264.196 are adopted, except for the closure provisions of § 264.196(e)(1) and (4).

4. Fugitive Air Emissions Conditions That Are Adopted From the NESHAP for Organic Liquid Distribution, the NESHAP for Tanks, the NESHAP for Containers, and the NESHAP for Equipment Leaks

All ECF tanks systems, containers with a capacity greater than 0.1 cubic meters (26 gallons), and equipment that contains or contacts ECF (*e.g.*, valves and pumps) are subject to conditions to control fugitive air emissions. The conditions are adopted from the organic liquid distribution (OLD) NESHAP, the NESHAP for containers (Level 1 or Level 2 controls), the NESHAP for tanks (Level 1 or Level 2 controls),[8] and the NESHAP for equipment leaks.

a. *Tanks.* Tanks containing ECF that are currently subject to the OLD requirements under § 63.2346 (Part 63, Subpart EEEE) are not subject to any additional conditions to control fugitive emissions (under § 261.38(c)(vi)(B) and (C), and (c)(vii)), with one exception. If your tank is subject to Items 1 through 5 in Table 2 to Subpart EEEE, rather than Item 6 because the annual average vapor pressure of regulated organic HAP[9] is less than 11.1 psia, you must consider the annual average vapor pressure of the RCRA oxygenates listed under § 261.38(c)(1)(vi)(B)(*3*) to determine if your tank must also satisfy the more stringent controls (drawn from the other OLD controls) we are adopting for ECF. See § 261.38(c)(vi)(A)(*2*).

Tanks that are not currently subject to the OLD requirements under § 63.2346, and that store ECF that meets the expanded definition of organic liquid which we are adopting for ECF under § 261.38(c)(vi)(B)(*4*),[10] are subject (as a condition) to emission limits adopted from the OLD NESHAP as a function of the tank design capacity and the annual average vapor pressure of the RCRA oxygenates and the organic HAP in the ECF. See § 261.38(c)(1)(vi)(C)(*5*).

Finally, ECF tanks that are not subject to the adopted OLD requirements (*i.e.*, tanks storing ECF that meets the adopted definition of organic liquid under § 261.38(c)(vi)(B)(*4*), but for which OLD controls are not adopted under § 63.2346, and tanks storing ECF that does not meet the adopted and expanded definition of organic liquid) are subject to the following conditions:

- For tanks that meet the tank capacity and vapor pressure criteria for hazardous waste tanks under § 264.1084(b)(1) for Level 1 control:
  - The NESHAP provisions for Level 1 control under Subpart OO, Part 63, §§ 63.901 through 63.907; or
  - The NESHAP provisions for organic liquid distribution under Subpart EEEE, Part 63 under Item 1.a.i or 1.a.ii in Table 2 to Subpart EEEE, which require 95% emissions reduction via venting to a control device under provisions of Subpart SS, Part 63, or Level 2 tank emissions control under Subpart WW, Part 63, or routing emissions to a fuel gas system or back to a process under § 63.984 of Subpart SS, Part 63, or vapor balancing emissions to the transport vehicle from which the storage tank is filled under § 63.2346(a)(4); or
  - Hazardous waste tank controls under Subpart CC, Part 264, under § 264.1084(d)(3), (d)(4), or (d)(5) for use of venting to a control device, or a pressure tank, or a tank located inside an enclosure that is vented through a

[8] As discussed below, we also provide as alternative tank controls three control alternatives for hazardous waste tanks under Subpart CC, Part 63, that are not included under the NESHAP.

[9] Organic HAP regulated by Subpart EEEE, Part 63 are listed in Table 1 to Subpart EEEE.

[10] An organic liquid for purposes of § 261.38(c)(vi) means emission comparable fuel that: (1) Contains 5 percent by weight or greater of the RCRA oxygenates as well as organic HAP listed in Table 1 to Part 63, Subpart EEEE; and (2) has an annual average true vapor pressure of 0.7 kilopascals (0.1 psia) or greater.

closed-vent system to an enclosed combustion control device, and the associated provisions under §§ 63.1081 (definitions), 264.1083(c) (determination of vapor pressure), 264.1084(j) (transfer to a tank), 264.1087 (closed-vent systems and control devices), and 264.89(b) (recordkeeping).

• For tanks that do not meet the tank capacity and vapor pressure criteria for hazardous waste tanks under § 264.1084(b)(1) and are, thus, subject to Level 2 control, the air emission controls are the same as for Level 1 control, except that the Level 1 controls under Subpart OO, Part 63, are not applicable.

The air emission conditions for ECF tanks are summarized in the table below:

| Tank capacity (gallons) | Vapor pressure (psia) | Adopted old NESHAP conditions (subpart EEEE, part 63) for tanks storing ECF that meets the definition of organic liquid [1] | | Adopted conditions for tanks not subject to adopted old controls |
|---|---|---|---|---|
| | | Existing sources | Reconstructed or new sources | |
| <5,000 | <11.1 | | | A or C |
| | >=11.1 | | | A or D |
| >=5,000 to <10,000 | <4.0 | | | A or C |
| | >=4.0 to <11.1 | A | A | A or C |
| | >11.1 | B | B | A or D |
| >=10,000 to <20,000 | <=0.1 | | | A or C |
| | >=0.1 to >4.0 | | A | A or C |
| | >=4.0 to >11.1 | A | A | A or C |
| | >=11.1 | B | B | A or D |
| >=20,000 to <40,000 | <=0.1 | | | A or C |
| | >=0.1 to >4.0 | | A | A or C |
| | >=4.0 to >11.1 | A | A | A or D |
| | >=11.1 | B | B | A or D |
| >=40,000 to <50,000 | <=0.1 | | | A or C |
| | >=0.1 to >0.75 | | A | A or C |
| | >=0.75 to >4.0 | | A | A or D |
| | >=4.0 to >11.1 | A | A | A or D |
| | >=11.1 | B | B | A or D |
| >=50,000 | <=0.1 | | | A or C |
| | >=0.1 to >0.75 | A | A | A or C |
| | >=0.75 to >11.1 | A | A | A or D |
| | >=11.1 | B | B | A or D |

[1] Organic liquid means emission comparable fuel that: (1) Contains 5 percent by weight or greater of the RCRA oxygenates as well as organic HAP listed in Table 1 to Part 63, Subpart EEEE; and (2) has an annual average true vapor pressure of 0.7 kilopascals (0.1 psia) or greater.

**Notes:**

A: 95% emissions reductions via venting to a control device under Subpart SS, Part 63; or Level 2 tank control under Subpart WW, Part 63; or route emissions to a fuel gas system or back to a process under 63.984 of Subpart SS, Part 63; or vapor balancing emissions to the transport vehicle from which the storage tank is filled under 63.2346(a)(4) of Subpart EEEE, Part 63.

B: 95% emissions reductions via venting to a control device under Subpart SS, Part 63; or route emissions to a fuel gas system or back to a process under 63.984 of Subpart SS, Part 63; or vapor balancing emissions to the transport vehicle from which the storage tank is filled under 63.2346(a)(4) of Subpart EEEE, Part 63.

C: Level 1 control under Subpart OO, Part 63, or venting to a control device under 264.1086(d)(3), or a pressure tank under 264.1084(d)(4) of; or tank located inside an enclosure that is vented to an enclosed combustion control device under 264.1084(d)(5).

D: Venting to a control device under 264.1086(d)(3); pressure tank under 264.1084(d)(4); or tank located inside an enclosure that is vented to an enclosed combustion control device under 264.1084(d)(5).

b. *Containers.* Containers that store ECF are subject to the adopted OLD provisions (see § 261.38(c)(1)(vi)(C)(*3*)) in order to be excluded. However, these provisions establish standards for containers only in a specific situation: Containers with a capacity greater than 55 gallons that are being loaded at a transfer rack at a new facility with ECF that meets the definition of organic liquid and where the annual volume of ECF is 800,000 gallons or more. See Items 9 and 10 in Table 2 to adopted Subpart EEEE.

To ensure that air emissions are controlled for other ECF containers as they are for containers storing liquids containing volatile organics (assuring that ECF is handled as are other commodities rather than being discarded), we adopt the national emission controls for containers under Subpart PP, Part 63. Subpart PP prescribes three levels of air emission controls: Level 1, Level 2, and Level 3. To determine which level of control would apply to ECF containers, we adopt the applicability criteria for hazardous waste containers under § 264.1086(b)(1). See § 261.38(c)(vii)(B)(1) and (c)(vii)(B)(2). Those applicability criteria specify whether Level 1 or Level 2 national emission controls for containers apply, considering the size of the container and whether it is ''in light material service.'' [11] Under these adopted controls as conditions for the exclusion, an ECF container having a design capacity greater than 0.1 cubic meters (26 gallons) satisfies the conditions if it: (1) Meets the applicable U.S. Department of Transportation (DOT) regulations on packaging hazardous materials for transportation; and (2) is kept closed unless ECF is being added or removed from the container.

c. *Equipment Leaks.* For tanks and containers that are conditioned on meeting the adopted OLD requirements, air emissions from leaks from equipment that contains or contacts ECF at a storage unit are controlled under the adopted OLD requirements

[11] An ECF container is in light material service if: (1) The vapor pressure of one or more of the organic components in the ECF is greater than 0.3 kilopascals (kPa) at 20 °C; and (2) the total concentration of the pure organic components having a vapor pressure greater than 0.3 kilopascals (kPa) at 20 °C is equal to or greater than 20 percent by weight. See § 264.1031.

(§ 63.2346(c)). For tanks and containers that are not conditioned on meeting the adopted OLD requirements, equipment leaks are subject to adopted NESHAP controls for equipment leaks, as discussed below. See § 261.38(c)(1)(vi)(C)(*3*), (c)(1)(vii)(A)(*3*), and (c)(1)(vii)(B)(*3*).

The OLD NESHAP subjects storage units to the following Part 63 NESHAP for equipment leaks if a facility has a tank or container subject to air emission control under Table 2 to Subpart EEEE: Subpart TT (Level 1 control), or Subpart UU (Level 2 control), or Subpart H.

For equipment leaks that are not conditioned on meeting OLD, we adopt as conditions the same suite of NESHAP controls that are required under OLD, and apply those controls to all equipment that stores or contacts ECF at a storage unit. The adopted NESHAP controls are: (1) Subpart TT, Part 63, (Level 1 control), except for § 63.1000; or (2) Subpart UU (Level 2 control), except for § 63.1019; or (3) Subpart H, except for §§ 63.160, 63.162(b) and (e), and 63.183.

*B. What Are the Alternative Storage Conditions?*

The rule establishes alternative storage conditions that we adopt from the hazardous waste storage standards under 40 CFR Part 264. See § 261.38(e). You may comply with these alternative conditions in lieu of the conditions just enumerated in Section II.A above. If you choose to meet these alternative conditions, you must substitute the term ''emission-comparable fuel'' for each occurrence of the term ''hazardous waste'' or ''waste.''

The alternative conditions for your ECF tank or container storage unit provide controls for: (1) Security; (2) inspections; (3) personnel training; (4) handling ignitable, reactive, or incompatible materials; (5) preparedness and prevention; (6) contingency plan and emergency procedures; and (7) air emission controls for equipment leaks.

Specifically, if you store ECF in a container, to maintain the exclusion, you must comply with conditions governing the use and management of those containers. Those conditions address: (1) The condition of the containers; (2) compatibility of the ECF with the containers; (3) management of the containers; (4) inspections; (5) containment; (6) special requirements for ignitable or reactive ECF; and (7) air emission controls.

On the other hand, if you store ECF in a tank, to maintain the ECF exclusion, you must comply with conditions that address: (1) Containment and detection of releases; (2) general operating requirements; (3) inspections; (4) response to leaks or spills and disposition of leaking or unfit-for-use tank systems; (5) ignitable or reactive materials; (6) incompatible materials; and (7) air emission controls.

*C. What Are the Other Storage Conditions?*

1. Underground Storage of ECF Is Prohibited

The final rule prohibits storage of ECF in underground tanks (*i.e.* a hazardous secondary material stored in an underground tank by definition cannot be ECF): A tank the volume of which (including the volume of underground pipes connecting thereto) is 10 percent or more beneath the surface of the ground.[12] In the preamble to the proposed rule, we requested comment on whether generators or burners would be likely to store ECF in underground tanks. We did not receive any information to indicate that ECF would be stored in underground tanks. Given the additional complexity to the rule that would result from the need to adopt air emission controls, as well as preparedness and prevention and emergency procedure provisions for underground storage tanks, we conclude that allowing the use of underground storage tanks for ECF would unnecessarily complicate the rule for very little benefit, or (more likely) no benefit at all.

2. What Are the Conditions for Closure of RCRA Storage Units That Become ECF Storage Units?

The rule waives the RCRA closure requirements in 40 CFR Parts 264 and 265 for those interim status and permitted storage units, and generator accumulation units exempt from the permitting requirements under § 262.34 of this chapter, that store ECF, provided that: (1) The storage unit has been used to store only the hazardous waste that is subsequently excluded as ECF under the conditions of § 261.38; and (2) the storage unit will be used to store only that ECF.

3. What Are the Conditions for Closure of Storage Units?

Like any other product storage unit which goes out of service, tank systems and container storage units would not be required to undergo closure under the RCRA hazardous waste regulations (unless liquids or accumulated solids were not cleaned from the tank system or container within 90 days of cessation of operation as an ECF storage unit), when the unit ceases operation as a product storage unit. See § 261.4(c). However, if an ECF storage unit ceases to be operated to store ECF product, but has not been cleaned by removing all liquids and accumulated solids within 90 days of cessation of ECF storage operations, the tank system or container would become subject to the RCRA Subtitle C regulations.[13] [14] See § 261.38(b)(13).

Discarded liquids and accumulated solids removed from a tank system or container that ceases to be operated for storage of ECF product are solid wastes. This material is hazardous waste if it exhibits a characteristic of hazardous waste or if the ECF no longer meets a condition of the exclusion and is otherwise listed as a hazardous waste. Similarly, liquids and accumulated solids removed from a tank system or container are solid wastes (and if identified or listed, hazardous wastes) if at any time they do not meet the ECF specifications and other conditions of the exclusion.[15]

4. What Are the Conditions for Management of Incompatible ECF and Other Materials?

ECF generators and burners must take precautions to prevent the mixing of ECF and other materials which could result in reactions which could: (1) Generate extreme heat or pressure, fire or explosions, or violent reactions; (2) produce uncontrolled hazardous mists, fumes, dusts, or gases; (3) produce uncontrolled flammable fumes or gases; or (4) damage the structural integrity of the storage unit or facility. See § 261.38(c)(1)(viii). ECF generators must document how they will take precautions to avoid these situations. This documentation must be kept on-site for three years.

## III. What Are the Conditions for ECF Burners?

ECF must be burned in particular combustors under prescribed conditions to be eligible for the exclusion.

[12] See § 280.12.

[13] This provision also applies to currently excluded comparable fuel.

[14] If the tank is used to actively accumulate hazardous waste after being taken out of service as an ECF (or comparable fuel) product tank, the tank may be eligible for the provisions under § 262.34 that waive the permit requirements for generator tanks that accumulate hazardous waste for not more than 90 days.

[15] This assumes that all hazardous secondary materials claimed to be ECF and stored in a tank or container properly met the conditions for the exclusion. If not, however, any liquid or accumulated solids removed from the tank or container, at any time, would be hazardous waste, and therefore subject to regulation as hazardous waste from the point of generation.

*A. What Types of Combustors May Burn ECF?*

To be excluded, ECF may be burned in an industrial or utility boiler that is a watertube type of steam boiler that does not feed fuel using a stoker or stoker-type mechanism. To be considered a boiler, a combustor must meet the definition of boiler under § 260.10. To be considered an industrial boiler, the boiler must be located on the site of a facility engaged in a manufacturing process where substances are transformed into new products, including the component parts of products, by mechanical or chemical processes. To be considered a utility boiler, the boiler must be used to produce electric power, steam, heated or cooled air, or other gases or fluids for sale. See § 261.38(b)(3)(i)(B).

ECF may also continue to be burned in any hazardous waste combustor operating under a RCRA permit issued under Part 270, provided the ECF is burned under the same operating requirements that apply to hazardous waste burned by the combustor (i.e., ECF must be burned as though it were hazardous waste). Those hazardous waste operating requirements apply in lieu of the conditions for burning ECF under § 261.38(c)(2), except that the ECF constituent feedrate limits under § 261.38(c)(2)(ii)(C) continue to apply.[16] [17] The hazardous waste operating requirements serve as conditions for exclusion of the ECF. Consequently, if the burner fails to comply with the hazardous waste operating requirements when burning ECF, the ECF loses the exclusion and must be managed as hazardous waste from the point of generation.[18]

*B. What Are the Operating Conditions for Burners?*

ECF must be burned under the following operating conditions to be excluded, as provided by § 261.38(c)(2)(ii):[19] [20]

- The feedrate of ECF constituents (i.e., oxygenates and hydrocarbons) must not exceed the limits provided by Table 2 to § 261.38; [21]
- Carbon monoxide (CO) concentrations in the stack gas must be monitored continuously, must be linked to an automatic ECF feed cutoff system, and must not exceed 100 ppmv on an hourly rolling average (corrected to 7% oxygen);
- The boiler must fire at least 50% primary fuel on a heating value and mass basis, and the primary fuel must be fossil fuel, fuels derived from fossil fuel, tall oil, or comparable fuel with a heating value of 8,000 Btu/lb or greater;
- The boiler load must be 40% or greater;
- Key operating parameters (i.e., CO; gas temperature at the inlet to the electrostatic precipitator (ESP) or fabric filter (FF) unless coal is the primary fuel; indicator of boiler load; ECF feedrate; primary fuel feedrate) must be linked to a system that automatically cuts off the ECF feed if the limits on the parameters are exceeded;
- ECF must be fired into the primary fuel flame zone;
- The ECF firing system must provide proper atomization; and
- If the boiler is equipped with an ESP or FF and does not fire coal as the primary fuel, the combustion gas temperature at the inlet to the ESP or FF must be continuously monitored, must be linked to the automatic ECF feed cutoff system, and must not exceed 400 °F on an hourly rolling average.

## IV. What Are the Recordkeeping, Notification, and Certification Conditions?

*A. Fuel Analysis Plans*

ECF generators must develop a fuel analysis plan prior to sampling and analysis of their ECF to determine if the ECF meets the exclusion specifications. See § 261.38(b)(4).

ECF burners may also be required to develop a fuel analysis plan as a condition of the exclusion. Specifically, when burning ECF, burners must know the as-fired heating value and the as-fired concentration of the ECF constituents for each fuel fed to the boiler. If a burner does not receive from the generator documentation of the heating value and concentration of the ECF constituents for each shipment or use the default values for primary fuels provided by § 261.38(c)(2)(ii)C), the burner must develop a fuel analysis plan.[22]

All sampling and analysis plans must document: (1) Sampling, analysis, and statistical analysis protocols that were employed; (2) sensitivity and bias of the measurement process; (3) precision of the analytical results for each batch of fuel tested; and (4) the results of the statistical analysis.

*B. Sampling and Analysis*

ECF must meet all of the specifications for comparable fuel, except the specifications for hydrocarbons and oxygenates. Sampling and analysis is required for all constituents (unless the generator uses process knowledge as discussed below) because, even though the specifications for hydrocarbons and oxygenates are not applicable, the concentrations of those constituents must be known to demonstrate compliance with the feed rate limits for each constituent under § 261.38(c)(2)(ii)(C) (i.e., to satisfy this condition of the exclusion). The generator must document the claim that specific hazardous constituents meet the exclusion specifications based on process knowledge. Just as for comparable fuel, the following cannot be determined to ''not be present'' in the fuel based on process knowledge: (1) A hazardous constituent that causes the ECF to exhibit the toxicity characteristic or hazardous constituents that were the basis for the waste code in 40 CFR 268.40; (2) a hazardous constituent detected in previous analysis of the ECF; (3) a hazardous constituent introduced into the process that generates the ECF; or (4) a hazardous constituent that is a byproduct or side reaction to the process that generates the ECF.

Regardless of which method a generator uses, testing or process knowledge, the generator is responsible for ensuring that the ECF meets all constituent specifications at all times. If at any time the ECF fails to meet any of the specifications, or other conditions of the exclusion, the ECF loses the exclusion and is subject to regulation as hazardous waste from the point of generation.

[16] Although the hazardous waste combustor operating requirements ensure that 99.99% DRE and good combustion is achieved, the ECF constituent feedrate limits are needed to ensure that emissions from the hazardous waste combustor are comparable to fuel oil emissions.

[17] In addition, to implement the ECF feedrate limits, the ECF automatic feed cutoff system requirements under § 261.38(c)(2)(ii)(G) that apply to monitoring the constituent feedrate limits as specified under § 261.38(c)(2)(ii)(G)(1)(ii) also apply to HWCs.

[18] See discussion in Part Four, Section V.A, below for the rationale for this provision.

[19] Note, however, that if ECF is burned in a hazardous waste combustor operating under a RCRA permit, these operating conditions do not apply, except for the ECF constituent feedrate limits. In this situation, all operating requirements that apply to hazardous waste burning apply as conditions for burning ECF.

[20] Please note also that boiler operators must be trained to operate and maintain the boiler and monitoring systems to ensure compliance with the burner conditions. See § 261.38(c)(2)(iii).

[21] See discussion in Part Three, Section III.B.3 below for the rationale for this provision and how it will be implemented. See also § 261.38(c)(2)(ii)(C).

[22] As noted earlier, EPA expects that in the majority of situations, the generator and burner of the ECF will be the same. In this case, the fuel analysis plan required for burners may be incorporated in the generator's fuel analysis plan.

*C. Speculative Accumulation and Legitimacy*

This rule adopts the same speculative accumulation provisions for ECF under § 261.38(b)(7) as those applying to existing comparable fuel and to any recycled hazardous waste under § 261.2(c)(4). Generators and burners must ''turn over'' annually at least 75 percent of the ECF on hand at the beginning of each calendar year. See the definition of ''accumulated speculatively'' in § 261.1(c)(8). An ECF generator must burn or ship off site for burning during the calendar year at least 75% of the ECF on hand on January 1. An ECF burner must burn during the calendar year at least 75% of the ECF on hand on January 1. Although there is no formal recordkeeping requirement associated with the speculative accumulation provision, the burden of proof is on the generator and burner to demonstrate that the ECF has not been speculatively accumulated.

In addition, as like all other hazardous secondary materials being recycled, ECF must satisfy legitimacy criteria assuring that recycling is not a sham for waste management. See, *e.g.* 72 FR 14197–198. Here, the ECF constituent specifications (identical concentrations of most hazardous constituents in ECF and fuel oil), substantial heating value in the oxygenates and hydrocarbons present in higher concentrations than in fuel oil, and conditions on burning assuring the same emissions from a boiler burning ECF as from burning fuel oil, all assure that ECF will be recycled legitimately.

*D. Notifications*

In order to be excluded, ECF generators and burners must comply with the same notification requirements that apply to comparable fuel burners and generators, along with a few additional notification conditions.

1. ECF Generator Notification

The ECF generator is the person who initially generates the hazardous secondary material (otherwise classified as a hazardous waste) and who documents and certifies that the material meets the ECF exclusion criteria. The generator must submit a one-time initial notification [23] to the RCRA and CAA regulatory authorities under § 261.38(b)(2)(i)(A) which contains general facility identification information, a certification stating that the generator is meeting the conditions under § 261.38, and ECF-specific information including:

- An estimate of the average and maximum monthly and annual quantity of hazardous secondary material for which the ECF exclusion is claimed;
- An estimate of the annual quantity of each hazardous secondary material stream for which the ECF exclusion is claimed; and
- An estimate of the maximum concentration of each ECF constituent (*i.e.*, hydrocarbons and oxygenates) in each ECF stream for which the ECF exceeds the comparable fuel specification levels in Table 1 to § 261.38.

2. ECF Burner Notifications

All ECF burners must publish a public notice in a major newspaper of general circulation local to the facility that provides information including (see § 261.38(b)(2)(ii)):

- General facility identification information; and
- An estimate of the average and maximum monthly and annual quantity of ECF to be burned.

In addition, ECF burners must submit a one-time initial notification to the RCRA and CAA regulatory authorities providing general facility identification information and ECF-specific information including (see § 261.38(c)(5)):

- An estimate of the maximum annual quantity of ECF that will be burned; and
- An estimate of the maximum as-fired concentrations of each hydrocarbon and oxygenate for which the ECF exceeds the comparable fuel specification levels in Table 1 to § 261.38.[24]

Finally, ECF burners must submit a notification to the RCRA and CAA regulatory authorities within 5 days of exceeding an operating limit that is linked to the ECF automatic feed cutoff system. The notification must document: (1) The exceedance; (2) the measures the burner has taken to manage the material as a hazardous waste; and (3) the measures the burner has taken to notify the generator that the burner has failed to comply with a condition of the exclusion.

3. Notification of Closure of a Tank or a Container Storage Unit

ECF generators and burners that store ECF in a tank or container must submit a notification to the RCRA regulatory authority when a tank or a container storage area goes out of ECF service.[25] The notification must state the date when the tank or container storage unit is no longer used to store ECF. A tank or container storage unit is out of ECF service if it no longer is used to store ECF that is destined to be burned under the conditions of the exclusion.

*E. Burner Certification*

ECF burners intending to accept ECF from off-site generators must provide the ECF generator with a one-time written, signed statement that includes the following: (1) A certification that the burner will meet the conditions under § 261.38 and that the State in which the burner is located is authorized to exclude ECF under § 261.38; and (2) general facility identification information.

*F. Recordkeeping*

ECF generators are subject to the same recordkeeping requirements that currently apply to comparable fuel generators. ECF burners are also subject to recordkeeping requirements as a condition of exclusion. Records must be maintained for three years.

1. ECF Generator Recordkeeping Requirements

As a condition of exclusion, ECF generators must maintain records containing information including: (1) Documentation of compliance with the applicable conditions of the exclusion; (2) the monthly and annual quantities of each hazardous secondary material that is excluded; and (3) for each off-site shipment, name and address of the burner, quantity of ECF shipped and delivered, date of shipment and delivery, and a cross-reference to the record of information used to document that the fuel meets the ECF specification. See § 261.38(b)(8).

2. ECF Burner Recordkeeping Requirements

ECF burners must keep a record of information required to comply with the operating requirements under § 261.38(c)(2) in order to be excluded.

[23] Please note that, if the generator currently claims an exclusion for comparable fuel and has previously submitted a notification for the comparable fuel, the generator must submit an additional notification to claim an exclusion for ECF.

[24] EPA proposed that burners notify as to the estimated amount of ECF burned monthly and annually (see 72 FR at 3310), but did not propose that the notification include concentration of ECF constituents. However, the proposed rule did not include conditions on the feedrate of ECF constituents, although EPA solicited comment on that possibility, and is adopting that approach in this final rule. EPA views notification of ECF constituent levels as a logical corollary to the rule's feedrate provisions.

[25] This provision is useful in assessing inspection priorities, and in assuring that tanks and containers are closed pursuant to the subtitle C standards if accumulated solids and liquids are not removed within 90 days of cessation of operation as an ECF storage unit. However, EPA considers the provision to be legally severable from the other conditions attached to the management of ECF.

Off-site burners must also keep records of each shipment of ECF received, including: (1) The name, address, and EPA ID number of the generator;[26] (2) the quantity of ECF delivered; and (3) the date of delivery.

*G. Transportation*

DOT requirements applicable to hazardous materials under 49 CFR Parts 171–180 apply to ECF. Those standards include a requirement for a shipping paper.

*H. Ineligible RCRA Hazardous Waste Codes*

Consistent with the current comparable fuel exclusion, hazardous wastes listed for the presence of dioxins or furans are not eligible for the ECF exclusion. See § 261.38(b)(11).

## V. What Are the Consequences of Failure To Comply With a Condition?

It is the responsibility of the generator claiming the exclusion to demonstrate eligibility.[27] More specifically, to be eligible for this exclusion, the person claiming the exclusion must document that ECF meets the ECF specifications under § 261.38(a)(2), as well as the other conditions of the exclusion, including: the conditions prohibiting blending and diluting to achieve the specifications under § 261.38(a)(4) and (a)(7); the implementation conditions under § 261.38(b); and the special conditions for managing ECF under § 261.38(c).

After the exclusion for a hazardous secondary material has been claimed, the conditions of the exclusion must continue to be met to maintain the exclusion.[28] If any person managing ECF fails to meet a condition of the exclusion, the exclusion is lost and the fuel must be managed as a hazardous waste from the point of generation. Therefore, except as discussed below, EPA (or an authorized state) could choose to bring an enforcement action under RCRA section 3008(a) for all violations of the RCRA subtitle C requirements occurring from the time the hazardous secondary material is generated through the time that it is ultimately burned. See § 261.38(d).

If, however, the generator that claims the exclusion for ECF that is burned in an off-site, unaffiliated burner[29] documents in the operating record that it has made reasonable efforts to ensure that the burner complies with the conditions of the exclusion, the hazardous secondary material will not be considered a hazardous waste when managed by the generator upon a finding that the burner has not complied with a condition of the exclusion. The reasonable efforts must be based on an objective evaluation, both prior to the first shipment and periodically thereafter, that the burner would manage the ECF under the applicable conditions of § 261.38. See discussion in Part Four, Section VI.A below.

## VI. What Conditions Apply to Spills and Leaks?

ECF that is spilled or leaked, not cleaned up immediately and which no longer meets the conditions of the exclusion, is ''discarded.'' Thus, it is a solid waste. Such spilled or leaked ECF is a hazardous waste if it exhibits a characteristic of hazardous waste or if the ECF were otherwise a listed hazardous waste.

Furthermore, the exclusion would not affect the obligation to promptly respond to and remediate any releases of ECF that may occur. Management of the released material not in compliance with applicable Federal and State hazardous waste requirements could result in an enforcement action. For example, a person who spilled or released ECF and failed to immediately clean it up could potentially be subject to enforcement for illegal disposal of ECF. See, for example, § 264.1(g)(8). In addition, the release could potentially be addressed through enforcement orders, such as orders under RCRA sections 3013 and 7003.

In addition, ECF that is spilled or leaked and can no longer be burned under the conditions of the exclusion is a waste (it is a hazardous waste if it exhibits a characteristic of hazardous waste or if the ECF were otherwise a listed hazardous waste) and must be managed in accordance with existing federal and state regulations. Furthermore, if an ECF tank system or container ceases to be operated to store ECF product, but has not been cleaned by removing all liquids and accumulated solids within 90 days of cessation of the ECF storage operations, the tank system or container would become subject to the RCRA subtitle C hazardous waste regulations.[30] (This is the same principle that applies to any product storage unit when it goes out of service. See § 261.4(c).) Liquids and accumulated solids removed from a tank system or container that ceases to be operated for storage of ECF product are waste (they are hazardous wastes if they exhibit a characteristic of hazardous waste or if the ECF were otherwise a listed hazardous waste).

## VII. What Are the Clarifications and Revisions to the Existing Conditions for Comparable Fuel?

We are amending several provisions that apply to the comparable fuel conditions for the same reasons that we are applying the amended provisions to ECF. Specifically, those amendments are:

- We are clarifying the consequences of failure to satisfy the conditions of the existing comparable fuel exclusion. That is, we are clarifying that excluded fuel that is spilled or leaked and that no longer meets the conditions of the exclusion must be managed as a hazardous waste if it exhibits a characteristic of hazardous waste or if it is otherwise a listed hazardous waste. See § 261.38(b)(15).
- We are clarifying the status of tank systems and container storage units that cease to be operated as comparable fuel storage units. That is, the tank system and container storage unit become subject to the RCRA hazardous waste facility standards if not cleaned of liquids and accumulated solids within 90 days of ceasing operations as a comparable fuel storage unit. We are also clarifying that discarded liquids and accumulated solids removed from the tank and container after the tank or container ceases to be operated for storage of comparable fuel must be managed as hazardous waste if they exhibit a characteristic of hazardous waste or if they are otherwise listed hazardous wastes. See § 261.38(b)(13).
- We are waiving the RCRA closure requirements for tank systems and container storage units that are used only to store hazardous wastes that are subsequently excluded as comparable fuel. See § 261.38(b)(14), and discussion above in Part Two, Section II.C.2.

[26] ECF generators (and off-site burners) must obtain an EPA ID number. See §§ 261.38(b)(2)(i)(A)(1) and (c)(4).

[27] The burden for demonstrating with appropriate documentation compliance with the conditions of an exclusion in an enforcement action is on the person claiming the exclusion. 40 CFR 261.2(f).

[28] Separate and distinct from any requirement or condition established under this rule, all generators of a secondary material—including ECF generators under this exclusion—have a continuing obligation to conduct proper hazardous waste determinations, including notifying the appropriate government official if they are generating a hazardous waste. 40 CFR 262.11.

[29] An unaffiliated burner is a boiler or hazardous waste combustor located at a facility that is not owned by the same parent company that generated the ECF.

[30] If the storage unit is used to actively accumulate hazardous waste after being taken out of service as an ECF product storage unit, the storage unit may be eligible for the provisions under § 262.34 that waive the permit requirements for generator storage units that accumulate hazardous waste for not more than 90 days.

• We are clarifying the regulatory status of boiler residues, including bottom ash and emission control residue. That is, these wastes would be hazardous if they exhibit a hazardous waste characteristic. See § 261.38(b)(12).

• We are requiring that the one-time notice by the generator to regulatory officials include an estimate of the average and maximum monthly and annual quantity of comparable fuel for which an exclusion is claimed.[31] See § 261.38(b)(2)(i)(A). This condition applies prospectively to generators that newly claim the exclusion and to generators that must submit a revised notification because of a substantive change in the information required by the notice.

In addition, please note that, as proposed, the final rule restructures the current conditions for comparable fuel (and syngas fuel) to make the regulatory language more readable given that the regulation must accommodate the exclusion for ECF. See 72 FR at 33289. Consequently, we have redrafted the entire section for clarity. In addition, we proposed certain technical corrections to several provisions of the rule.[32] Those language changes are purely technical and are promulgated in this final rule. As explained at proposal, we did not reexamine, reconsider, or otherwise reopen these provisions for comment.

## Part Three: What Are the Major Changes Since Proposal?

### I. What Are the Major Changes to the Emission-Comparable Fuel Specification?

Under the final rule, the specifications in Table 1 to § 261.38 do not apply to hydrocarbons and oxygenates in ECF. See § 261.38(a)(2)(ii)(B).

The proposed rule would have continued to apply the specifications to naphthalene and the 10 PAHs listed in Table 1 to § 261.38. We were concerned that, when ECF with high concentrations of the hydrocarbons or oxygenates for which the specifications would not apply is burned, emissions of those compounds may be somewhat higher than from burning fuel oil, even though the boiler is operating under good combustion conditions and achieving 99.99 percent destruction and removal efficiency for organic compounds in the feed. If, notwithstanding the conditions proposed for burning, emissions of naphthalene or the PAHs from burning ECF under a particular situation were higher than emissions from burning fuel oil, we were concerned that ECF emissions may not remain protective.

Given that the final rule (unlike the proposed rule) establishes feedrate limits for each ECF constituent,[33] we now have objective assurance that a boiler burning ECF will have emissions comparable to a boiler burning fuel oil. Consequently, it is no longer necessary to continue to apply the specifications to naphthalene and the 10 PAHs. See discussion of the need for feedrate limits, and an explanation of how they are derived, in Part Three, Section III.B.3 below.[34]

In addition, the specification for minimum heating value under the final rule is 8,000 Btu/lb, and the ECF must meet this specification as generated. The proposed rule would have established a minimum heating value specification of 5,000 Btu/lb, but would have required an as-fired minimum heating value of 8,000 Btu/lb. 72 FR at 33296. The final rule establishes a minimum 8,000 Btu/lb specification as generated consistent with the principle that the conditions which assure that ECF is not discarded all apply to ECF as generated. A heating value for ECF, as-fired, of 8,000 Btu/lb is one of those conditions—it is necessary to assure that emissions from a boiler burning ECF are comparable to a boiler burning fuel oil. This assures that ECF is comparable to fuel oil when burned from the standpoint of physical composition and emissions, and confirms that ECF is reasonably classified as a fuel product and not as a discarded waste. Accordingly, the final rule requires as a condition of the exclusion that the minimum heating value specification applies to ECF as it is generated. See also discussion in Part Two, Section I above.

### II. What Are the Major Changes to the Storage Conditions?

*A. Storage in Containers Is Allowed*

The final rule allows storage of ECF in containers. The proposed rule would have allowed storage only in tanks, but requested comment on whether generators would be likely to store ECF in containers. Several commenters stated that limiting ECF storage to tanks would render small volume facilities ineligible without a rational basis. We believe this is a valid critique and have, therefore, established in the final rule conditions for storage of ECF in containers based on the same principles that we used to establish conditions for storage of ECF in tanks. See § 261.38(c)(1).

*B. Alternative Storage Conditions Are Provided*

The final rule establishes alternative storage conditions that are adopted solely from the hazardous waste storage requirements under Part 264. See § 261.38(e). These controls are of comparable stringency to those drawn from the storage requirements for fuel products and organic liquid products and by-products. You may comply with these conditions in lieu of the collection of storage conditions adopted from the storage requirements for other materials: Discharge prevention requirements adopted from the SPCC requirements for oil storage facilities; containment and emergency procedure requirements adopted from the hazardous waste storage requirements; and fugitive air emission controls adopted from several NESHAP (National Emission Standards for Hazardous Air Pollutants). See discussion in Part Four, Section III.B for the rationale for these alternative conditions.

*C. Conditions To Control Fugitive Air Emissions From Tank Systems Are Revised*

In response to comments on the proposed rule, we reevaluated the controls for air emissions from tanks and determined that: (1) We proposed conditions to expand the applicability of the OLD controls to tank capacity/ECF vapor pressure scenarios that would result in controls more stringent than those that apply to hazardous waste tanks; (2) there are several other tank capacity/ECF vapor pressure scenarios for which OLD is not applicable and for which we inadvertently did not propose conditions to expand OLD control; and (3) we inadvertently did not propose conditions to control air emissions for tanks that store ECF that does not meet

[31] Providing an estimate of excluded quantities would help regulatory officials establish inspection and monitoring priorities. Omission of this condition was an oversight when the exclusion was initially promulgated. We conditioned the exclusion on the burner issuing a public notice that included this information (see existing § 261.38(c)(1)(ii)(D)), but we inadvertently did not specify that the generator who claims the exclusion was to provide this same information to regulatory officials.

[32] See memorandum from Bob Holloway, USEPA, to Docket ID No. EPA–HQ–RCRA–2005–20017, dated January 10, 2007.

[33] ECF constituent means the hydrocarbons and oxygenates in Table 1 to § 261.38, for which the specifications do not apply for ECF.

[34] In addition to these changes to the ECF specification, the final rule also requires that ECF must meet the viscosity specification as generated. Viscosity is a specification that must be met (for both ECF and comparable fuel) before a hazardous secondary material is excluded as a fuel product. Given that ECF may not be treated to meet the specifications, ECF must meet the viscosity (and other) specifications as generated.

the adopted definition of organic liquid, and thus would not be subject to OLD control. We have addressed these issues and revised the fugitive air emission conditions for tanks, as discussed in Part Four, Section III.C below.

*D. Storage in Underground Storage Tanks Is Prohibited*

Storage of ECF in underground storage tanks is prohibited, as discussed in Part II, Section II.C.1, above. Although the proposed rule would have allowed storage in underground tanks, the final rule prohibits such storage to avoid adding further complexity to the rule for a practice that commenters did not indicate would be widely used, if used at all.

**III. What Are the Major Changes to the Burner Conditions?**

*A. What Types of Devices May Burn Emission-Comparable Fuel?*

Under the proposed rule, ECF could be burned only in an industrial or utility boiler that is a watertube type of steam boiler that does not feed fuel using a stoker or stoker-type mechanism. The final rule also allows ECF to be burned in hazardous waste combustors operating under a RCRA permit and in compliance with the applicable requirements under Subpart O, Part 264, Subpart H, Part 266, and Subpart EEE, Part 63, under the condition that the ECF is burned under the same operating requirements that apply to hazardous waste burned by the combustor. The ECF burner operating conditions do not apply to hazardous waste combustors, except for the ECF constituent feedrate limits. See discussion in Part Four, Section V.A below, and § 261.38(c)(2)(i)(B).

*B. What Are the Changes to the Burner Conditions?*

1. Comparable Fuel May Be Primary Fuel

To meet the condition that ECF must be fired with at least 50 percent primary fuel on a heat or mass input basis, the final rule adds comparable fuel with an as-fired heating value of 8,000 Btu/lb or higher to the list of fuels that may be used as a primary fuel. Consequently, you may use the following fuels as primary fuel, provided that they have an as-fired heating value of 8,000 Btu/lb or higher: Fossil fuel; fuels derived from fossil fuel; tall oil; or comparable fuel. See discussion in Part Four, Section V.D below, and § 261.38(c)(2)(ii)(A) and (B).

2. The 50 Percent Primary Fuel Firing Rate Is Based on Heat and Mass Input

A minimum of 50 percent of the fuel fired to the boiler must be primary fuel, determined on a total heat and mass input basis.[35] The proposed rule inadvertently stated that the minimum 50 percent firing rate condition must be determined on a total heat input or *volume* input basis, whichever results in a greater *volume* feedrate of primary fuel. A mass basis for the calculation of the primary fuel firing rate is more appropriate than a volume basis because it is consistent with the mass feedrate limits for the ECF constituents, as discussed below. We also note that the parallel provision for hazardous waste boilers for which the DRE standard is waived (see § 266.110) bases the 50 percent minimum primary fuel requirement on a heat or mass input, whichever results in the greater mass input of primary fuel.[36]

3. A Feedrate Limit for Each ECF Constituent Is Established

The final rule establishes in Table 2 to § 261.38 as a condition of the exclusion a maximum allowable feedrate limit normalized by gas flowrate for each ECF constituent [37] for which the specification does not apply under paragraph (a)(2)(ii)(B). The gas flowrate-normalized feedrate limits have the units, ug/dscm, and are converted to feedrate limits, kg/hr of ECF constituents, by multiplying by the stack gas flowrate, dscm/hr. Although we did not propose regulatory language for feedrate limits for ECF constituents, we discussed at proposal the approach we would use to establish the limits, and presented example limits. 72 FR at 33315–16.[38] We have considered comments on the proposed approach and have refined the approach for the final rule, as discussed below.

The ECF constituent feedrate limits provide objective assurance that the emissions from ECF burning are comparable to the emissions from burning fuel oil: Emissions of ECF constituents from an industrial boiler burning ECF will be comparable to emissions of those compounds from an industrial boiler burning fuel oil. The proposed rule would have addressed this issue by continuing to apply the comparable fuel specifications to PAHs and naphthalene because: (1) When ECF with high concentrations of the hydrocarbons or oxygenates for which the specifications would not apply is burned, emissions of those compounds may be somewhat higher than from burning fuel oil, even though the boiler is operating under good combustion conditions; and (2) higher emissions of PAHs and naphthalene would raise protectiveness concerns because these compounds pose a relatively high hazard compared to other hydrocarbons and the oxygenates listed in Table 1 to § 261.38. 72 FR at 33299. Given that the final rule provides objective assurance through conditions on the feedrate for each ECF constituent that the emissions from ECF burning are comparable to the emissions from burning fuel oil that would often otherwise be the fuel of choice, the rationale for continuing to apply the specifications for these compounds is no longer valid.

Similarly, the proposed 25 percent maximum ECF firing rate limit when benzene or acrolein concentrations exceed two percent is no longer needed. See 72 FR at 33299. The limitation (through conditions) of feedrate of each ECF constituent is a more direct way than the proposed firing rate limit on ECF as a whole to assure that emissions from burning ECF would be comparable to emissions from burning fuel oil.

We discuss below how we derived the feedrate limits and how they are implemented.

[35] We note that this condition was worded at proposal as ''The 50 percent primary fuel firing rate shall be determined on a total heat or volume input basis, whichever results in the greater volume feedrate of primary fuel fired.'' As a practical matter, this means that the primary fuel must provide at least 50% of the heat input to the boiler *and* at least 50% of the volume input of fuels to the boiler. To ensure that the meaning is clear, the final rule expresses the condition as follows: The primary fuel shall comprise at least 50% of the total fuel heat input to the boiler and at least 50% of the total fuel mass input to the boiler. (Note further that we explain in the preamble that we meant to specify the mass input at proposal rather than the volume input.) As an example of how the condition works, if the primary fuel were to provide 60% of the heat input to the boiler but only 40% of the fuel mass input, the mass input must be increased to at least 50%.

[36] We note further that, when EPA initially promulgated the § 266.110 provisions, the rule established the 50 percent primary fuel firing rate on a heat input or volume input, whichever resulted in the greater volume input of primary fuel. EPA subsequently amended the provision, however, to change the volume basis to a mass basis. See 56 FR at 42510 (Aug. 27, 1991).

[37] ECF constituent means the hydrocarbons and oxygenates listed in Table 1 to § 261.38 and for which the specifications do not apply for ECF.

[38] As discussed at proposal (72 FR at 33314), we requested comment on establishing feedrate limits for each ECF constituent in response to a peer review comment stating that it may be problematic to conclude that ECF emissions would invariably be comparable to emissions from burning fuel oil. This is because ECF could have unlimited concentrations of hydrocarbons and oxygenates and that combustion is generally considered to be a constant percent reduction process. Thus, as the concentration of an organic constituent in the feed increases, the concentration of the compound in the emissions may also increase.

a. *Overview of Approach to Establishing Feedrate Limits.* To calculate the ECF constituent feedrate limits, we first identified the industrial boiler fuel oil emission level for each constituent (*i.e.*, measured levels of that constituent in emissions from industrial boilers burning fuel oil) or, where fuel oil emissions data were not available for a specific ECF constituent, a surrogate emission level. We then projected a DRE for each constituent, considering available DRE data, the thermal stability of the compound, and whether the compound is commonly formed as a product of incomplete combustion (PIC). We then back-calculated a maximum feedrate limit that is normalized by stack gas flowrate, and that has the units, ug/dscm. The gas flowrate-normalized feedrate is converted to an ECF constituent feedrate limit (*i.e.*, kg/hr) by multiplying by the boiler gas flowrate (*i.e.*, dscm/hr).

b. *Fuel Oil Emission Levels.* We have industrial boiler fuel oil emissions data for 12 of the 37 ECF constituents.[39] We used the highest test condition average emissions to establish the maximum allowable emission levels for these 12 constituents. It is reasonable to use the highest test condition average as the maximum allowable emission level rather than the average or 95th percentile because the data base is not robust—the full range of boiler emissions may not be represented by the limited data base. Using the highest test condition average is a reasonable means of accounting for emissions variability.

For the other 25 ECF constituents-the two PAHs and the oxygenates other than acrolein—we identified surrogates for industrial boiler oil emission levels.[40] For the two PAHs, we identify a surrogate oil emission level of 0.02 ug/dscm using emission data from other PAHs for which we do have emission data from oil-burning boilers. This approach is reasonable because: (1) 0.02 ug/dscm is at the low end of the range of emission levels for PAHs from oil-burning boilers[41]; and it is appropriate to select from the low end of this range because PAHs are more toxic than the other hydrocarbons and the oxygenates[42]; and (2) available emissions data indicate that PAHs are emitted at substantially lower levels—less than 0.6 ug/dscm—than either the oxygenates or the other hydrocarbons and the emission level we selected are consistent with these data.

For the oxygenates, we identified a surrogate oil emission level of 18 ug/dscm because: (1) It is the only available emission level in our data base for an oxygenate (*i.e.*, acrolein) from a boiler burning fuel oil; (2) it is in the range of emission levels for oxygenates from other combustion sources[43]; and (3) although it is not at the low end of the range of oxygenate emissions from combustion sources, it is an appropriate surrogate emission level because it would result in *de minimis* health risk.[44]

c. *Projected Destruction and Removal Efficiencies (DREs).* We projected DREs for each of the 37 ECF constituents considering the available DRE data, the thermal stability of the compound, and whether, even under good combustion conditions, the compound is commonly formed as a PIC.[45]

As discussed at proposal, we investigated the DRE data available for hazardous waste-fired liquid fuel boilers to project a DRE for the ECF constituents.[46] We have both DRE and feedrate data for approximately 200 runs from 27 boilers for 10 compounds. Two of those compounds are ECF constituents: Benzene and toluene. Based on analysis of those data (*i.e.*, the DRE data for the ECF constituents and other compounds), it was reasonable to project a DRE for ECF constituents in the feed of 99.99 percent for thermal stability class 1 and 2 compounds (which are more difficult to destroy), and a DRE for ECF constituents in the feed of 99.995 percent for class 3–7 compounds.[47]

During development of the final rule and in response to public comment,[48] however, we concluded that, for ECF constituents that are commonly formed as PICs (*i.e.*, benzene, naphthalene, phenol, and toluene),[49] the effective, measured DRE may be lower (*i.e.*, appearing to be less efficient destruction evidenced by emissions of the compound), particularly at low constituent feedrates, even under good combustion conditions, considering the total emissions of the compound: Emissions from unburned compounds in the feed, and emissions attributable to PIC formation during the incomplete destruction of other compounds in the ECF and other boiler fuels. Although the DRE for the quantity of the compound in the feed to the boiler would be at least 99.99% under good combustion conditions, the effective, measured DRE of compounds that are common PICs may be lower than 99.99% when they are fed at low feedrates. This is because at low feedrates, the portion of the compound in the emissions that is attributable to PICs, rather than unburned compound in the feed, can be substantial. As the compound feedrate increases, emissions of the compound attributable to unburned compound in the feed mask the quantity of the compound present as a PIC, and the effective, measured DRE becomes more representative of the feed-related DRE. Because ECF constituents can be fed at low feedrates, however, the DRE used to calculate the ECF constituent feedrate limits for the constituents that are common PICs—benzene, naphthalene, phenol, and toluene—must account for the proportion of the emissions of the constituent that is emitted as unburned compound in the feed relative to the portion of emissions attributable to PICs

[39] We have oil emissions data for benzene, naphthalene, toluene, acrolein and eight of 10 PAHs.

[40] For more information than provided in the preamble, see USEPA, ''Final Technical Support Document for the Expansion of the Comparable Fuels Exclusion,'' November 2008, Section 6.3.

[41] The oil emissions data for the eight PAHs are: 0.005 ug/dscm; 0.02 ug/dscm; 0.04 ug/dscm; 0.1 ug/dscm; 0.1 ug/dscm, 0.16 ug/dscm; 0.18 ug/dscm; and 0.61 ug/dscm.

[42] See the relative hazard ranking for the ECF constituents in USEPA, ''Final Technical Support Document for the Expansion of the Comparable Fuels Exclusion,'' November 2008, Section 2.4.

[43] Hazardous waste boilers operating under good combustion conditions can emit oxygenates in the range of 0.6 ug/dscm to 130 ug/dscm, and coal boilers can emit oxygenates in the range of 1.6 ug/dscm to 38 ug/dscm. See USEPA, ''Final Technical Support Document for the Expansion of the Comparable Fuels Exclusion,'' November 2008, Section 6.3.

[44] Maximum annual ground level concentrations of the oxygenates will be orders of magnitude lower than the reference air concentrations (RfCs) for the oxygenates other than acrolein. (The RfC is an estimate of a continuous inhalation exposure concentration to people (including sensitive subgroups) that is likely to be without risk of deleterious effects during a lifetime.) See USEPA, ''Final Technical Support Document for the Expansion of the Comparable Fuels Exclusion,'' November 2008, Section 6.3. Although the RfC for acrolein is much lower than the RfCs for the other oxygenates such that maximum annual ground level concentrations of acrolein from burning ECF could approach this RfC, we have emissions data for acrolein from an oil-burning boiler and therefore do not need to identify (and justify) a surrogate emission level to back-calculate a feedrate limit.

[45] For purposes of this discussion, PICs are compounds in emissions that are formed from the incomplete destruction of organic compounds in the ECF and other boiler fuels.

[46] See 72 FR at 33315–16, and Document No. EPA–HQ–RCRA–2005–0017–0067 and Document No. EPA–HQ–RCRA–2005–0017–0068.

[47] The Thermal Stability ranking classifies (generally) hazardous compounds according to their gas phase thermal stability under oxygen-starved conditions. Compounds are ranked according to the temperature required to destroy 99% of the compound in 2 seconds under oxygen-starved conditions. See USEPA, ''Guidance on Setting Permit Conditions and Reporting Trial Burn Results, Volume II of the Hazardous Waste Incineration Guidance Series,'' January 1989, Table D–1.

[48] See USEPA, ''Comment Response Document for the Exclusion of Emission-Comparable Fuel,'' October 2008, Section 4.7, Comment No. 126A.9.

[49] USEPA, ''Final Technical Support Document for the Expansion of the Comparable Fuels Exclusion,'' November 2008, Section 6.3.

at low feedrates. Thus, the DREs used to calculate the feedrate limits for the common PICs may be lower than the DREs associated with higher feedrates where the PIC contribution is masked by unburned compound in the feed.[50] [51]

Although 14 ECF constituents are thermal stability class 1 or 2 compounds for which we project a feed-related (not effective) DRE of 99.99%, three of those compounds are common PICs: Benzene, naphthalene, and toluene. For these three compounds, we believe it is reasonable to consider reducing the feed-related DRE by an order of magnitude to project a default, effective DRE of 99.9% to account for PIC emissions at low feedrates of these compounds. We note, however, that we have substantial DRE data for benzene (from two boilers at one source) documenting (effective) DREs below 99.9 percent at low feedrates in the range allowed for ECF. Consequently, we project a DRE for benzene of 99.7% because it is at the low end of the range of DREs achieved at the low feedrates at which benzene in ECF may be fed.[52] In addition, we note that, for toluene, we have approximately 20 DRE runs at low feedrates (i.e., the same low feedrates for which benzene DREs were well below 99.99%), all of which are *above* 99.99%.[53] We also have more than 20 DRE runs for toluene at moderate feedrates, and all but one of those runs achieved greater than 99.99% DRE. The lowest run achieved 99.987% DRE. Consequently, we believe that a projected DRE of 99.99% is appropriate and is more in line with the measured DREs for toluene than the nominal order of magnitude reduction in feed-related DRE for common PICs that we would otherwise apply. We did not have DRE data for naphthalene at proposal, and therefore use the default order of magnitude reduction in DRE to account for PICs (*i.e.*, 99.9%).

For similar reasons, for the thermal stability class 3 compound that is a common PIC—phenol—we project an effective DRE of 99.95 percent, an order of magnitude lower than the 99.995 percent feed-related projected DRE. We did not have DRE data for phenol at proposal, and therefore use the default order of magnitude reduction in DRE to account for PICs.

We also considered whether PICs from the combustion of ECF compounds that are not themselves common PICs could cause an exceedance of the fuel oil (or surrogate) emission levels for the ECF constituents.[54] We note that several ECF constituents are aromatics (*e.g.*, the cresols, the phthalates, and acetophenone) that could form PICs that are ECF constituents. It is reasonable to conclude, however, that PICs from these compounds will not cause an exceedance of the fuel oil (or surrogate) emission levels for other ECF constituents because: (1) Only four ECF constituents are common PICs; and (2) the projected, effective DREs for these PICs, and thus their feedrate limits, account for PIC emissions.

EPA may consider expanding the comparable emissions approach, and revisiting the DRE analysis, in light of new data we may gather. As part of various rulemakings and other activities, EPA may receive data from hazardous waste combustors on emissions and feed used, which might be used to refine the comparable emissions approach.

d. *Implementation of Feedrate Limits.* As discussed above, the feedrate limits are expressed as a gas flowrate-normalized feedrate (ug/dscm), which is the feedrate in mass/unit time normalized by stack gas flowrate. The total feedrate limit (kg/hr) for each ECF constituent, for total boiler fuels, is determined by the boiler gas flowrate and the maximum ECF constituent feedrate (ug/dscm) provided by Table 2 to § 261.38. The maximum feedrate (kg/hr) of a constituent attributable to ECF is the total boiler constituent feedrate (kg/hr) minus the constituent feedrate (kg/hr) for all other boiler feedstreams.

To account for ECF constituents in fuel oil used as the primary fuel, burners may use actual concentrations of ECF constituents in their fuel oil, or the default concentrations based on fuel oil analysis EPA used to support the comparable fuel specification.[55] See Table 3 to § 261.38. Burners may also use other fuels as primary fuel, including coal and natural gas. See § 261.38(c)(2)(ii)(A). If coal is the primary fuel, burners may use actual concentrations of ECF constituents in their coal, or default concentrations based on AP–42 emission factors. See Table 4 to § 261.38. If natural gas is the primary fuel, burners may assume the gas does not contribute ECF constituents.

Example calculations for maximum feedrates of ECF constituents and concentrations of constituents in ECF, and example ECF firing rate restrictions resulting from the ECF constituent feedrate limits are presented in USEPA, ''Final Technical Support Document for the Expansion of the Comparable Fuels Exclusion,'' November 2008, Section 6.3.

4. Additional Operating Parameters Must Be Linked to the ECF Automatic Feed Cutoff System

The final rule requires that additional operating parameters be linked to the ECF automatic feed cutoff system (AFCOS) to ensure compliance with the conditions of the exclusion. In addition to requiring that the ECF AFCOS engage when carbon monoxide levels exceed 100 ppmv on an hourly rolling average and when the combustion gas temperature at the inlet to the initial dry particulate matter control device exceeds 400 °F on an hourly rolling average, as proposed (72 FR at 333296 and 333298), the final rule also requires that the ECF AFCOS engage when: (1) The emission-comparable fuel feedrate limit for a constituent exceeds the limit provided in Table 2 to § 261.38; (2) the primary fuel firing rate is below 50 percent on either a heat input or mass input basis; and (3) the steam production rate (or other appropriate indicator) indicates that the boiler load

[50] If the DRE associated with high ECF constituent feedrates were used to calculate the ECF constituent feedrate limits, emissions from burning ECF at low feedrates would be higher than from burning fuel oil. This is because the allowable emissions of the compound would be calculated assuming incorrectly that the PIC contribution would not be significant at low feedrates. When the PIC contribution is considered, emissions of the compound would be higher than from fuel oil emissions.

[51] Please note that, because we cannot quantify the increase in DRE as feedrate increases, we projected a constant DRE across all feedrates. Nonetheless, we conducted an analysis of DREs at higher feedrates by drawing curves that bound the worst DREs at higher feedrates. That analysis corroborated the ECF constituent feedrate limits calculated by assuming a constant DRE across feedrates. Although the analysis indicates that higher DREs are achieved at higher feedrates, those higher DREs are not high enough to provide comparable emissions, i.e., applying those DREs to the associated feedrates would result in emissions exceeding fuel oil emission levels. See USEPA, ''Final Technical Support Document for the Expansion of the Comparable Fuels Exclusion,'' November 2008, Section 6.3, and the memorandum from Bob Holloway, USEPA, to Docket ID Number EPA–HQ–RCRA–2005–0017, entitled ''Projecting DREs to Calculate ECF Constituent Feedrate Limits: Bounding Analysis to Investigate the Relationship Between DRE and Feedrate,'' dated November 24, 2008.

[52] USEPA, ''Final Technical Support Document for the Expansion of the Comparable Fuels Exclusion,'' November 2008, Section 6.3.

[53] USEPA, ''Final Technical Support Document for the Expansion of the Comparable Fuels Exclusion,'' November 2008, Figure 6–2.

[54] We note that PICs from the combustion of ECF constituents would not result in emissions of compounds other than ECF constituents at levels greater than from oil emissions. This is because the feedrate limits ensure that ECF constituents will not result in emissions of ECF constituents, and by extension PICs from those constituents, at levels higher than fuel oil.

[55] USEPA, ''Final Technical Support Document for HWC MACT Standards, Development of Comparable Fuel Specifications,'' May 1998, Appendix B.

is below 40 percent (i.e., the automatic feed cutoff system activates when one of the conditions on burning is about to be exceeded). See § 261.38(c)(2)(ii)(F)(1).

In addition, the final rule corrects the proposed excessive exceedance reporting requirement to require an exceedance report within five days of exceeding an operating limit linked to the AFCOS when ECF is in the combustion chamber. At proposal, we inadvertently directly adopted for ECF the excessive exceedance reporting requirements applicable to hazardous waste combustors (HWCs). For HWCs, operating parameters that are linked to the automatic waste feed cutoff system are indicators that a source may have failed to maintain compliance with an emission standard. Thus, exceeding one or more operating limits more than 10 times in a 60 day block is considered to be excessive (and indicating an increased possibility that an emission standard may be exceeded), and an excessive exceedance report is required. Upon receipt of an excessive exceedance report, the regulatory authority may review the HWC's operations and provide additional requirements to minimize exceedances.

For ECF burners, however, any exceedance of an operating limit linked to the AFCOS when ECF is in the combustion chamber is a failure to comply with a condition of the exclusion. In that event, the material must be managed as hazardous waste from the point of generation. Accordingly, this final rule requires that the burner notify the regulatory authority within five days of exceeding an operating limit linked to the AFCOS when ECF is in the combustion chamber. Those operating parameters that are linked to the AFCOS and for which limits are established are: (1) CO level in the stack gas; (2) temperature at the inlet to the FF or ESP for sources not burning coal as the primary fuel; (3) an indicator of boiler load; (4) primary fuel firing rate; and (5) feedrate of ECF constituents. The notification must document: (1) The exceedance; (2) the measures the burner has taken to manage the material as a hazardous waste; and (3) the measures the burner has taken to notify the generator that the burner has failed to comply with a condition of the exclusion.

5. Burners Must Provide Operator Training

The final rule includes a condition requiring boiler operator training. See § 261.38(c)(2)(iii). Boiler operator training is needed to ensure compliance with the boiler operating conditions under § 261.38(c)(2)(ii). Although we included a condition in the proposed rule that would require operator training for storage units,[56] and so implied that operator training would generally be an applicable condition, we inadvertently did not propose a parallel condition for boiler operator training.

We are correcting this omission in the final rule. The condition is needed to assure that combustion occurs under the specified conditions, which in turn assures emission comparability, an element of our determination that ECF is not discarded (through destruction of the ECF constituents) when it is burned, but rather is managed (including burned) as a fuel commodity. The boiler operating conditions are sufficiently complex that training is needed to ensure that boiler operation and maintenance personnel can understand and effectively implement the operating requirements of the conditions for exclusion, including the continuous monitoring system requirements and the ECF AFCOS. In fact, without such training, we do not believe that a burner could comply with the conditions on burning, and thus, should not be eligible for the exclusion. (Note: The boiler operator training provision is not redundant to emergency response training requirements under the Occupational Safety and Health Administration (OSHA) regulations at 29 CFR 1910.120(q).)

For purposes of this provision, boiler operators are personnel that operate or maintain the boiler when ECF is burned, including continuous monitoring systems and the ECF AFCOS. The condition requires that boiler operators must successfully complete a program that teaches them to perform their duties in a way that ensures the boiler's compliance with the operating conditions under § 261.38(c)(2)(ii).

The training program must be directed by a person trained in boiler operation procedures, and must include instruction which teaches boiler operators procedures relevant to the positions in which they are employed. At a minimum, the training program must be designed to ensure that boiler operators understand the operating conditions under paragraph (c)(2)(ii) and are able to respond effectively when the ECF AFCOS engages an automatic cutoff of the feed of ECF. Boiler operators must take part in an annual review of the initial training.

The boiler owner or operator must maintain the following documents and records at the facility: (1) The job title and written description of the position for each boiler operator position, and the name of the employee filling each job; (2) a written description of the type and amount of both introductory and continuing training that will be given to each person; and (3) records that document that the required training or job experience has been given to, and completed by, boiler operators.

Training records on current personnel must be kept until ECF is no longer burned in the boiler. Training records on former boiler operators must be kept for at least three years from the date the employee last worked as a boiler operator at the facility.

## IV. What Are the Major Changes to the Implementation Conditions?

### *A. What Are the Changes to the Analysis Plan Provisions for Burners?*

To comply with the feedrate conditions for ECF constituents provided by § 261.38(c)(2)(ii)(C) and in Table 2 to § 261.38, the final rule requires that ECF burners must know the as-fired heating value of each fuel and the as-fired concentration of ECF constituents in each fuel fed to the boiler (*e.g.*, fossil fuels and ECF itself). The proposed rule would have established feedrate conditions only on ECF that contained more than two percent benzene or acrolein. These proposed conditions have been superseded by the feedrate conditions for all ECF constituents. See discussion in Section III.B.3 above. Accordingly, the final rule expands the analysis plan requirements for burners to implement the feedrate conditions on ECF constituents. See § 261.38(b)(2)(5).

ECF burners are subject to the fuel analysis plan conditions under § 261.38(b)(4) to determine the as-fired heating value and concentration of ECF constituents in each fuel fed to the boiler, except: (1) The burner may use documentation provided by the generator for each shipment of ECF of the heating value and concentration of ECF constituents[57]; and (2) the burner may use the default primary fuel heating values and ECF constituent concentrations provided in § 261.38(c)(2)(ii)(C)(*4*).

### *B. What Are the Changes to the Notification Provisions?*

1. Initial Notification

For generators of ECF, the final rule expands the information required in the

[56] See proposed § 261.38(c)(1)(iii)(D) that adopts the SPCC training provisions under § 112.7(f).

[57] If the burner commingles the ECF with other fuels, the burner may use documentation provided by the generator to calculate the as-fired heating value of the ECF and the concentration of ECF constituents.

one-time notification [58] to the RCRA and CAA regulatory authority in whose jurisdiction the exclusion is being claimed. In particular, in addition to the general facility information and an estimate of the average and maximum monthly and annual quantity of hazardous secondary materials for which an exclusion would be claimed under the proposed rule, the final rule is conditioned on the generator also providing an estimate of the annual quantity of each ECF stream, and, for each ECF stream, the maximum concentration of each ECF constituent that exceeds the comparable fuel specification in Table 1 to § 261.38. See § 261.38(b)(2)(i)(B). This additional information characterizing the ECF will assist the regulatory authorities establish monitoring and enforcement priorities.

For burners of ECF that receive the fuel from an offsite generator, the final rule also expands the information required in the one-time notification from the burner to the RCRA and CAA regulatory authority in whose jurisdiction the exclusion is being claimed. In particular, in addition to the general facility information and certification of compliance with the storage and burner conditions of the exclusion required under the proposed rule, the final rule also requires the burner to: (1) Provide an estimate of the maximum annual quantity of ECF that will be burned, and an estimate of the maximum as-fired concentrations of each ECF constituent for which the ECF exceeds the specifications for comparable fuel in Table 1 to § 261.38; and (2) provide documentation that ECF will be fired into the flame zone of the primary fuel.[59] See § 261.38(c)(5). This additional information characterizing the ECF and boiler operating conditions will assist regulatory authorities to establish monitoring and enforcement priorities.

2. Notification of Closure of a Tank or a Container Storage Unit

ECF generators and burners that store ECF in a tank or container must submit a notification to the RCRA regulatory authority when a tank or a container storage area goes out of ECF service. The notification must state the date when the tank or container storage unit is no longer used to store ECF. A tank or container storage unit is out of ECF service if it no longer is used to store ECF that is destined to be burned under the conditions of the exclusion.

*C. What Are the Changes to the Consequences of Failure To Comply With a Condition of the Exclusion?*

As proposed, an excluded fuel (*i.e.*, existing comparable fuel, synthesis gas fuel, and ECF) loses its exclusion if any person managing the fuel fails to comply with the conditions of the exclusion under § 261.38, and the hazardous secondary material must be managed as a hazardous waste from the point of generation. In such situations, EPA or an authorized state agency may take enforcement action under RCRA section 3008(a).

The final rule provides a ''reasonable efforts'' provision, however, to address generator liability when an offsite, unaffiliated burner fails to comply with a condition of the exclusion for ECF.[60] If the generator who claims the exclusion for ECF that is burned in an off-site, unaffiliated boiler [61] documents in the operating record that reasonable efforts have been made to ensure that the burner complies with the conditions of exclusion, the burner rather than the generator will be liable for discarding a hazardous waste upon a finding that the burner has not complied with a condition of exclusion. See § 261.38(d)(2).

The reasonable efforts must be based on an objective evaluation by the generator, both prior to the first shipment and periodically thereafter, that the burner would manage the ECF under the applicable conditions of § 261.38. Reasonable efforts by the generator must include, at a minimum, affirmative answers to the following questions prior to shipping the ECF to the burner, and must be repeated every three years thereafter: (1) Has a burner submitted the notification to the RCRA and CAA Directors required under § 261.38(c)(5)(i), and has the burner published the public notification of burning activity as required under § 261.38(b)(2)(ii); (2) are there any unresolved significant violations of environmental regulations at the burner facility, or any formal enforcement actions taken against the facility in the previous three years for violations of environmental regulations, and if yes, does the generator have credible evidence that the burner will nonetheless manage the ECF under the conditions of § 261.38; and (3) does the burner have the equipment and trained personnel to manage the ECF under the conditions of § 261.38.

In making these reasonable efforts, the generator may use any credible evidence available, including information obtained from the burner and information obtained from a third party. The generator must maintain for a minimum of three years documentation and certification that reasonable efforts were made for each burner facility to which ECF is shipped.

**Part Four: What Are the Responses to Major Comments?**

**I. Scope of the ECF Exclusion**

*Comment:* Several commenters state that EPA's decision not to address their analytical concerns about demonstrating compliance with the existing exclusion is a significant ''missed opportunity'' to increase the usefulness of the existing exclusion. They claim that matrix interferences and detection limit problems make it difficult or impossible to demonstrate comparability for many waste fuels. These same commenters also urge EPA to allow for blending to meet the specification limits for hydrocarbons and oxygenates.

*Response:* Regarding the commenters' analytic concerns, we explained at proposal that the specifications in Table 1 to § 261.38 for volatile organic compounds that were not detected in fuel oil or gasoline were based on the low levels of detection achievable for fuel oil rather than the much higher levels of detection achievable for gasoline.[62] 72 FR at 33287–88. Given that only benzene, toluene, and naphthalene were detected in our benchmark fuels—fuel oils and gasoline—we used this approach for most of the volatile organic compounds. We acknowledged this deviation from establishing the specification for undetected compounds as the highest level of detection in a benchmark fuel and explained that the levels of detection for volatile compounds in gasoline were inflated because of matrix effects. Commenters believe that we should consider the fact that many hazardous secondary materials used as a fuel may pose the same matrix effects

[58] If there are subsequent, substantive changes in the information provided in the notification, the generator must submit a revised notification to the regulatory authorities.

[59] See discussion in Part Four, Section IV.C regarding the rationale for documenting that ECF will be fired into the flame zone of the primary fuel, and guidance on acceptable documentation.

[60] A reasonable efforts provision is not provided for comparable fuel and synthesis gas fuel generators because there are minimal conditions on burners for those excluded fuels, and the generator can readily determine if the burner has complied with those conditions. Comparable fuel and syngas fuel burners must: (1) Publish a public notice of their intent to burn excluded fuel, as required by § 261.38(b)(2(ii); and (2) submit a certification to the generator, as required by § 261.38(b)(10)(i).

[61] The rule defines an unaffiliated burner as a boiler or hazardous waste combustor located at a facility that is not owned by the same parent company that generated the ECF.

[62] EPA promulgated these specifications in 1998, 63 FR 33782 (June 19, 1998).

as gasoline, such that the fuel oil-based specifications would not be reasonably achievable.

We continue to believe that it would not be appropriate to consider increasing the specifications for all volatile organic compounds and base them on the higher levels of detection in gasoline rather than fuel oil levels of detection because most of the compounds (*e.g.*, halogenated compounds) would simply not be expected to be found in fuel oil or gasoline. As a result, use of the higher detection limits would result in specification levels that could exclude hazardous secondary materials that are not comparable to fuel oil or gasoline. Rather, only certain hydrocarbons would be expected to be in these fuels. We explained at proposal that we could potentially also consider oxygenates, however, because they are within a class of compounds that are added to fuels to enhance combustion.

It appeared, however, that this potential revision would not likely result in additional hazardous secondary materials being conditionally excluded. In discussions with the chemical industry during the development of the proposed rule, they did not identify any hazardous secondary materials that cannot meet the current specifications using analytical methodologies recommended for the matrix in question, but that could qualify for exclusion if the specifications for volatile hydrocarbons and oxygenates were increased to the levels of detection for gasoline that we experienced when sampling the benchmark fuels. Although the commenters reiterate their concerns about analytic issues, they again have not identified any hazardous secondary materials that would be conditionally excluded from regulation if the specifications for volatile hydrocarbons and oxygenates were increased to the levels of detection for gasoline. We continue to be unable to identify the problem. Consequently, the final rule does not revise the specifications for volatile hydrocarbons and oxygenates.

With respect to commenters' concern regarding allowing blending to meet the specification limits for hydrocarbons and oxygenates, in discussions with the chemical industry during the development of the proposed rule, they again did not identify any hazardous secondary materials that would be conditionally excluded from regulation if blending were allowed. Consequently, we did not pursue this approach further. Even though the commenters reiterate their concerns about blending in response to the proposed rule, commenters again have not identified any hazardous secondary materials that would be excluded if blending to meet the specifications for hydrocarbons and oxygenates were allowed. Consequently, EPA is finalizing this aspect of the rule, as proposed.

## II. Legal Rationale for the ECF Exclusion

### *A. EPA's Interpretation of the Solid Waste Disposal Act (SWDA)*

1. Hazardous Waste Burned for Energy Recovery

*Comment:* A commenter states that EPA's claim that hazardous secondary material that is otherwise a hazardous waste can be classified as a fuel if it is burned for energy recovery under certain combustion conditions contravenes the Solid Waste Disposal Act (SWDA). The commenter believes that the text of the Act makes clear that burning a material that would otherwise qualify as a hazardous waste does not transform that material into something other than a waste, regardless of whether energy is recovered from the combustion process and regardless of the conditions under which it is burned. The text of the SWDA demonstrates that Congress was well aware that waste is burned for energy recovery, but did not intend that combusting a hazardous secondary material for energy recovery would transform that material from a regulated waste to an unregulated fuel, according to the commenter. The commenter states that § 3004(q) requires EPA to issue standards applicable to facilities that produce fuel from hazardous waste, facilities that ''burn, for purposes of energy recovery, any fuel produced'' from hazardous waste, and persons who distribute or market fuel produced from hazardous waste. 42 U.S.C. 6924(q)(1)(A)–(C).

*Response:* The final rule does not exclude from the definition of solid waste fuels produced from hazardous waste. The rule states that ECF is not a solid waste due to the combination of management practices (determined via conditions on the exclusion) and the physical identity of ECF to the fossil fuels for which it can substitute which demonstrate objectively that the hazardous secondary material can permissibly be classified as non-discarded. ECF will be stored subject to conditions similar to or identical to those which apply to commercial fuels, products, or by-products. It will be burned under conditions such that emissions will not be different from the fuel oil that could be burned in its place. It is largely physically identical to fuel oil with respect to hazardous constituent concentrations. To be ECF, the secondary material as initially generated must meet the hazardous constituent specification, as well as the other specifications, and then be subject to all other conditions. Such materials can permissibly be considered not to be discarded and hence not solid wastes.

EPA sees nothing in § 3004(q) which supports the commenter's contention that such materials must be classified as discarded. The provision only applies to hazardous wastes, so the first inquiry must necessarily be whether the material at issue—ECF—is discarded. Section 3004(q) does not itself address that question. The commenter's statement that § 3004(q) requires EPA to develop rules that regulate emissions from burning hazardous waste for energy recovery is correct, but does not address whether ECF is discarded—i.e., is solid waste in the first instance. Under section 3004 (q), a hazardous secondary material must first be a hazardous (and solid) waste before restrictions can apply to burning it for energy recovery.

2. SWDA § 3004(q)

*Comment:* The commenter notes that § 3004(q) further expressly provides ''[f]or purposes of this subsection, the term 'hazardous waste listed under section 6921 of this title' *includes* any commercial chemical product which is listed under section 6921 of this title and which, in lieu of its original intended use, is (i) produced for use as (or as a component of) a fuel, (ii) distributed as a fuel, or (iii) burned as a fuel.'' 42 U.S.C. 6924(q)(1) (emphasis added). Thus, the commenter states that § 3004(q) makes clear that Congress intended any material that qualifies as hazardous waste to be regulated as hazardous waste regardless of whether it is turned into a fuel, marketed or distributed as a fuel, or burned as a fuel for energy recovery. The commenter notes that Congress emphasized this point by making clear that such materials are ''waste'' even if they are ''commercial chemical product[s]'' rather than materials that were not deliberately produced for sale or some other purpose.

*Response:* The reference to ''commercial chemical products'' refers to those hazardous secondary materials listed in § 261.33 and does not classify as wastes materials listed in that section which are themselves ordinary fuels. At the time of the 1984 amendments, EPA had in place a rule (former §§ 261.2 and 261.33) which did not classify those listed commercial chemicals burned as fuels as discarded. Congress in promulgating § 3004(q) made clear that

commercial chemical products listed in § 261.33 not produced as fuels were to be classified as hazardous wastes when burned for energy recovery. Congress made equally clear that listed commercial chemical products which were themselves ordinary fuels (for example, benzene, toluene, and xylene) were not to be classified as wastes (see § 3004(q)(1)) (reference to listed commercial chemical products includes only those products listed in § 261.33 which are not used for their original intended purpose but instead are burned as a fuel; see also H.R. Rep. 98–198, 98th Cong. 1st session 40 (same)). This has been EPA's consistent interpretation of this provision. See 61 FR at 17459 (April 19, 1996) (commercial chemical benzene, toluene, and xylene are not discarded when used as fuels since they are themselves fuels); 50 FR at 49168 n. 8 (Nov. 29, 1985) (pipeline interface from transport of toluene not a waste when burned for energy recovery, under the same principle).

This provision has been construed narrowly as applying solely to commercial chemical products used as fuels in lieu of their normal use. *AMC I,* 824 F. 2d at 1189. ECF is not such a material. See also related responses below.

*Comment:* The same commenter states that the legislative history of § 3004(q) confirms that fuel produced from hazardous waste must be regulated as hazardous waste. The commenter notes that, before § 3004(q) was amended, EPA had created a regulatory provision that ''provided that unused commercial chemical products were solid wastes only when 'discarded' '' and defined that term as ''abandoned (and not recycled) by being disposed, burned, or incinerated (*but not burned for energy recovery*).'' *American Mining Congress* v. *EPA,* 824 F.2d 1177, 1188–1189 (DC Cir. 1987) (''*AMC I*'') (*quoting* 1983 regulatory provisions) (emphasis added). To ''override'' that regulatory provision, Congress added the following language to § 3004(q), according to the commenter: ''for purposes of this subsection, the term 'hazardous waste listed under section 6921 of this title' *includes* any commercial chemical product which is listed under section 6921 of this title and which, in lieu of its original intended use, is (i) produced for use as (or as a component of) a fuel, (ii) distributed as a fuel, or (iii) burned as a fuel.''' 824 F.2d at 1188–1189 (*quoting* 42 U.S.C. 6924(q)(1)) (emphasis added). The commenter notes that the House Report on this amendment expressly states:

> Hazardous waste, as used in this provision, includes not only wastes identified or listed as hazardous under EPA's regulations, but also includes any commercial chemical product (and related materials) listed pursuant to 40 CFR 261.33, which is not used for its original intended purpose but instead is burned or processed as fuel. (Under current EPA regulations, burning is not deemed to be a form of discard; hence listed commercial chemical products, unlike spent materials, by products or sludges, are not deemed to be a ''waste'' when burned as fuel. They are only ''waste'' when actually discarded or intended for discard.)

824 F.2d at 1189 (*quoting* H.R. Rep. No. 198, 98th Cong., 1st Session 40).

According to the commenter, the House Report affirms that ''EPA already has the authority to regulate the blending and burning of hazardous wastes for purposes of energy recovery'' and explains that their objective is ''to accelerate the agency's rulemaking and close a major gap in the present regulations and to set an outside deadline for the *regulation of all burning of hazardous wastes.*'' H.R. Rep. No. 198, 98th Cong., 1st Session 42 (emphasis added). The House Report reiterates that the legislation ''corrects a major deficiency in the present RCRA regulations by requiring EPA to exercise its existing authority over hazardous waste-derived fuels by regulating their production, distribution and use.'' *Id.* at 39. In summary, the House Report states:

> EPA has asserted its jurisdiction over burning and blending of hazardous waste for energy recovery * * * However, the committee still believes, as it did last year, that legislation is necessary to assure that the committee's objective in compelling EPA to develop and implement a comprehensive regulatory program over burning and blending for energy recovery are [sic] achieved, within the timetable set by the committee. The provisions of Section 6 do not grant EPA any new statutory authority; RCRA now provides EPA full authority to regulate hazardous wastes that are blended or burned for energy recovery and to regulate the owners and operators of the blending and burning facilities. *The committee wants to assure that EPA will exercise its authority over all facilities that blend or burn hazardous waste for energy recovery.*

*Id.* at 39 (emphasis added). The commenter states that, as the DC Circuit concluded from the amendment to § 3004 and the House Report, Congress deliberately addressed the burning of commercial chemical fuels by ''deeming the offending materials to be 'discarded' '' and therefore within the statutory definition of 'solid waste.' '' 824 F.2d at 1189.

*Response:* The DC Circuit's analysis directly contradicts this comment. In *American Mining Congress* v. *EPA* (''AMC I''), 824 F.2d 1177, 1188–89, the DC Circuit, citing the same legislative history as the comment, stated that the provision making non-fuel commercial chemicals hazardous wastes was limited in scope and did not change the need to first define any other hazardous secondary materials as solid wastes. The court noted that EPA regulation in 1983 had provided that unused commercial chemical products were solid wastes only when discarded, which the Agency had defined as not including burning for energy recovery. As a result, in the 1985 RCRA amendments, ''Congress addressed this problem by *deeming* the offending materials to be 'discarded' and therefore within the statutory definition of 'solid waste.' This specific measure did not, however, revamp the basic definitional section of the statute.'' *AMC I* at 1189.

The Court rejected, as circular, the implication in this argument, and others, that a statutory statement that certain materials are, or are not, solid or hazardous wastes, somehow, changes the definitional provisions of RCRA. See *AMC I* at 1187, 1188, 1191. With respect to 3004(q), in particular, the court stated:

> EPA argues that [section 3004(q)(1)] evinces Congressional intent to include recycled in-process materials within the definition of ''solid waste.'' We note at the outset that this provision is likewise a subsection of [section 3004] and is therefore directed towards hazardous waste treatment facilities. The ever-present circularity problem thus looms here as well.

*AMC I* at 1188.

Therefore, a hazardous secondary material can be excluded from the definition of solid waste even if it is burned for energy recovery.

*Comment:* The same commenter states that the structure of § 3004(q) reinforces Congress' clear intent. Sections 3004(q)(2)(A) and (B) contain two exemptions from the requirements of § 3004(q)(1) pertaining to facilities that burn, produce, distribute and market hazardous waste fuel. The presence of these very narrow exemptions from the regulations clearly indicates that Congress considered exactly which fuels should be exempted from these requirements, according to the commenter. The commenter states that the Act allows only a narrow exemption for petroleum refinery wastes containing oil that are converted into petroleum coke at the same facility at which such wastes were generated, unless the resulting coke product would exceed one or more characteristics by which a substance would be identified as a hazardous waste under section 6921 of the Act. 42 U.S.C. 6924(q)(2)(A). The

commenter states that the second exemption pertains to facilities that burn *de minimis* quantities of fuel under certain specified circumstances. According to the commenter, the exclusion is also narrowly defined and requires that the Administrator determine that (1) such wastes are burned at the same facility at which such wastes are generated; (2) the waste is burned to recover useful energy as determined by the Administrator on the basis of the design and operating characteristics of the facility and the heating value and other characteristics of the waste; and (3) the waste is burned in a type of device determined by the Administrator to be designed and operated at a destruction and removal efficiency sufficient such that protection of human health and environment is assured. 42 U.S.C. 6924(q)(2)(B).

*Response:* The commenter again supposes that the hazardous secondary materials at issue are wastes, the issue to be determined. This type of circularity in reasoning was rejected, with respect to these very provisions, by the DC Circuit in *AMC I.* See 824 F.2d at 1187–88 and previous response. In addition, as also just explained, statutory exemptions for hazardous secondary materials that have already become wastes do not affect the basic definitional provision as to what constitutes a waste in the first place. *AMC I,* 824 F.2d at 1187–88 and n.16.

*Comment:* The same commenter states that the exclusion would deprive § 3004(q) of meaning and, indeed, is a transparent attempt by the Agency to circumvent § 3004 and elevate the current administration's policy goal of excusing hazardous waste combustion from pollution control requirements over Congress' decision that the burning of hazardous waste and fuel produced from hazardous waste must be regulated under the SWDA.

*Response:* This exclusion does not deprive § 3004(q) of practical meaning. Of the current universe of 1,943,000 tons per year [63] of hazardous waste burned for energy recovery, EPA estimates that this rule will reclassify only 118,500 tons per year (or approximately six percent) under the conditional exclusion. In any case, the issue is whether ECF must be considered discarded even though it is physically identical to, or has emissions comparable to, fossil fuels and is otherwise managed so that discard does not occur when it is burned, transported, or stored.

*Comment:* The same commenter states that SWDA § 3004(r) further confirms that Congress did not intend EPA to exempt hazardous waste from SWDA regulation just because it is burned for energy recovery. The commenter notes that § 3004(r) expressly prohibits ''any person'' from distributing or marketing ''any fuel which is produced from hazardous waste identified or listed under section 6921 of this title or any fuel which otherwise contains any hazardous waste'' without a label warning that such fuel ''CONTAINS HAZARDOUS WASTES'' and lists the hazardous wastes contained therein. 42 U.S.C. 6924(r)(1). The commenter also notes that Section 3004(r)(2) then provides a limited exception from that labeling requirement covering only ''fuels produced from petroleum refining waste containing oil if—(A) such materials are generated and reinserted onsite into the refining process; (B) contaminants are removed; and (C) such refining waste containing oil is converted into petroleum-derived fuel products at a facility at which crude oil is refined into petroleum products * * *'' 42 U.S.C. § 6924(r)(2). Section 3004(r)(3) then provides EPA with authority to create one further narrow exception from the labeling requirements for ''fuels produced from oily materials, resulting from normal petroleum refining, production, and transportation processes, if (A) contaminants are removed and (B) such oily materials are converted along with normal process streams into petroleum-derived fuel products at a facility at which crude oil is refined into petroleum products'' 42 U.S.C. 6924(r)(3). Both of the limited exceptions described in § 3004(r)(2) and (3) are applicable ''unless the Administrator determines otherwise as may be necessary to protect human health and the environment.'' 42 U.S.C. § 6924(r)(2) and (3). The commenter believes that, by requiring the labeling of all fuel produced from hazardous waste as hazardous waste and providing only limited exceptions, which are conditioned on protection of human health and the environment, § 3004(r) further confirms that Congress intended that hazardous wastes and fuels produced from hazardous wastes do not cease to be hazardous wastes just because they are burned for energy recovery. EPA's proposed exclusion deprives § 3004(r) of meaning, and is a transparent attempt to circumvent the limitations that section imposes on the agency's discretion, according to the commenter.

*Response:* EPA disagrees with this comment. Although hazardous wastes used as fuels are subject to the hazardous waste regulations, the exclusion promulgated here is limited to that ECF that meets the hazardous constituent specifications, as well as the other specifications, as generated; that is, before it is a solid waste. Thus, because section 3004(r), like § 3004(q), is written in terms of wastes, requiring in the first instance that a determination be made as to whether a hazardous secondary material is a waste before the provision can apply, we disagree with the commenter. For the reasons already given, EPA has reasonably determined that ECF, in the first instance, is not discarded.

3. Impact of the Exclusion on SWDA § 3001(f)

*Comment:* The same commenter states that EPA's proposal also circumvents § 3001(f) and deprives it of meaning. The Agency asserts authority to declare that listed wastes are not wastes if they are burned for energy recovery under certain combustion conditions. But, § 3001(f) provides procedures for excluding listed waste from listing and thus from regulation as hazardous waste. 42 U.S.C. 6921(f). EPA thus deprives § 3001(f) of meaning with regard to wastes that are burned for energy recovery by interpreting the SWDA as allowing it to exclude such wastes from the SWDA requirements—i.e., effectively to delist them—without following the SWDA's delisting requirements.

*Response:* Section 3001(f) is not relevant here. It establishes a mechanism for delisting listed hazardous wastes—i.e., evaluating whether they are still hazardous. The issue here is whether the hazardous secondary materials are wastes in the first instance, which does not turn on an evaluation of hazard, but rather on whether they are discarded.

4. Factors for Use in Determining an Exclusion

*Comment:* The same commenter states that the statute does not provide authority for EPA to broadly exclude hazardous waste fuels from the definition of solid waste based on factors that are absent in the statute and that are contrary to its clear provisions and the intent of Congress. The commenter states that EPA does not contend that the material it purports to exclude is anything other than hazardous waste, *except to the extent* that it is burned for energy recovery. According to the commenter, the Agency's reliance on combustion with energy recovery to transform a material that is otherwise undisputedly a hazardous waste into a non-waste fuel

[63] See 70 FR at 59530.

contravenes Congress' plainly expressed intent that hazardous waste burned as fuel is still hazardous waste.

*Response:* As noted above, this is not EPA's position. EPA's determination that ECF is not discarded is based on factors reasonably relevant to that inquiry, namely the combination of management conditions and physical identity which provide objective assurance that ECF will not be discarded when stored, transported, or burned. With respect to burning, EPA is stating that hazardous secondary materials which are physically identical to normal fuels, except with respect to particular hydrocarbon and oxygenate constituents which actually impart fuel value to the material, need not be classified as ''discarded'' when they are burned under conditions where they are managed like fuel oil and the emissions from a boiler burning ECF will be no different than from a boiler burning the fuel oil that would often be used in ECF's place. With respect to storage and transport, EPA is stating that ECF will again be managed like a product (fuel oil or some other type of organic liquid) or otherwise stored to assure that discard has not occurred.

*B. EPA's Use of Safe Foods and Fertilizers (SFAF) to Justify the Exclusion*

1. The Term ''Discarded'' With Regard to Hazardous Waste Burned for Energy Recovery

*Comment:* A commenter states EPA's attempted reliance on *Safe Foods and Fertilizers (SFAF),* 72 FR at 33290, is misplaced. *SFAF* addresses EPA's exemption of certain ''recycled materials'' from SWDA requirements. 350 F.3d at 1268. The *SFAF* Court found that the term ''discarded'' is ambiguous with respect to these materials. The commenter states that it did not find that the term is ambiguous with respect to material that otherwise qualifies as hazardous waste, but is burned for energy recovery. Indeed, any such finding would have been directly at odds with the text and legislative history of the SWDA, as well as with binding prior precedent, according to the commenter.

*Response:* The comment misreads *Safe Food.* The *Safe Food* court held that materials were reasonably classified as non-wastes—not discarded—based on a set of conditions under which EPA had determined that ''market participants treat the exempted materials more like valuable products than like negatively-valued wastes, managing them in ways inconsistent with discard, and that the fertilizers derived from these recycled feedstocks are chemically indistinguishable from analogous commercial products made from virgin materials.'' 350 F. 3d at 1269. The same principles are applicable to ECF. ECF will be managed as a valuable product due to the conditions on management which objectively assure lack of discard, and ECF is indistinguishable from fuel oil with respect to physical composition and emissions—emissions of hazardous constituents from boilers burning ECF will be the same as those from a boiler burning fuel oil.

2. Application of the Identity Principle to ECF

*Comment:* The same commenter states that EPA does not argue that emission-comparable fuels are ''chemically indistinguishable'' from analogous commercial products (ordinary fuel). EPA apparently believes that it need not show chemical identity. Instead, EPA rests its case on an assertion that it need only show that the ''secondary materials are physically comparable to virgin products which would be used in their place, or which pose similar or otherwise low risks when used in the same manner as the virgin product.'' 72 FR 33290.

The commenter states that EPA's version of ''comparable'' identity in lieu of ''chemically indistinguishable'' identity is unreasonable and contrary to the ruling in *SFAF.* The SFAF Court required that the secondary materials be ''indistinguishable in the relevant respects.'' *SFAF* at 1269. The Court explains that it does not believe that affirmance of the EPA's principle requires literal identity, so long as the differences are so slight as to be substantively meaningless when viewed from the ''perspective based on health and environmental risks.'' *Id.* at 1270. The commenter states further that, in the case of the zinc fertilizers at issue in *SFAF,* EPA pointed to two risk assessments that purported to show that the secondary materials presented risks ''considerably below levels that we estimate (albeit roughly) to be safe for humans and ecosystems.'' *Id.* citing 67 FR at 48,403/3.

*Response:* The ''identity'' principle, as described by the *Safe Food* court, refers to ''contaminant limits assuring substantial chemical identity'' with products made from virgin materials. 350 F.3d at 1269. Where contaminant levels in the excluded fertilizer differed substantially from those in the virgin fertilizer for which it substituted, the Court further decided it could affirm EPA's identity principle as a basis for exclusion if, based on the Agency's analysis of health and environmental risks, the differences are so slight as to be substantively meaningless. See 350 F. 3d at 1270 ( ''the apparent differences in the EPA's exclusion ceilings and the contaminant levels in the virgin fertilizer samples lose their significance when put in proper perspective—namely, a perspective based on health and environmental risks.'').

Here, there are no ''apparent differences'' in environmental effect from burning ECF in place of fuel oil. We have explained at proposal, in this preamble, and in supporting documents that the conditions on burning—including in particular that the ECF constituent feedrate limits coupled with the requirement of identical concentrations of most hazardous constituents for ECF and for fuel oil—will ensure that there will be no difference in environmental effect between burning ECF or fuel oil in a boiler. Because there is no end environmental difference between burning the hazardous secondary material and the virgin fossil fuel for which it could substitute, ECF meets the ''identity'' test under *Safe Food.* See 350 F. 3d at 1270–71 (physical difference not considered determinative of discard where that difference does not result in adverse environmental effect).[64]

3. Need for a Risk Assessment

*Comment:* The same commenter states that EPA has not presented a risk assessment in the record to show that storage, transport, burning and disposal of ECF presents no risk of harm to health and the environment. EPA performed a ''risk screening'' pertaining only to the *burning* of ECF, but a screening is not an adequate substitute for an assessment, and the screening did not address the potential threats posed by storage, transportation and management of waste residuals.

*Response:* Again, the comment misreads *Safe Food.* The Court evaluated several identity scenarios which required different levels of analysis depending on the contaminant levels in the final product. See 350 F.3d at 1269–72. The type of analysis varied from chemical to chemical and the various chemicals required different

[64] Please note, however, that we have shown that the emissions from the ECF oxygenates other than acrolein would result in maximum annual average ground level concentrations that would be orders of magnitude lower than their reference air concentrations (RfCs). See discussion in Part Three, Section III.B.3 of the preamble. Although acrolein emissions may result in maximum annual average ground level concentrations that approach the RfC, acrolein emissions from burning ECF will be no greater than measured acrolein emissions from an oil-fired industrial boiler.

levels of analysis depending on how they related to the virgin materials and what kinds of assessment of risk were needed by EPA. It is instructive to review the Court's analysis to evaluate how it relates to the Agency's analysis of ECF.

As in the comment to this rule, the petitioners in *Safe Food* objected to the ''factual predicate'' of EPA's identity principle because the petitioners argued that the levels EPA picked were not ''identical'' to what was found in products made from virgin materials. 350 F.3d at 1269. Of particular difficulty was the situation in which, for some cases, contaminant levels in the recycled products would appear to be ''sometimes considerably higher'' than in products made from virgin materials. *Id.* In general, the court determined that it could affirm EPA's determination if, based on the Agency's analysis of health and environmental risks, the differences are so slight as to be substantively meaningless and found that ''the apparent differences in the EPA's exclusion ceilings and the contaminant levels in the virgin fertilizer samples lose their significance when put in proper perspective—namely, a perspective based on health and environmental risks.'' 350 F.3d at 1270.

For four contaminants—lead, arsenic, mercury and cadmium—EPA picked levels in the recycled fertilizer product that were related to the ''concentration levels found in virgin materials.'' 350 F.3d at 1271; see 350 F.3d at 1270 (Table titled ''Comparison of EPA Limit and Virgin Commercial Samples * * *''). In addition, the court relied on risk assessments performed by industry to determine that the levels ''do not endanger human health or the environment until they are present in concentrations between 20 and 372 times'' the levels EPA allowed in its regulations. 350 F.3d at 1270. In response to the petitioners' argument that the industry studies should be given no weight, the court deferred to EPA's technical judgment that, even though the studies could be more rigorous, they were ''a good enough benchmark for * * * levels that were tiny fractions of the risk thresholds.'' *Id.* Accordingly, the court found that the levels of these contaminants ''did not undermine the EPA's application of its identity principle.'' *Id.*

For dioxin, EPA needed a more rigorous analysis. In that case, EPA did not set the limit on concentration levels found in virgin materials, but instead set a limit of 8 parts per trillion (ppt), ''similar to the average background dioxin concentration in soil.'' Even though commercial fertilizers had levels much lower at 1 ppt, basic risk findings from prior risk assessments showed that dioxin did not pose a risk at background levels and no comments on the rule challenged the basic risk determinations. The court, therefore, found that EPA was reasonable that the 8 ppt standard was '''identical' enough'' to support a finding that the excluded fertilizers were products rather than wastes. 350 F.3d at 1271.

The court made a different decision for chromium and remanded the decision to the Agency to ''clarify'' the chromium level. 350 F.3d at 1271–72. The industry study did not show the high risk thresholds for chromium as it did for the other contaminants. Also, EPA did not report such a risk threshold in the final rule and the court found that the results of an EPA risk study on chromium ''are not easily translatable by lay judges into a form comparable with the proposed exclusion ceiling.'' 350 F.3d at 1271. Moreover, the court found ''particularly striking'' the difference between the chromium level for fertilizers made from recycled hazardous secondary materials and for chromium in fertilizer made from virgin materials. EPA set a level at 21.3 parts per million (ppm) for recycled fertilizer. However, of twenty virgin fertilizer samples reported, six reported chromium—one of 8 ppm and five less than 1 ppm. Thus, EPA's level was double the highest sample, ten times the sample mean, and twenty times the sample median, with nothing the court could understand which indicated that these differences were trivial from a health and environment perspective.

In summary, for none of the contaminants at issue was EPA required to perform a full ''risk assessment'' to determine that there is ''no risk of harm to human health or the environment,'' as the commenter would have it. Instead, the Court found it reasonable for EPA to rely on information commensurate with the relationship of products made with virgin materials to products made with non-discarded hazardous secondary materials. In some cases (dioxin and chromium), EPA needed a more rigorous analysis. 350 F.3d at 1271. For other materials (heavy metals), EPA's analysis was less rigorous and nonetheless appropriate.

EPA's analysis for ECF falls well within the parameters evaluated by the court in *Safe Food.* As noted in the response to the previous comment, there is no end environmental difference between the activities of burning for energy recovery of fuel oil and ECF. This rule thus does not pose the issues the Safe Food court faced regarding dioxin or chromium levels, although it should be noted that EPA's approach here resulting in no increase of emissions of ECF constituents from a boiler burning ECF compared to that boiler burning fuel oil has similarities with the approach to dioxin upheld in *Safe Food* where the specification was established to assure no increases in ambient levels of that contaminant from use of the excluded fertilizer. There thus is no need to justify differing environmental outcomes from burning by showing *de minimis* risk.

We have also explained that the conditions on storage of ECF, although based substantially on controls applicable to analogous products, are enhanced to assure that discard is not occurring through conditions relating to primary and secondary containment (*e.g.*, secondary containment and leak detection conditions for tanks; containment system conditions for containers). Thus, the storage conditions under the exclusion are equivalent to the storage requirements currently applicable to ECF currently classified as hazardous waste or to analogous fossil fuels or product or by-product organic liquids. Finally, with respect to the hazards associated with the transportation of ECF, we note that ECF is subject to DOT's requirements for hazardous materials. Thus, ECF is subject to the same packaging, labeling, marking, and placarding requirements as hazardous waste, and each ECF shipment must be accompanied by a DOT hazardous material shipping paper. These controls assure that ECF's market participation when stored and transported will be as a valued commodity, without discard.

4. Applicability of the Market—Participation Theory to ECF

*Comment:* The same commenter states that, although the *SFAF* test clearly comprises two parts, EPA fails to address the second part of the test, which is that ''market participants must treat the materials more like valuable products then like negatively-valued waste.'' Presently, the record shows that hazardous wastes that can be burned as fuel, which are not eligible for the existing comparable fuels exclusion, are largely shipped to hazardous waste incinerators and cement kilns for incineration. Generators of such hazardous waste are required to store and transport such waste under stringent subtitle C regulation. The wastes are presently not treated like valuable products, *i.e.*, as feedstock for commercial products or valuable fuel for energy production. In the case at issue in *SFAF*, the materials were ''feedstocks in a non-discarded final

product'' (the zinc fertilizer). Here, the hazardous waste is not a feedstock in a non-discarded final product. EPA must demonstrate why it believes that ECF meets the market participation test set forth in *SFAF*.

*Response:* The commenter misreads EPA's determination with respect to the exclusion in this rule. EPA is finding that when ECF is stored, transported and burned under the conditions set forth in the rule—*i.e.*, when ECF participates in the market—market participants will manage ECF as a valuable commodity, not as a waste. They will do so because: (1) Pursuant to the conditions set out for the exclusion, storage of the material will include storage safeguards to which fuel oil and product organic liquids are subject, plus additional conditions to assure containment; (2) the conditions on burning assure that burning will occur under the same optimized combustion conditions as product fuel oil when carefully combusted in industrial boilers; (3) the feedrate conditions assure that emissions of ECF constituents from a boiler burning ECF will be comparable to (*i.e.*, the same as) emissions from a boiler burning fuel oil; and (4) the physical composition conditions assure that the remaining hazardous constituents are present in no greater concentrations than in fuel oil. Thus, it is reasonable for EPA to determine that the conditions of the rule provide an objective assurance of ECF not being discarded in the first instance and, ultimately, used as a valuable fuel commodity by market participants under the same conditions and with the same emissions as valuable fuel commodities, *e.g.*, fuel oil.

''Market participation'' and ''identity'' are also more closely related than the commenter would have it. Physical identity of a hazardous secondary material with a commercial product for which it substitutes is itself an aspect of market participation, assuring that the hazardous secondary material will be managed as a valuable commodity—the commodity to which it is identical, and not be discarded. Cf. *Safe Foods,* 350 F.3d at 1269 (''[n]obody questions that virgin fertilizers and feedstocks are products rather than wastes. Once one accepts that premise, it seems eminently reasonable to treat materials that are indistinguishable in the relevant respects as products as well''). Thus, the exclusion for the zinc fertilizers at issue in *Safe Foods* contains no conditions on market participation beyond meeting the hazardous constituent concentration specifications, plus sampling of the fertilizers to document that the fertilizers meet those specification levels, whereas more market participation conditions attached to the hazardous secondary materials used to produce the excluded fertilizers. See 40 CFR section 261.4(a)(21) and (20). In any event, evaluated separately, EPA believes that the rule is entirely consistent with the market participation and identity principles set out in *Safe Foods.*

Finally, in response to the commenter's statement that hazardous waste fuels that are currently sent to hazardous waste incinerators and cement kilns are burned for incineration, we note that these materials are burned for energy recovery in lieu of fossil fuels. Cement kilns burn hazardous waste fuels in lieu of coal to provide the heat to calcine limestone to produce clinker product, and hazardous waste incinerators burn hazardous waste fuels in lieu of fuel oil or natural gas to provide heat to combust wastes with little or no heating value.

## III. Conditions for Storage of ECF

### *A. Storage in Containers*

*Comment:* In response to a request for comment at proposal as to whether generators would be likely to store ECF in containers, several commenters state that storage in containers should be allowed to enable smaller volume ECF generators to use the exclusion. Other commenters oppose allowing storage in containers. One commenter states that storage of ECF in drums may easily allow indiscriminate mixing of other wastes due to the lack of adequate controls. Another commenter states that storage of ECF in containers should not be allowed because, absent hazardous waste standards and permit requirements, container storage would pose a hazard to the public.

*Response:* We agree with the commenters that support allowing storage of ECF in containers. Therefore, the final rule allows storage of ECF in containers under conditions that are similar to the conditions for storage in tanks. As discussed below, the conditions for ECF container storage are adopted from the provisions applicable to commercial products analogous to ECF or are equivalent to the hazardous waste container requirements under Subparts CC and BB of Part 264 (which controls are based on those for containers storing organic liquid products or byproducts).

Regarding the commenter's concern for the potential for indiscriminate mixing of waste with ECF, if ECF does not meet the specifications under § 261.38(a)(2), the material loses the exclusion and must be managed as a hazardous waste from the point of generation. In addition, ECF must meet the specifications for exclusion as-generated; blending, dilution, or other treatment is not allowed to meet the specifications.

The discharge prevention conditions for container storage are adopted from the SPCC requirements and the emergency procedure provisions are adopted from the hazardous waste storage requirements for containers and are identical to those adopted for ECF tanks. This is appropriate because container storage can pose the same types of hazards as tank storage.

The conditions to provide containment for container storage are adopted from the requirements for used oil stored at burner facilities,[65] coupled with the controls adopted from the hazardous waste container requirements to address the additional hazards that ECF container storage can pose. We note that we mentioned at proposal that if the final rule allowed container storage, we would subject containers to conditions similar to those that apply to hazardous waste containers. See 72 FR at 33301. We adopt the containment conditions for containers from the containment requirements for hazardous waste container storage units under § 264.173. This is appropriate because: (1) These requirements include the requirements for used oil container storage, as well as provisions that address the hazards that ECF containers can pose; and (2) ECF container storage units are currently subject to those containment requirements, which address hazards that remain after the ECF exclusion is claimed.

To establish conditions to control fugitive air emissions from containers and leaks from equipment that contains or contacts ECF at the container storage unit, our principles are as follows. First, we adopt the OLD NESHAP controls that apply to containers. This is appropriate for the reasons discussed at proposal in the context of adopting the OLD NESHAP controls for tanks. See 72 FR 33305. Second, for containers that are not subject to the OLD NESHAP, we adopt the NESHAP emission standards for containers under Subpart PP, Part 63. This is appropriate because the Agency developed these standards for storage of organic liquid feedstock, products, and by-products by manufacturing facilities, and ECF is an organic liquid product. Third, to determine the applicability of the Level

[65] See § 279.64(b) and (c) requiring that containers be in good condition and stored in an area with a containment system comprised of dikes, berms, or walls surrounding a floor, which are impervious to used oil.

1 or Level 2 controls under Subpart PP, we adopt the container size and other criteria (*i.e.*, whether the ECF meets the definition of a ''light liquid'') that the Agency established for hazardous waste containers under § 264.1086(b)(1). These hazardous waste container applicability criteria establish the applicability of Level 1 or Level 2 controls under § 264.1086(c) and (d) which are equivalent to the Level 1 or Level 2 controls under Subpart PP. It is reasonable to adopt the hazardous waste container applicability criteria because ECF containers pose air emission hazards that remain after the ECF exclusion is claimed. Finally, we do not adopt provisions under Subpart PP that are not relevant, such as the applicability of the subpart to other Part 63 subparts, enforcement of the subpart under the CAA, and provisions for site-specific waivers or approval of alternative provisions.

By applying these principles, we establish the following air emission conditions for containers.

*Containers Subject to the OLD NESHAP.* We adopt the fugitive air emission conditions for container storage units from the OLD NESHAP. See § 261.38(c)(1)(vi). Although the OLD NESHAP controls air emissions during distribution operations, it does not address air emissions from other aspects of container management, such as storage and unloading liquids from containers. In fact, the OLD NESHAP is applicable to ECF containers only when ECF that meets the adopted definition of organic liquid [66] is being loaded into a container with a capacity greater than 55 gallons at a transfer rack at a new facility where the annual volume of ECF is 800,000 gallons or more. See Items 9 and 10 in Table 2 to adopted Subpart EEEE which subject such containers generally to Level 3 control under Subpart PP, Part 63. Consequently, we adopt other controls as conditions for containers that are not subject to the OLD NESHAP, as discussed below.

We also adopt the OLD NESHAP provisions that control leaks from equipment (*e.g.*, pumps, valves) that contain or contact ECF in a storage unit that has a container subject to control under Items 9 or 10 in Table 2 to adopted Subpart EEEE. These provisions under adopted § 63.2346(c) require compliance with the applicable requirements of the following NESHAP subparts: Subpart TT (Level 1 control), or Subpart UU (Level 2 control), or Subpart H.

*Containers That Are Not Subject to the OLD NESHAP.* To ensure that air emissions from other ECF containers are controlled, we adopt in this final rule the applicability criteria for hazardous waste containers under § 264.1086(b)(1) to determine the applicability of the Level 1 or Level 2 national emission controls under Subpart PP, Part 63. Using the hazardous waste container applicability criteria for ECF containers is consistent with our principle of ensuring that controls through conditions are provided for the storage hazards that remain after the ECF exclusion is claimed, thus assuring safe handling commensurate with ECF's classification as a product and ensuring that it does not become part of the waste disposal problem. See *AMC II,* 907 F.2d at 1186. The national emission standards for Level 1 and Level 2 controls under Subpart PP are appropriate because they apply to containers storing raw materials, products, and by-products at manufacturing facilities and are equivalent to the Level 1 and Level 2 controls required for hazardous waste containers under § 264.1086(c) and (d).

Under these adopted provisions, a container having a design capacity greater than 0.1 cubic meters (26 gallons) can comply with the conditions if it: (1) Meets the applicable DOT regulations on packaging hazardous materials for transportation; and (2) is kept closed unless ECF is being added or removed from the container.

To control leaks from equipment that contains or contacts ECF at container storage units, we adopt the equipment leak provisions from the OLD NESHAP. The OLD NESHAP subjects containers to the Part 63 NESHAP for equipment leaks if the facility has a tank or container subject to air emission controls under Table 2 to Subpart EEEE: Subpart TT (Level 1 control), or Subpart UU (Level 2 control), or Subpart H. These are alternative controls. Owners and operators can elect to comply with a level of control among these alternatives. For ECF equipment leaks for equipment not subject to OLD, we adopt the same NESHAP controls required under OLD, and use the hazardous waste equipment leak applicability criterion under § 264.1050(b) to determine when those controls, as conditions, apply.[67] As a practical matter, the controls will apply to all equipment that contains or contacts ECF in a container storage unit. This is because § 264.1050(b) subjects equipment that contains or contacts hazardous waste with an organic concentration of at least 10 percent by weight to the equipment leak requirements. Given that ECF will invariably have an organic concentration of at least 10 percent, the adopted equipment leak controls apply to all equipment that contains or contacts ECF in a container storage unit.

In adopting the NESHAP equipment leak controls for equipment that contains or contacts ECF, we are omitting those provisions that are not relevant (*e.g.*, applicability provisions referencing other Part 63 subparts; CAA enforcement). Consequently, we are adopting the following alternative conditions: (1) Subpart TT, Part 63, (Level 1 control), except for § 63.1000; (2) Subpart UU (Level 2 control), except for § 63.1019; and (3) Subpart H, except for §§ 63.160, 63.162(b) and (e), and 63.183.

### *B. Alternative Hazardous Waste Storage Conditions*

We requested comment at proposal on whether the conditions to control air emissions from tank systems would be easier to understand and implement if we simply adopted the hazardous waste provisions under Part 264, Subparts AA, BB, and CC rather than adopting controls under the OLD NESHAP.

*Comment:* Several commenters suggest that the Agency adopt the hazardous waste storage requirements for ECF storage units in lieu of the collection of SPCC, OLD NESHAP, and hazardous waste storage controls that we proposed to avoid the complications created by adapting and then adopting those controls for ECF.[68]

*Response:* While we acknowledge that the adapted and adopted controls on ECF storage are complicated, and that hazardous waste generators and burners may not be familiar with them, we believe it is appropriate to retain those conditions. Those conditions are our best effort to ensure that ECF is subject (via conditions) to controls for analogous products and that address hazards that remain after the ECF exclusion is claimed, assuring that in its management, ECF will not become ''part of the waste disposal problem'' (*AMC I,*

[66] The ''adopted definition of organic liquid'' means ECF that contains 5 percent or greater by weight of the RCRA oxygenates, as well as organic HAP listed in Table 1 to Subpart EEEE, and that has an annual average true vapor pressure of 0.1 psia or greater. See § 261.38(c)(1)(vi)(B)(*4*).

[67] As discussed elsewhere in the preamble, it is reasonable to use the hazardous waste applicability criteria to establish applicability of the equipment leak controls for ECF equipment given our principle of controlling hazards that remain after the ECF exclusion is claimed.

[68] We note that the collection of adopted controls is even more complicated in the final rule given the need to adopt controls for containers, and the need to adopt air emission controls for tanks and containers that would not be subject to the adopted provisions of the OLD NESHAP. See discussion below in the preamble in Part Four, Section III.C.

824 F. 2d at 1186), and so is not discarded.

Nonetheless, we understand commenters' concerns and have, therefore, provided alternative storage conditions that are adopted solely from the hazardous waste storage requirements under Part 264, Subparts I (containers), J (tanks), AA (closed vent systems and control devices), BB (equipment leaks), and CC (air emissions from tanks and containers).[69] These conditions are coupled with the other general requirements that apply to hazardous waste storage units to ensure containment and protection of human health and the environment, and which address security; inspections; personnel training; ignitable, reactive, and incompatible material; preparedness and prevention; and a contingency plan and emergency procedures. See § 261.38(e). ECF storage units are currently subject to these conditions and the conditions parallel the suite of conditions adopted from the SPCC provisions, the OLD NESHAP, and the hazardous waste provisions that are the base storage conditions provided under § 261.38(c)(1)(ii–viii).

*C. Air Emission Controls for Tanks*

*Comment:* One commenter states that the air emission controls for tanks adopted from the OLD NESHAP under Subpart EEEE, Part 63, are not equivalent to the hazardous waste tank controls that currently apply to ECF and could allow an increase in hazardous air emissions. The commenter notes that tanks not meeting the adopted OLD criteria for design capacity and ECF vapor pressure would not be subject to the OLD controls, while those tanks are currently subject to the hazardous waste tank air emission controls. In addition, the commenter notes that the OLD vapor pressure criterion for organic HAP and RCRA oxygenates in ECF for determining applicability of air emission controls is based on the ''annual average true vapor pressure,'' while the vapor pressure criterion for applicability of the hazardous waste tank air emission controls is based on the ''maximum organic vapor pressure.'' The commenter believes that the OLD controls may not be adequately protective and, therefore, the hazardous waste tank controls should be adopted for ECF tanks.

*Response:* We continue to believe that, because ECF is a product, it should be subject to the same controls that apply to analogous products. This provides an objective indication that the materials are not discarded. Consequently, it is reasonable to adopt conditions for storage of ECF from the OLD NESHAP, as discussed at proposal. See 72 FR at 33305.

Nonetheless, as discussed previously in this preamble and at proposal, the OLD NESHAP does not address hazards from the storage of ECF that remain after the exclusion is claimed because certain types of ECF storage activities would not be subject to that rule. Consequently, we proposed to adopt provisions of the OLD controls so that those controls address all ECF tanks. See 72 FR at 33306.

In light of the commenter's concerns, we have reviewed the proposed tank air emission controls and conclude that: (1) We inadvertently proposed to expand the applicability of the adopted OLD controls to two tank capacity and ECF vapor pressure scenarios that would have established controls that are more stringent than the hazardous waste tank controls for those scenarios; (2) there are additional tank capacity and ECF vapor pressure scenarios where ECF that meets the adopted definition of an organic liquid would not be subject to the adopted OLD controls, but should be to assure that all ECF is subject to the controls for product organic liquids, or controls comparable thereto; (3) we inadvertently did not propose to adopt air emission controls for tanks that store ECF that does not meet the adopted definition of organic liquid and these tanks need to be subject (via condition) to product organic liquid controls, or controls comparable thereto, when all other tanks storing ECF are; and (4) it is reasonable to adopt the OLD definition of annual average vapor pressure rather than the hazardous waste definition of maximum organic vapor pressure. We discuss these issues below.

*Proposal To Expand OLD Controls to Additional Tank Capacity and ECF Vapor Pressure Situations.* We explained at proposal that the OLD NESHAP would not require controls for two tank size/vapor pressure scenarios: (1) Existing, reconstructed, or new ECF tanks with a capacity less than 5,000 gallons handling ECF with a RCRA oxygenate and organic HAP vapor pressure equal to or greater than 76.6 kPa; and (2) existing ECF tanks with a capacity in the range of 5,000 gallons to 50,000 gallons handling ECF with a RCRA oxygenate and organic HAP vapor pressure in the range of 5.2 kPa (0.75 psia) to 76.6 kPa. (11.1 psia).[70] See 72 FR at 33306–07. Consequently, we proposed to adopt the OLD NESHAP controls for those two tank size/vapor pressure scenarios. In retrospect, however, we do not believe it is appropriate to expand OLD control to those tank capacity/vapor pressure scenarios because the adopted OLD controls would be more stringent than the hazardous waste controls that currently apply to the ECF tank. See discussion below where we explain how the final rule provides appropriate controls via conditions for those two scenarios.

*Air Emission Conditions for Tanks and Containers that Are Not Subject to Conditions Adopted from Part 63, Subpart EEEE.* We have determined since proposal that, in addition to the two scenarios discussed above, there are other ECF tanks that would not be subject to the adopted OLD controls even though they are currently subject to hazardous waste tank controls: (1) Tanks with a design capacity in the range of 5,000 to 50,000 gallons when the ECF meets the adopted definition of organic liquid and has a vapor pressure in the range of 0.1 psia to 0.75 psia; and (2) all tanks storing ECF that does not meet the adopted definition of organic liquid (*i.e.*, ECF that contains less than five percent by weight of the RCRA oxygenates, as well as organic HAP, or has an annual average vapor pressure less than 0.1 psia).

The final rule establishes conditions to control air emissions for these ECF tank scenarios—ECF tanks that are not subject to the adopted OLD controls, but that are currently subject to the hazardous waste tank air emission controls. See § 261.38(c)(1)(vii). Using the hazardous waste tank applicability criteria for tank capacity and ECF vapor pressure under § 264.1084(b)(1) is consistent with our primary principle stated at proposal for establishing tank air emission controls: Emissions should be controlled to a level comparable to levels currently required given that air emissions from storage and handling of ECF can pose the same hazards as storage and handling of the hazardous waste. See 72 FR at 33306.

We therefore use the hazardous waste tank capacity/vapor pressure applicability criteria that designate whether Level 1 or Level 2 emissions control apply to establish conditions for ECF tanks that provide at least equivalent control. Rather than adopting the hazardous waste tank controls

[69] As noted, the Subpart AA, BB, and CC controls are themselves adapted from controls for product and byproduct organic liquids, and so are analogous to controls used for product container storage.

[70] Please note that, as discussed in this section, we have since determined that there are other tank capacity/vapor pressure scenarios for which OLD would not apply, and OLD would not apply to tanks storing ECF where ECF does not meet the adopted definition of organic liquid.

verbatim, however, we adopt a suite of alternative NESHAP controls that are equivalent to the hazardous waste tank controls. This is appropriate because ECF is a product and these controls apply to tanks storing organic liquid feedstocks, products, and by-products at manufacturing facilities.

To establish a suite of alternative controls for ECF tanks that are equivalent to the hazardous waste tank Level 1 controls, we adopt: (1) The Level 1 national emission standards for tank air emissions provided by Subpart OO, Part 63; (2) the OLD controls designated under Item 1 in Table 2 to Subpart EEEE,[71] Part 63; and (3) three additional alternative control measures provided for (Level 2) control for hazardous waste tanks-venting to a control device, a pressure tank, and a tank located in an enclosure that is vented to a combustion control device.[72]

To establish a suite of alternative controls for ECF tanks that are equivalent to the hazardous waste tank Level 2 controls, we adopt: (1) The OLD controls designated under Item 1 in Table 2 to Subpart EEEE, Part 63; and (2) the three additional alternative control measures provided for (Level 2) control for hazardous waste tanks-venting to a control device, a pressure tank, and a tank located in an enclosure that is vented to a combustion control device.

Finally, the tank air emission controls include conditions to control air emissions from leaks from equipment that contains or contacts ECF. We adopt the same equipment leak conditions for tank storage units that we adopted for container storage units, and for the same reasons: (1) Subpart TT, Part 63, (Level 1 control), except for § 63.1000; or (2)Subpart UU (Level 2 control), except for § 63.1019; or (3) Subpart H, except for §§ 63.160, 63.162(b) and (e), and 63.183. See discussion in Part Four, Section III.A above.

*Vapor Pressure Criterion.* It is reasonable to adopt the OLD definition of annual average vapor rather than the hazardous waste definition of maximum organic vapor pressure to establish the applicability of the adopted OLD controls. The OLD controls are equally or more stringent than the hazardous waste controls for all tank capacity/vapor pressure scenarios that are applicable to ECF tanks. For ECF tanks that are not subject to the adopted OLD controls, the hazardous waste tank vapor pressure definition under § 264.1083(c) applies when determining the applicability of the adopted controls as discussed above, and those adopted controls are at least equivalent to the hazardous waste tank controls. Consequently, adopting the OLD definition of vapor pressure will still ensure that tank air emission controls are equivalent to hazardous waste tank air emission controls.

*D. Definitions of Tank Cars and Tank Trucks*

*Comment:* A commenter states that the definition of tank cars and tank trucks in the proposed rule is unclear.

*Response:* The final rule does not use the terms tank car or tank truck. These terms are used, however, in the adopted SPCC requirements. Although the SPCC requirements do not explicitly define these terms, a tank car is a container used to transport ECF by rail, and a tank truck is a container used to transport ECF by roadway.

*E. Adequacy of the ECF Storage Conditions*

*Comment:* Several commenters believe that ECF storage poses a greater hazard than fuel oil, the product that EPA states is most analogous to ECF. The commenters believe that the hazardous waste storage controls are needed to address the hazards posed by storage of ECF.

*Response:* We stated at proposal that fuel oil is the most analogous product to ECF and, thus, the ECF exclusion would typically be conditioned on meeting storage controls that are applicable to fuel oil as a means of assuring lack of discard. We also stated, however, that additional controls are necessary to minimize the potential for releases to the environment (*i.e.*, discard). See 72 FR at 33301. The SPCC controls, coupled with the other controls (*e.g.*, secondary containment, preparedness and prevention, emergency procedures, air emissions) are equivalent to the controls that apply to hazardous waste storage units. Consequently, the storage of ECF will pose no greater hazard than storage of hazardous waste based upon the conditions drawn from the requirements for storage of organic liquids and hazardous wastes.

*F. Management of Residues in Tanks*

*Comment:* A commenter states that the management of residues in tanks and containers during operation is not addressed. The commenter believes that the final rule should be clear that solids and other wastes generated as a result of managing ECF are hazardous waste irrespective of when they are generated.

*Response:* As proposed, the final rule states that liquid and accumulated solid residues that remain in a container or tank system for more than 90 days after the container or tank system ceases to be operated for storage or transport of the excluded fuel product (*i.e.*, ECF or comparable fuel) are subject to regulation as hazardous waste if identified or listed as a hazardous waste. In addition, liquid and accumulated solid residues that are removed from a container or tank system after the container or tank system ceases to be operated for storage or transport of the excluded fuel product are solid wastes subject to regulation as hazardous waste if the waste exhibits a characteristic of hazardous waste under §§ 261.21 through 261.24 or if the fuel were otherwise listed under §§ 261.31 through 261.33 when the exclusion was claimed. See § 261.38(b)(13)(i) and (ii).

We inadvertently did not address the situation raised by the commenter, however; that is, where residues may be removed from an ECF container or tank that remains in ECF service, and where the ECF no longer meets the specification for the exclusion. We agree with the commenter that such hazardous secondary materials should be managed as a hazardous waste if it exhibits a characteristic of hazardous waste under §§ 261.21 through 261.24 or if the hazardous secondary material would otherwise have been listed as a hazardous waste when the exclusion was claimed. See § 261.38(b)(13)(iii).

*G. Closure Conditions for ECF Tanks*

*Comment:* Commenters state that EPA should apply the closure requirements to ECF storage units. They argue that EPA appears to disregard the fact that facilities may store substantial amounts of ECF in these tank systems for significant periods of time. Acknowledging that spilling, seepage and releases routinely occur during waste storage, the closure requirements provide assurance that the party responsible for the management of the ECF performs a comprehensive cleanup in a timely manner when the waste storage unit is no longer used to store such material. EPA's failure to impose closure requirements violates SWDA section 3004(a) that requires EPA to impose such performance standards on facilities that store, treat or dispose of hazardous waste ''as may be necessary to protect human health or the environment.'' 42 U.S.C. 6924(a). In addition, the failure of EPA to impose

[71] These OLD controls are equivalent to Level 2 hazardous waste tank controls (*e.g.*, alternative controls include an internal or external floating roof).

[72] Although our preference is to adopt NESHAP controls for ECF tanks, it is reasonable to adopt hazardous waste tank controls as alternatives to the adopted NESHAP controls.

such requirements contravenes the statutory mandates of SWDA section 1003. 42 U.S.C. 6902. Further, commenters state that there is no reason to leave the decontamination and decommissioning of a unit that stored hazardous waste to the discretion of the owner/operator when RCRA regulations provide explicit direction on how to close such units safely. EPA provides nothing in the record that indicates that a ''regulatory authority,'' presumably the state solid waste agency where the owner/operator is located, will have any expertise ''to ensure that the unit is cleaned properly.'' *Id.*

The commenters also state that facilities may avoid liability for environmental damage discovered after the facilities have closed. Without CERCLA liability, state and federal taxpayers will pay the financial costs to clean up these facilities, while people in communities across the nation pay the human health and environmental cost associated with the contamination. Because the proposal could significantly reduce or even altogether eliminate facility and particularly generator liability at some Superfund sites, taxpayers will be required, through EPA-funded actions, to pay for cleanups. The commenters suggest that preparation of a closure procedure should be required and submitted to the local agency at least 90 days in advance of initiating closure activities. This plan would also include provisions to sample and potentially remediate soils in the area of the storage tanks and loading and/or unloading areas. The Agency can then have an opportunity to review and modify the provisions as necessary, similar to the authority for the Director to require modifications to the SPCC Plan if it is found to be deficient.

*Response:* We explained at proposal that closure of an ECF tank would be addressed the same as closure of any other product tank that goes out of service.[73] The tank system would not be required to undergo closure according to the RCRA hazardous waste regulations unless liquids or accumulated solids were not cleaned from the tank system within 90 days of cessation of operation as an ECF storage unit. See 72 FR at 33308. Liquids and accumulated solids removed from a tank system that ceases to be operated for storage/transport of ECF product are solid wastes. They are hazardous waste if they exhibit a characteristic of hazardous waste or if the ECF were otherwise listed. See § 261.38(b)(13).

[73] We note also that analogous products are not subject to closure requirements.

In retrospect, however, and considering the comments on this issue, we believe it is reasonable to require generators and burners to notify the RCRA regulatory authority when an ECF tank or an ECF container storage unit goes out of service. Therefore, the final rule includes this provision as a condition of the exclusion. See § 261.38(f). The notification must state the date when the tank system or container storage unit is no longer used to store ECF. This information will enable the regulatory authority to know which units are operating under the conditional exclusion and to enforce the hazardous waste closure provisions if liquids or accumulated solids are not removed from the ECF tank system or ECF container storage unit within 90 days of cessation of operation as an ECF storage unit.

*H. Financial Assurance for ECF Tanks*

*Comment:* Several commenters note that EPA fails to impose financial assurance requirements on facilities that store and burn ECF. Commenters argue that given the increased threat to health and the environment posed by the relaxed restrictions on the storage and burning of ECF, EPA's failure to require that such facilities maintain financial assurance to address potential remediation, without any justification in the record, is arbitrary, capricious and in violation of law. Although ECF that is not managed in compliance with the conditions would lose the exclusion and must be managed as hazardous waste, commenters state that there is no provision for ensuring that generators or burners are financially prepared to dispose of accumulated ECF in this event. Commenters believe that generators and burners should be required to provide adequate financial assurance, similar to the existing RCRA mechanisms, to manage ECF. Waiting until the ECF is mismanaged and only then imposing the applicable RCRA hazardous waste regulations, including the financial assurance regulations, may not result in adequate funds being available in the event that mismanagement and abandonment occurs, according to the commenters. Considering EPA's current focus on ensuring adequate financial assurance for hazardous waste facilities, commenters believe that the lack of coverage proposed for ECF units seems arbitrary and contrary to common sense. In fact, commenters note that financial assurance has been, and continues to be, an important part of EPA's verification that finances are available to close hazardous waste storage tanks, and not leaving the problem for local and state governments.

Under the proposed ECF exclusion, industrial boiler facilities could manage potentially large volumes of ECF with no financial assurance for proper closure of the storage units and no insurance for third-party harm. Commenters note that EPA also proposed to revise the definition of solid waste (DSW) for recyclable materials, and there EPA recognized the necessity of requiring financial assurance for reclamation facilities. Commenters believe that, if facilities that conduct solvent distillation, metals recovery, and similar recycling are required to have financial assurance, then boiler facilities that recycle hazardous waste by burning ECF fuels must meet the same condition. Commenters also note that EPA's Damage Case Study in the DSW rulemaking includes numerous sites where organic hazardous wastes similar to ECF were mismanaged causing environmental harm and cleanup costs. EPA's rationale for financial assurance in the DSW rulemaking applies equally and with full force to the ECF proposal, according to commenters. Commenters state that there is no rational basis for including financial assurance in one rule on recycling and not in this rule.

*Response:* In response to the commenter's view that financial assurance provisions should be required for ECF storage units given that the Agency proposed financial assurance provisions for reclamation facilities under the proposed Definition of Solid Waste (72 FR 14172), we note that the proposed financial responsibility conditions in that proposed rule only apply to hazardous secondary materials that are being reclaimed. Such materials are not usable in their current form and must be reclaimed before they can be a useful product. The financial assurance condition in the Definition of Solid Waste proposal would safeguard against the abandonment or out-of-control accumulation of spent materials awaiting reclamation that led to certain of the damage incidents involving waste reclamation. Those situations are not present for ECF. That is, the hazardous secondary materials must meet objective product specifications as-generated, and will be stored and otherwise managed as is fossil fuel or other organic liquids. EPA thus does not believe that the financial assurance provisions are appropriate to assure legitimate recycling and management of ECF, as is the case for other products.

*I. Waiver of RCRA Closure Requirements for Tanks Storing Hazardous Wastes That Are Subsequently Excluded ECF*

*Comment:* A commenter recommends that waiver of the RCRA closure requirements for tanks used only to store hazardous wastes that are subsequently excluded as comparable fuel under § 261.38(b)(14) should include consideration of whether there is evidence of a release from the tank system to surrounding soils and/or groundwater and whether the tank system is subject to corrective action due to prior releases before waiving the closure requirements.

*Response:* The obligation under § 264.101 to address facility-wide corrective action at permitted facilities, which attaches at permit issuance, is not affected by this final rule, and remains in effect until corrective action at the facility is completed.[74] Owners and operators of permitted and interim status facilities with corrective action obligations should refer to the Agency's February 25, 2003, guidance entitled, ''Final Guidance on Completion of Corrective Action Activities at RCRA Facilities'' (see 68 FR 8757) for a detailed discussion of corrective action completion. Therefore, an owner or operator of a facility that manages only hazardous secondary materials that are excluded under this final rule, and who seeks to terminate the facility's permit by modifying the permit term, must still demonstrate as part of the permit modification request that the corrective action obligations at the facility have been addressed. The Agency's corrective action authority at such facilities is not affected by this rulemaking and the Agency thus retains its authority to address corrective action at such facilities using all authorities applicable prior to this rulemaking.

At some facilities, corrective action obligations will likely continue to be addressed through the corrective action provisions of the permit. In these cases, maintenance of the permit would ensure that facility-wide corrective action will be addressed. Thus, in these cases, the permit would not be terminated by modifying the permit term, but would be modified to remove the provisions that applied to the now-excluded hazardous secondary material. The facility's permit would, thereafter, only address corrective action.

In other cases, however, EPA or an authorized state may have available an alternative federal or state enforcement mechanism, or other federal or state cleanup authority, through which it could choose to address the facility's cleanup obligations, rather than continue to pursue corrective action under a permit. In these cases, where the alternate authority would ensure that facility-wide corrective action will be addressed, maintenance of the permit would not be necessary.

EPA has long taken the position that RCRA treatment, storage, and disposal facilities are still subject to unfulfilled corrective action obligations, after they cease hazardous waste treatment, storage, or disposal activities. The Agency discussed the issue of its corrective action authority to address non-SWMU-related releases at RCRA treatment, storage, or disposal facilities in the May 1, 1996, Advance Notice of Proposed rulemaking (see 61 FR 19442–3). There, the Agency stated, ''[g]iven the legislative history of RCRA section 3004(u), which emphasizes that RCRA facilities should be adequately cleaned up, in part, to prevent the creation of new Superfund sites, EPA believes that corrective action authorities can be used to address all unacceptable risks to human health and the environment from RCRA facilities. In the permitting context, remediation of non-SWMU related releases may be required under the ''omnibus'' authority. In other contexts, orders under RCRA sections 3008(h) or 7003 may require remedial action to address releases regardless of whether a SWMU is present.

## IV. Rationale for Comparable Emissions

*A. Appropriate Benchmark Fuel for ECF Emissions*

*Comment:* A commenter states that ECF emissions should be comparable to emissions from an industrial boiler burning natural gas rather than fuel oil. The commenter notes that an EPA document[75] states that approximately 80% of industrial boilers burn natural gas as the primary fuel, and approximately 51% of U.S. industrial boiler capacity (measured as MMBtu/hr) uses natural gas as the primary fuel. Only 11% of industrial boilers with 8% of boiler capacity are fired with oil.

*Response:* Identifying the most analogous fossil fuel to ECF is a major consideration for establishing conditions of the exclusion for storage and burning. Those conditions must ensure that ECF is stored and burned under conditions similar to those applicable to the most analogous product (and that also address hazards that remain after the exclusion is claimed).

The fact that most industrial boilers burn natural gas as the primary fuel is not a principle factor in determining the most analogous fossil fuel to ECF. ECF is a liquid fuel, as is fuel oil, that is subject to the constituent specifications and maximum viscosity specification for comparable fuel excluded under § 261.38(a), except for the specifications for the 37 hydrocarbons and oxygenates. (In addition, ECF must also meet a minimum heating value specification.) Those specifications ensure that comparable fuel has constituent concentrations and properties relevant to burning that are comparable to fuel oil, a fossil fuel that also is burned in industrial boilers.[76] Thus, fuel oil is the most analogous fossil fuel to ECF, is burned in boilers, and consequently remains a reasonable benchmark for comparison in determining comparability of emissions.

*B. Impact of ECF Exclusion on Emissions of Air Pollutants*

*Comment:* A commenter states that the ECF exclusion will result in an increase in air pollutants because: (1) The vast majority of industrial boilers burn natural gas which is a cleaner fuel than ECF; and (2) ECF will be diverted from cement kilns and must be replaced with coal. The commenter states that a high-end estimate of the quantity of hazardous waste fuels that could be displaced from cement kilns could be 146,000 tpy rather than EPA's estimate of 48,400 tpy. In addition, the commenter estimates that the 146,000 tpy of hazardous waste fuels that could potentially be diverted from cement kilns would increase emissions of air pollutants when fired in natural gas boilers of: 16.1 tpy of toxic metals and 4,012 lb/yr of organic hazardous air pollutants (HAP). In addition, cement kilns would replace the diverted hazardous waste fuels with coal, which could increase emissions of SOx by as much as 6,502 tpy and NOx by as much as 4,256 tpy, according to the commenter. Finally, the commenter estimates that emissions of the greenhouse gas, $CO_2$, could increase as much as 381,000 tpy because the ECF that is diverted from use as a fuel in cement kilns could be incinerated.

The commenter also estimates that the ECF exclusion could result in as much as 292,000 tpy of hazardous waste being diverted from cement kilns because the typical fuel blend for cement kilns

[74] Please note that this response is also applicable to ECF container storage units, and to comparable fuel storage units.

[75] Energy and Environmental Analysis, Inc., ''Characterization of the U.S. Industrial Commercial Boiler Population, May 2005, p. 2–5.

[76] The specifications for only three compounds, benzene, naphthalene, and toluene, are based on concentrations in gasoline.

prepared by commercial fuel blenders contains approximately 15 to 25% of hazardous secondary materials that would qualify as ECF.[77] For fuel blenders to meet the specification for cement kilns, the commenter states that the loss of ECF will mean the possible elimination of certain other waste streams that require blending with higher-quality material, such as the hazardous secondary materials that will qualify as ECF. Fuel blenders estimate that they could lose other nonblendable hazardous wastes of a quantity that would be in a range from one-half up to an equal volume of lost ECF. That is, for every ton of ECF that is lost, the commenter believes that between one-half and one ton of other hazardous wastes would not be able to be blended to produce fuel usable at cement kilns. The commenter believes that most of the hazardous waste that is lost because blendable ECF fuel is no longer available probably would require incineration in the future. This other hazardous waste is lower in Btu value[78] and may require thermal treatment; thus, incineration is the most likely alternative outlet for these hazardous wastes.

*Response:* We would first note that the final rule allows ECF to be burned in cement kilns that burn hazardous waste fuels. Thus, cement kilns may compete with industrial boilers for ECF and can largely determine through their fuel pricing procedures how much ECF may be diverted. However, the fact that ECF may be diverted from cement kilns to other types of burning units is not relevant to an analysis of whether ECF is reasonably classifiable as a nondiscarded material. Nevertheless, EPA has evaluated this comment as part of its obligations under Executive Order 12866 to evaluate costs and benefits of major rules.

The commenter's argument that burning ECF as a replacement for natural gas in boilers will result in an increase in emissions of toxic metals is derived from assuming that ECF contains the maximum levels of metals allowed by the comparable fuel specifications provided in Table 1 to § 261.38 and that the emissions will be uncontrolled. While this may be theoretically possible (it is in fact enormously unlikely that every constituent would be present at the maximum level), it simply reflects that facilities can choose which fuel to burn in their boilers: Natural gas, fuel oil, coal, or other fuels, including comparable fuel or ECF. The comparable fuel specifications for metals apply to ECF and ensure that comparable fuel and ECF contain toxic metals at no higher concentrations than found in fuel oil. Thus, burning ECF in lieu of natural gas will result in emissions of toxic metals no greater than if a boiler decides to burn fuel oil in lieu of natural gas.

Also, the commenter's argument that burning ECF as a replacement for natural gas in boilers will result in an increase in emissions of organic HAP is derived from comparing AP–42 emission factors[79] for fuel oil and natural gas. As discussed above, facilities can choose which fuels to burn in their boilers. The fact that burning fuel oil, or ECF with emissions comparable to fuel oil, in lieu of natural gas or coal may result in higher or lower emissions of air pollutants has no bearing on whether hazardous secondary materials should be excluded from the definition of solid waste if they are managed similar to fossil fuels, their emissions are comparable to those from burning fuel oil, and they are physically identical with respect to most hazardous constituents (and there is no aspect of discard in other management phases, *e.g.*, storage and transport).

*Potential Increase in $NO_X$ and $SO_X$ Emissions.* The commenter's argument that there will be an increase in $SO_X$ and $NO_X$ emissions is premised on the need for cement kilns to replace the hazardous secondary materials that will be excluded as ECF with coal.[80] $SO_X$ emissions will increase if coal contains higher concentrations of sulfur than ECF. The commenter believes that $NO_X$ emissions will increase because burning hazardous secondary materials in cement kilns reduces the formation of thermal $NO_X$ (*i.e.*, the hazardous secondary material changes the shape of the flame and reduces flame temperatures, thus reducing $NO_X$ formed at high temperatures from the nitrogen in air). In response, we note that the state regulatory authority will determine under the State Implementation Plan (SIP) if any increase in emissions of either $SO_2$ or $NO_2$ must be further controlled pursuant to the area's attainment or maintenance of the relevant National Ambient Air Quality Standard (NAAQS).

Nonetheless, we have estimated the increase in $NO_X$ and $SO_X$ emissions at cement kilns that may be caused by the diversion of ECF from cement kilns to boilers, and the cost of controlling those emissions so that there is no net increase in emissions.[81] [82] Although we estimated at proposal that 48,400 tpy of ECF could be diverted from cement kilns, the commenter has estimated that as much as 292,000 tpy[83] of hazardous secondary materials may be diverted. Consequently, we estimated the impacts of the exclusion considering that range of diverted materials.[84]

Regarding $NO_X$ emissions, we have determined in the study that the commenter used as an example of the potential increase in $NO_X$ emissions may not accurately represent the impact of reducing the ECF firing rate on $NO_X$ emissions. The study involved $NO_X$ emissions testing at a cement facility under two test conditions where coal was fired with and without hazardous waste fuel. The tests showed a substantial decrease in $NO_X$ (and $SO_X$) emissions when hazardous waste fuel was fired at a 50 percent mass input rate. Other key parameters that can affect $NO_X$ emissions also varied during those tests, however: The type of coal and the raw material composition. Those parameters may affect the excess air requirements, flame temperature, and flame profile, which can affect $NO_X$ emissions. Consequently, we conducted an independent analysis of the impact on $NO_X$ emissions of reducing the hazardous waste fuel firing rate using $NO_X$ equilibrium calculations to assess flame temperatures and the resultant impact on $NO_X$ formation. We determined that $NO_X$ emissions may increase by a total of 130 to 530 tpy nationwide for the 20 cement kilns burning hazardous waste fuels. Given the small average increase in $NO_X$

[77] Docket No. EPA–HQ–RCRA–2005–0017–0126.3, pp. 34–35.

[78] The commenter provides the example of a waste stream that may contain flammable solvents with 80% water but that, EPA presumes, has a heating value greater than 5,000 Btu/lb as-generated and is thus considered to be burned for its heating value rather than for destruction.

[79] See *http://www.epa.gov/ttn/chief/ap42/*.

[80] We note that $SO_2$ and $NO_2$ are criteria air pollutants for which EPA has established NAAQS. In addition, $NO_X$ emissions are precursors for ground-level ozone (also a criteria pollutant controlled with a NAAQS), and both $NO_X$ and $SO_X$ contribute to fine particulates (*i.e.*, PM2.5), a criteria pollutant that is also controlled with a NAAQS.

[81] See USEPA, ''Comment Response Document for the Expansion of the Comparable Fuels Exclusion,'' October 2008, Section 4.1.

[82] We note that these costs may not be incurred if the state regulatory authority under the SIP determines that the increase in $SO_X$ emissions will not result in an exceedance of the NAAQS.

[83] The commenter states that as much as 146,000 tpy of hazardous secondary materials may be diverted from cement kilns as ECF, and that another 146,000 tpy of hazardous waste may be diverted to incinerators because the wastes can no longer be blended with the higher quality hazardous secondary materials (*i.e.*, ECF) to meet the fuel specifications for cement kilns.

[84] We reiterate that we conducted this analysis to meet our obligations under Executive Order 12866 to evaluate costs and benefits of major rules. These impacts have no bearing on whether ECF is a ''solid waste.''

emissions at each kiln (*i.e.*, from 7–27 tpy), we believe the emission reductions could be achieved without significant cost by minor adjustments to boiler operating parameters, such as operating at a fractionally lower oxygen concentration.

Regarding $SO_X$ emissions, we note that the higher sulfur content of the coal that may replace ECF is not likely to increase $SO_X$ emissions at eight of the 20 kilns that burn hazardous waste. That is, eight of the kilns are preheater/precalciner kilns where $SO_X$ emissions attributable to fuels are scrubbed from the combustion gas by the limestone as the combustion gas passes through the preheater/precalciner cyclones. The remaining 12 long wet or long dry kilns do not provide this scrubbing effect, however, and fuel-related sulfur will result in an increase in $SO_X$ emissions. We estimate that $SO_X$ emissions will increase by 570 tpy nationwide under our estimate that 48,400 tpy of ECF may be diverted, and by 2,300 tpy under the commenter's estimate that 292,000 tpy of ECF may be diverted. To control these $SO_X$ emissions, we have estimated that the annualized cost of dry scrubbing would range from $1.1 million to $1.7 million. We have revised our economic impact analysis of the ECF exclusion to account for these costs.

*Potential Increase in $CO_2$ Emissions.* Finally, we do not accept the commenter's argument that emissions of the greenhouse gas $CO_2$ (an air pollutant under the Clean Air Act) could increase because ECF is diverted from use as a fuel in cement kilns. Although the commenter explains that hazardous waste fuels that have high water or ash content must be blended with higher quality waste fuels, such as ECF, to meet the commercial specifications for cement kiln fuels, the heating value of those lower quality fuels nonetheless provides useful heat input to the cement kiln.[85] If those low quality fuels can no longer be blended to produce cement kiln fuel because there is less high quality fuel available because of the ECF exclusion, those low quality fuels may be diverted to hazardous waste incinerators. Those fuels will not be simply treated for destruction by incineration, however. Those fuels will provide useable heat energy to treat other hazardous wastes with little or negative heating value, thus reducing the incinerator's need to provide supplemental heat input from fossil fuel (e.g., natural gas). This is the same role that (we presume) those lower quality fuels played in cement kilns—providing useable heat to displace fossil fuel. Thus, there should not be an increase in $CO_2$ emissions.

### *C. Assurance of 99.99% DRE of ECF Constituents*

*Comment:* Several commenters state that the conditions for burning ECF are not adequate to ensure 99.99% DRE. Specifically, commenters question why hazardous waste combustors are subject under MACT and RCRA to a DRE emissions demonstration and limits on multiple operating parameters (*e.g.*, minimum combustion chamber temperature; indicator of maximum gas flowrate; waste feedrate limits) if 99.99% DRE can be assured simply by complying with the conditions for burning ECF.

A commenter notes further that EPA states that the two primary operating conditions to ensure 99.99% DRE and good combustion are that CO levels remain below 100 ppmv and that ECF is fired into the flame of the primary fuel. EPA states that ECF must be fired into the flame of the primary fuel to avoid total ignition failure whereby low CO levels may not ensure good combustion.[86] Yet, the commenter notes that the exclusion does not require the burner to document that, in fact, ECF is fired into the flame zone so that CO will be a valid indicator of good combustion. Another commenter that is generally in favor of the exclusion questions why the other burner operating conditions are needed if the two primary operating conditions are to maintain CO emissions below 100 ppmv and to fire ECF into the flame zone of the primary fuel.

*Response: ECF Conditions Ensure 99.99% DRE.* The boiler operating conditions for burning ECF are provided under § 261.38(c)(2)(ii)(C). The principal operating conditions that ensure good combustion are: (1) Continuous monitoring of CO emissions to ensure that levels remain below 100 ppmv; and (2) firing the ECF into the flame of the primary fossil fuel, which must comprise at least 50% of the boiler's fuel requirements. The ECF boiler operating conditions are less rigorous (at least facially) than requirements to ensure 99.99% DRE for hazardous waste combustors under the MACT standards of 40 CFR Part 63, Subpart EEE and the RCRA standards of 40 CFR Part 264, Subpart O, and Part 266, Subpart H. Those hazardous waste combustor requirements include a requirement to conduct a DRE emission test and to establish operating limits on several parameters based on the levels achieved during the DRE test.

A demonstration test that an ECF boiler is achieving 99.99% DRE is not needed, however, because the ECF boiler design and operating conditions ensure that 99.99% DRE will be achieved.[87] Because 99.99% DRE is assured, the operating limits that must be established for hazardous waste combustors under a DRE demonstration test to ensure that DRE is maintained are not needed for ECF boilers. As explained at proposal (72 FR at 33294), EPA concluded from substantial boiler testing in the mid-1980's that boilers cofiring hazardous waste fuels with fossil fuels where the hazardous waste provides less than 50 percent of the boiler's fuel requirements and CO levels remain below 100 ppmv can achieve 99.99% DRE under a wide range of operating conditions (*e.g.*, load changes, waste feed rate changes, excess air rate changes). Based on that testing (which is fully documented in the record to the 1991 boiler and industrial furnace rulemaking (56 FR 7134, Feb. 21, 1991), and has been added to the docket for this rule), EPA promulgated a provision in the Boiler and Industrial Furnace final rule whereby the DRE demonstration (and associated operating limits) are waived for boilers burning hazardous waste. See § 266.110. The ECF boiler conditions in this rule are equivalent to the hazardous waste boiler provisions for waiving the DRE demonstration.[88] Thus, the ECF boiler

[85] *Note:* If these lower quality fuels are not themselves fuels prior to blending such that burning in a cement kiln would be destruction, as opposed to providing heat input, then blending these lower quality fuels with high quality fuels at a cement kiln would constitute ''sham'' recycling. This would raise the question of whether the clinker product is derived-from hazardous waste.

[86] Under total ignition failure, CO may be low because the fuel is not combusted. Rather, the fuel is simply volatilized, resulting in high hydrocarbon emissions.

[87] Please note that we are referring to DRE of an organic compound in a feedstream, not the effective, measured DRE of compounds that are common PICs, even under good combustion conditions. If DRE is measured for compounds that are common PICs (*e.g.*, benzene, toluene, naphthalene, and phenol), and those compounds are fed at low rates, the amount of the compound present as a PIC may be large enough relative to the amount of the unburned compound contributed by the feed such that less than 99.99% effective DRE may be measured.

[88] The ECF boiler conditions are actually more stringent than the requirements for waiving the DRE demonstration for hazardous waste boilers. ECF may not be burned in process heaters because of concern that combustion gas may be quenched to cool the gas to provide temperatures needed to heat process fluids appropriately, such that the temperature quench may preclude complete combustion of organic compounds and emissions would no longer be comparable. In addition, the ECF cannot exceed a particle size of 200 mesh (74 microns) to ensure good combustion, while the DRE waiver for hazardous waste boilers requires that only 70% of particles pass a 200 mesh screen.

conditions will also ensure that (at least) 99.99% DRE is achieved.

*A Demonstration That ECF Is Fired into the Flame Zone Is Needed.* We agree with the commenter, however, that an ECF boiler should be required to document that ECF is, in fact, fired into the flame zone of the primary fuel, thus ensuring that CO is a valid indicator of good combustion (*i.e.*, that CO is not low simply because ECF is not being combusted). If ECF were inadvertently not fired into the flame zone of the primary fuel, CO levels could be low even though hydrocarbon (HC) emissions could be high. Organic compounds in the feed could be simply volatilized rather than combusted, vitiating emission comparability. Although it is unlikely that ECF would not be fired into the primary fuel flame zone (which is necessary for the boiler to derive the full heating value from the fuel), this situation could potentially occur due to poor design or installation of the ECF firing system. Accordingly, the final rule requires the burner to document by information or testing that ECF will be fired directly into the primary fuel flame zone. The documentation must be included in the initial notification to the RCRA and CAA regulatory authorities. See § 261.38(c)(5)(i)(H).

A one-time HC test when burning ECF under reasonable worst-case conditions demonstrating that HC levels are below 10 ppmv, while CO is below 100 ppmv, would be one way to make the demonstration. A HC level of 10 ppmv or below is indicative of good combustion conditions and is the MACT emission standard for hazardous waste boilers. 70 FR at 59462–63. Operating conditions during the HC test should include: (1) The highest ECF firing rate anticipated; (2) the lowest ECF heating value anticipated; (3) the lowest primary fuel firing rate and heating value anticipated; and (4) the lowest boiler load anticipated. Although we have revised our economic impacts analysis for the exclusion to account for the cost of a one-time HC test for all boilers burning ECF, information other than HC testing could be used to document that ECF is fired into the primary fuel flame zone. That is, HC testing is not required if other documentation can be provided to show that the ECF is fired into the primary fuel flame zone. For example, documentation could be provided that the ECF is fired in the same firing system (*e.g.*, via concentric firing nozzles) as primary fuel.

*D. Use of Available Emissions Data To Document ECF Emissions Will Be Comparable to Fuel Oil Emissions*

*Comment:* A commenter states that EPA's analysis purporting to document that emissions from burning ECF will be comparable to emissions from burning fuel oil in an industrial boiler is riddled with flaws.

*Response:* Although we address each of the commenter's major concerns below,[89] we acknowledge that, absent a robust data base, stakeholders could reasonably have opposing views on the issues. Nonetheless, we believe that our technical evaluation at proposal was reliable. However, we note that the issue of whether available data support a finding that ECF emissions will be comparable to fuel oil emissions has been superseded by including conditions in the final rule that establish a feedrate limit for each ECF constituent. The feedrate limits provide objective assurance that emissions from a boiler burning ECF will be comparable to emissions from a boiler burning fuel oil. See discussion in Part Three, Section III.B.3 above.

1. Use of Hazardous Waste Boiler Emissions Data

*Comment:* The commenter states that, absent emissions data from burning ECF in industrial boilers, EPA uses hazardous waste boiler emissions data as a surrogate. This is an indirect comparison, however, filled with huge data gaps.

*Response:* Hazardous waste boiler emissions data are a reasonable surrogate for ECF boiler emissions data because the combustion of organic compounds in ECF will be controlled by conditions on ECF burners that are at least as stringent as the controls on hazardous waste boilers. 72 FR at 33291. Although hazardous waste boiler emissions data are an indirect comparison, we believe they are still a valid comparison. We respond to the commenter's concerns about data gaps below.

2. Concern That EPA's Oil Emissions Data Base Has Emissions Data for Only 12 of 37 ECF Constituents

*Comment:* The commenter states that EPA's oil emissions data base contains data on only 12 of the 37 hydrocarbons and oxygenates listed in Table 1 to § 261.38 for which the specifications would no longer apply. Absent a fuel oil emissions benchmark, EPA cannot conclude that ECF emissions are comparable, according to the commenter.

*Response:* As discussed above in Part Three, Section III.B.3, the final rule establishes feedrate conditions for each ECF constituent that will ensure that ECF emissions are comparable to fuel oil emissions. The feedrate conditions are established by back-calculating from industrial boiler fuel oil emission levels (or surrogate emission levels) using projected destruction and removal efficiencies. We have oil emission levels for 12 ECF constituents and establish surrogate oil emission levels for the remaining ECF constituents. Those surrogate emission levels are representative of oil emission levels (for the PAHs) and, for the oxygenates, are reasonable surrogates that result in *de minimis* health risk.[90]

3. Concern That EPA's Oil Emissions Data Base Is Too Sparse To Establish Benchmarks

*Comment:* The commenter states that, of the 12 ECF constituents for which EPA has oil emissions data, data for seven of the constituents are too sparse to establish a benchmark. That is, for seven of the ECF constituents, oil emissions data are available for only one or two boilers, and are insufficient to establish a benchmark. The commenter believes that EPA then compounds the problem of too few data by using a 95th percentile as the benchmark for comparison to the hazardous waste boiler emissions data.

*Response:* We believe it is reasonable to use the available oil emissions data for these 12 ECF constituents. We also note, however, that because the limited oil emissions data are not likely to represent the total range of oil emissions data, we use the highest test condition average for these 12 ECF constituents to establish the ECF constituent feedrate limits discussed above in Part Three, Section III.B.3.

4. Concern That EPA Did Not Evaluate the Oil Emissions Data Base for Probable Outliers

*Comment:* The commenter states that the oil emissions data used as benchmarks may overstate emission levels given that the Agency did not evaluate the data for outliers.

[89] We provide responses to all of the commenter's concerns in USEPA, ''Comment Response Document for Expansion of the Comparable Fuel Exclusion,'' October 2008, Section 4.

[90] We note that the fuel oil emission level for acrolein (*i.e.*, 18 ug/dscm) may result in maximum annual average ground level concentrations that approach the reference air concentration (RfC) (as may occur when boilers burn fuel oil). Although we use the acrolein oil emission level as a surrogate emission level for the other ECF oxygenates, maximum annual average ground level concentrations for those other oxygenates will be orders of magnitude below their RfCs.

*Response:* We concur that an outlier analysis should be performed on the oil emissions data for the ECF constituents where sufficient data are available to identify high outliers. We performed that analysis for the final rule and determined that the highest test condition for toluene has a run variance that is a high outlier, even though the test condition average is not a high outlier relative to the other test condition averages.[91] Consequently, the highest test condition average for toluene is 120 ug/dscm, rather than 350 ug/dscm.

5. Concern That the Level of Detection Is Needed for Nondetect Data Points in the Hazardous Waste Boiler Data Base

*Comment:* The commenter states that EPA should present the level of detection for hazardous waste boiler emissions data that are reported as nondetect. If the level of detection for the hazardous waste boiler emissions for an ECF constituent is higher than the oil emissions benchmark, the Agency cannot conclude that emissions are comparable, according to the commenter.

*Response:* The level of detection for the nondetect data in the hazardous waste boiler emissions data base is not readily available. While we agree that this is a limitation of the data base, the level of detection for the hazardous waste boiler emissions data would be helpful only if it were below the highest oil emission data level for an ECF constituent. As the commenter notes, if the level of detection were higher than the oil emissions data, we would not know whether the hazardous waste boiler emissions level were higher or lower than the oil emissions level. Moreover, as noted previously, our analysis comparing hazardous waste boiler emissions data (as a surrogate for ECF emissions data) to fuel oil emissions data has been superseded in the final rule by establishing feedrate limits for each ECF constituent. The feedrate limits provide objective assurance that the ECF emissions will be comparable to the fuel oil emissions.

6. Concern Regarding the Concentration of ECF Constituents in Hazardous Waste Boiler Fuels

*Comment:* The commenter states that the concentration of ECF constituents in the hazardous waste boiler fuels must be provided to determine whether hazardous waste boiler emissions are comparable to the fuel oil emissions. The commenter believes that, given that emissions will increase as feeds increase, it is important to know whether the hazardous waste feeds had the same concentrations of ECF constituents as allowed for ECF (*i.e.*, 100%). EPA must establish concentration limits for each ECF constituent consistent with the hazardous waste fuel concentrations that document comparable emissions, according to the commenter.

*Response:* We agree that emissions of ECF constituents can be expected to increase with increased feedrate. To address this concern, the final rule establishes a feedrate limit for each ECF constituent that will ensure that emissions of those constituents from a boiler burning ECF are comparable to emissions of those constituents from a boiler burning fuel oil. As mentioned above, these feedrate limits provide objective assurance of comparable emissions and effectively supersede our analysis comparing hazardous waste boiler emissions with oil emissions.

7. Concern Whether EPA Has Adequately Considered PIC Emissions

*Comment:* The commenter states that the hazardous waste boiler emissions (as a surrogate for ECF emissions) document that emissions of PICs that are not ECF constituents are higher than the emissions from oil-fired boilers.

*Response:* At proposal, we examined each compound that our data base indicated may be emitted by hazardous waste boilers at levels higher than fuel oil boilers and explained why the seeming exceedance should not be considered as documentation that ECF emissions are not comparable to oil emissions.[92] The reasons for explaining the exceedances include: (1) Dichloromethane is a common lab contaminant; (2) ethyl benzene and phenathrene were emitted at *de minimis* levels (*i.e.*, neither were emitted at concentrations above 8 ug/dscm); and (3) the hazardous waste boilers were often not operated under the stringent conditions that will be required for ECF boilers, such that combustion conditions may have been less than optimum resulting in higher emissions than will result from ECF burning.

Nonetheless, we agree with the commenter that PIC emissions must be considered in making a finding that ECF emissions will be comparable to oil emissions. For the final rule, we have objectively accounted for PIC emissions in establishing a feedrate limit for each ECF constituent. See discussion above in Part Three, Section III.B.3.

## V. Conditions for Burning ECF

### *A. Applicability of ECF Exclusion to Other Combustors*

*Comment:* Several commenters state that combustors other than watertube boilers that are not stoker-fired should be allowed to burn ECF, such as: hazardous waste combustors (HWCs) operating under a RCRA permit, process heaters, thermal oxidizers, fire tube boilers, and stoker-fired boilers. Several commenters also state that EPA should allow ECF to be burned in the same types of combustion units allowed to burn existing comparable fuel.[93]

*Response:* We agree with the commenters that state that the exclusion should allow ECF to be burned in HWCs. Therefore, the final rule allows ECF to be burned in HWCs (*i.e.*, incinerators, cement kilns, lightweight aggregate kilns, boilers (including stoker-fired boilers, firetube boilers, and process heaters), and halogen acid production furnaces) operating under a RCRA permit,[94] provided the ECF is burned under the operating requirements that would be applicable if the ECF were a hazardous waste. See § 261.38(c)(2)(i). Thus, the operating requirements applicable to the hazardous waste will apply to burning of ECF as a fuel (as a condition of the exclusion) in lieu of the ECF burner operating conditions under § 261.38(c)(2)(ii), with one exception. The ECF feedrate limits under § 261.38(c)(2)(ii)(C) continue to apply to HWCs. Although the RCRA and CAA operating requirements applicable to hazardous waste ensure 99.99 percent DRE and good combustion conditions, the ECF constituent feedrate limits are also needed to ensure that ECF emissions from HWCs will be comparable to fuel oil emissions (for the same reasons the feedrate limits are needed for ECF boilers).[95] [96] In addition,

[91] See USEPA, ''Final Technical Support Document for the Expansion of the Comparable Fuels Exclusion,'' November 2008, Section 6.3.

[92] See USEPA, ''Draft Technical Support Document for the Expansion of the Comparable Fuels Exclusion,'' May 2007, Section 5.5.1.

[93] Under § 261.38(b)(3)(i) of the final rule, comparable fuel must be burned in a hazardous waste incinerator operating under a RCRA permit, an industrial furnace, or an industrial or utility boiler.

[94] Although all hazardous waste combustors must obtain a RCRA operating permit, the principal substantive operating requirements derive from the NESHAP under Subpart EEE, Part 63. As a condition of the exclusion, ECF must be burned under all of the operating requirements applicable to hazardous waste, whether they derive from the NESHAP or RCRA (*e.g.*, RCRA requirements for startup, shutdown, and malfunctions).

[95] Even though the ECF burner operating conditions under § 261.38(c)(2)(ii) ensure 99.99% DRE and good combustion, the feedrate limits under paragraph (c)(2)(ii)(C) are needed to ensure that ECF emissions are comparable to fuel oil emissions because combustion is generally a

to implement the ECF constituent feedrate limits, the ECF automatic feed cutoff system requirements under § 261.38(c)(2)(ii)(G) that apply to monitoring the constituent feedrate limits as specified under § 261.38(c)(2)(ii)(G)(1)(ii) also apply to HWCs.

Several other commenters suggest that the rule allow ECF to be burned in a RCRA-permitted hazardous waste combustor under the CO monitoring condition only. These commenters believe that the other hazardous waste operating requirements should not apply. These commenters state that ECF should be allowed to be burned, for example, during startup or shutdown, provided that the CO limit of 100 ppmv is met. We disagree. Complying with the CO condition alone may not ensure 99.99 percent DRE and good combustion. We note that hazardous waste may be burned in a hazardous waste combustor during startup and shutdown provided that the combustor is operating under the operating limits in the permit. Those operating limits include operating parameters (*e.g.*, minimum combustion chamber temperature) in addition to a CO limit of 100 ppmv to ensure 99.99 percent DRE and overall good combustion. (Those other operating limits for hazardous waste combustors (*i.e.*, other than the CO limit of 100 ppmv) help ensure good combustion of hazardous waste just as the other ECF burner conditions help ensure good combustion of ECF.) Therefore, the hazardous waste combustor operating requirements for hazardous waste must apply at all times that ECF is burned.

Commenters stating that other combustors, including those that are eligible to burn comparable fuel (*i.e.*, other than hazardous waste combustors operating under requirements applicable to hazardous waste), should be allowed to burn ECF did not provide adequate supporting information that such combustors would achieve 99.99% DRE and good combustion conditions. We acknowledge that many types of combustors can achieve 99.99% DRE and good combustion conditions when burning hazardous waste fuels or ECF under various conditions, under the regulatory oversight provided by an operating permit program (which among other things, establishes site-specific parametric monitoring requirements to assure that the source continues operating under the conditions of the successful trial burn). We are concerned, however, that these combustors may not always be able to achieve 99.99% DRE and good combustion conditions under all situations when complying with the ECF operating conditions under the exclusion. We explained at proposal that there is a greater potential for poor distribution of combustion gases and localized cold spots in firetube and stoker boilers that can result in poor combustion conditions. 72 FR at 33294. Although a commenter states that modern firetube boilers equipped with modern controls do not have the potential for cold spots and poor combustion, the commenter did not suggest how we could distinguish such modern firetube boilers from others, and did not indicate whether those boilers could operate efficiently under a wide range of conditions (*e.g.*, boiler load). Similarly, another commenter states that their process heaters do not quench the combustion gas to reduce gas temperatures to avoid overheating a process fluid, a concern we expressed at proposal that could adversely affect combustion efficiency by interrupting the complete combustion of organic compounds. 72 FR at 33294. The commenter did not suggest, however, how we could distinguish between process heaters that may quench the combustion gas and those that do not.

*B. EPA's Approach To Identify Feedrate Limits for ECF Constituents*

*Comment:* A commenter argues that the approach EPA discussed at proposal to establish feedrate limits—back-calculating from oil emission levels using projected DREs—is flawed. The commenter believes that EPA has no basis to assume the projected DREs will be achieved by boilers burning ECF, given that the only operating control is for carbon monoxide. The commenter notes that DRE performance also depends on other key operating conditions, such as the maximum demonstrated waste feed rate, minimum combustion temperature, maximum combustion gas velocity, minimum atomization pressure, and other operating parameters that are defined based on performance tests.

In addition, the commenter notes that EPA has oil emissions data for only 12 ECF constituents and states that the *de minimis* emission level established for the remaining constituents is nothing more than an arbitrary guess. The commenter also states that the maximum allowable emission levels should be based on the average oil emissions, not the highest test condition average.

Finally, another commenter states that it is surprising that EPA establishes a *de minimis* emission level as high as 20 ug/dscm given that several emissions standards for hazardous waste combustors (HWCs) established under CAA section 112(d)(3) (MACT standards) are lower than this level. 40 CFR Part 63, Subpart EEE. For example, the commenter notes that the HWC MACT standard for new boilers for mercury is 6.8 ug/dscm, and the standards for new incinerators are 8.1 ug/dscm for mercury and 10 ug/dscm for semivolatile metals.

*Response:* We use the same general approach for the final rule that we proposed. We establish a feedrate limit for each ECF constituent, expressed as a gas flowrate-normalized feedrate limit, that is back-calculated from the fuel oil emission level (or surrogate emission levels) for each constituent using a projected DRE. The fuel oil emission level is the highest test condition average for that constituent in the oil emissions database, or a surrogate emission level where oil emissions data are not available. The DRE for each constituent is projected considering the thermal stability of the constituent and whether the constituent is a common PIC. See discussion in Part Three, Section II.B.3 above.

We disagree with the commenter's views that 99.99 percent DRE cannot be projected for ECF constituents. We have explained that the extensive ECF boiler design and operating conditions will ensure good combustion and a minimum of 99.99 percent DRE for the ECF constituents in the feed.[97] See

constant percent reduction process. The greater the constituent feedrate, the greater the (residual) emission rate of the constituent.

[96] HWCs must comply with the ECF constituent feedrate limit conditions because the generator has claimed the exclusion for ECF and realized some benefits of the exclusion (*e.g.*, waived closure requirements; no hazardous waste manifest). The other substantive benefits of the ECF exclusion that accrue to off-site ECF burners (*e.g.*, no RCRA permit requirement for the storage unit or combustor; no closure or financial assurance requirements) may not be realized by HWCs, however, because the HWC is already subject to those controls. Of course, if the generator did not claim the exclusion, the ECF constituent feedrate conditions would not apply to the HWC.

[97] Please note that, although we project DREs of less than 99.99% for ECF constituents that are commonly formed as PICs, the feed-related DREs for these ECF constituents are 99.99% or higher. That is, the DRE of the compound in the feed is at least 99.99%. (The conditions on burning are at least equivalent to the controls on hazardous waste boilers that ensure 99.99% DRE under § 266.110.) The measured or apparent DRE, however, can be lower than 99.99% for these compounds because, at low feedrates of the compound, the PIC contribution of the compound from the destruction of other compounds can provide a significant contribution to emissions relative to the residual from 99.99% destruction of the compound in the feed.

discussion in Part Three, Section III.B.3 above.

In response to the commenter's views on the *de minimis* emission levels we discussed at proposal, we have revised our approach to identify surrogate emission levels for ECF constituents for which we do not have oil emissions data. See discussion above in Part Three, Section III.B.3. For the final rule, we identify a surrogate emission level of 0.02 ug/dscm for the two PAHs for which we do not have oil emissions data, and a surrogate emission level of 18 ug/dscm for the oxygenates for which we do not have oil emissions data. Consequently, we are not identifying *de minimis* emission levels.

Finally, we also disagree with the commenter's view that the maximum allowable emission level for the 12 ECF constituents for which we have oil emissions data should be based on the average oil emissions rather than the highest test condition average. We have explained previously why it is reasonable to establish the allowable emission levels for these constituents as the highest test condition average rather than another metric, such as the average test condition average or the 95th percentile test condition average. See Part Three, Section II.B.3 above.

*C. Use of WMPT To Rank ECF Constituents According to Hazard Potential*

*Comment:* Several commenters argue that EPA's use of the WMPT methodology to rank ECF constituents by their hazard potential is flawed because it does not assess exposure.

*Response:* As stated at proposal, our hazard ranking effort was not a full quantitative risk assessment, but rather a screening-level ranking of hazardous compounds based on potential chronic (*i.e.*, long-term) risks to human health and the environment. 72 FR at 33318. As such, we consider it appropriate to apply the WMPT's use of a small number of relatively simple measures (*i.e.*, combination of bioaccumulation and persistence factors) to represent the exposure potential of each chemical.

Moreover, we note that the final rule does not rely on the WMPT-based hazard ranking procedure to support maintaining the comparable fuel specifications for the PAHs and naphthalene and for establishing special firing rate limits for benzene and acrolein, as proposed. 72 FR at 33299–301. Because the final rule establishes a feedrate limit for each ECF constituent which provides objective assurance that emissions of ECF constituents from ECF burners will be comparable to emissions from fuel oil boilers, the proposed restrictions on PAHs, naphthalene, benzene, and acrolein are not included in the final rule.

*D. Request To Expand Primary Fuel Condition*

*Comment:* Several commenters state that fuels other than fossil fuel, fuel derived from fossil fuel, or tall oil having a minimum heating value of 8,000 Btu/lb should be allowed as primary fuel to meet the condition that ECF must be cofired with at least 50 percent primary fuel. Commenters state that the following fuels should also be considered primary fuel: Comparable fuel excluded under § 261.38(a)(1); hydrogen gas, and alcohol fuels.

*Response:* To consider other fuels as a primary fuel, we would need information describing their fuel-related properties given that we rely on the primary fuel to provide the hot, stable flame needed to ensure a 99.99% DRE and good combustion. For example, we would need to know the range of most of the parameters defined by the proximate and ultimate analyses of the fuels, as well as their viscosity. Commenters did not provide any description of ''hydrogen gas'' or ''alcohol fuels.'' Consequently, we cannot assess whether these fuels should be considered primary fuel.

We agree with commenters, however, that comparable fuel excluded under § 261.38(a)(1) should be allowed as a primary fuel, provided that the as-fired heating value is at least 8,000 Btu/lb, consistent with the minimum heating value requirement for the other primary fuels. Given that existing comparable fuel has a composition and physical properties related to combustion that are the same as fuel oil, it is reasonable to consider it a primary fuel, provided the as-fired heating value is at least 8,000 Btu/lb.

*E. Minimum Primary Fuel Firing Rate*

*Comment:* Several commenters state that the proposed minimum 50 percent firing rate for primary fuel should be reduced. One commenter suggested that the minimum primary fuel firing rate requirement should be reduced to 20 percent, while other commenters argued that there should be no minimum primary fuel firing rate requirement.

In addition, a commenter states that EPA failed to support the primary fuel firing rate requirement with data or a sound basis. The commenter believes that, because ECF must have a heating value of at least 8,000 Btu/lb and can exceed the comparable fuel specifications solely for hydrocarbons and oxygenates, there is no reason that the ECF firing rate should be limited at all.

Another commenter notes that most boilers use a primary fuel, such as natural gas, for startup, but then switch to other, nonfossil fuels after steady-state conditions are attained. These boilers easily maintain compliance with the RCRA standards for hazardous waste boilers, including very low CO levels (*e.g.*, below 3 ppmv), according to the commenter.

*Response:* As discussed at proposal, EPA conducted a program of parametric testing in the mid-1980s of boilers burning waste fuels to identify design and operating conditions that would ensure 99.99 percent DRE and good combustion conditions. 72 FR at 33293. We proposed operating conditions for ECF boilers based on the conclusions of that extensive testing, including the requirement to burn at least 50 percent primary fuel. Commenters that suggest that a lower (or no) primary fuel firing rate would still ensure 99.99 percent DRE and good combustion conditions simply note that low CO levels can be maintained, which is evidence of good combustion conditions. These commenters did not provide information, however, documenting the properties of any of the fuels being fired to the boiler, or whether good combustion conditions were maintained over a range of boiler loads. While we believe that maintaining CO levels at or below 100 ppmv (measured continuously) is a principal factor for ensuring good combustion conditions, other conditions are also necessary to help ensure good combustion under a regulatory exclusion without the oversight of an operating permit program. Moreover, we note that hazardous waste boilers must comply with a 50 percent minimum primary fuel requirement to obtain a waiver of the DRE standard. See § 266.110.

*F. Request To Increase the Minimum 8,000 Btu/lb Requirement for ECF*

*Comment:* Several commenters argue that the proposed 8,000 Btu/lb minimum as-fired heating value for ECF is much too low because it is not comparable to the 18,000 Btu/lb heating value of fuel oil.

*Response:* A principle of the ECF exclusion is that the emissions from burning ECF are comparable to the emissions from burning fuel oil when ECF is burned under the conditions set out in the exclusion. Although the concentrations of hydrocarbons and oxygenates in ECF may be higher than in fuel oil, these constituents themselves exhibit fuel value; in addition, the emissions of those

compounds from a boiler burning ECF are comparable to the emissions of these compounds from a boiler burning fuel oil given the level of destruction achieved by ECF boilers operating under good combustion conditions. Similarly, the heating value of ECF need not be comparable to the heating value of fuel oil to assure emission comparability, although we would note, as we did at proposal, that the minimum heating value of fossil fuels normally burned in industrial boilers are in the range of 8,000 Btu/lb. 72 FR at 33296. We establish a minimum 8,000 Btu/lb heating value for ECF to help ensure that ECF combusts well so that ECF emissions will be comparable to emissions from burning fuel oil in the same units.

*G. Request for Periodic CO Monitoring*

*Comment:* Several commenters argue that periodic rather than continuous CO monitoring should be allowed.[98] One commenter states that, because EPA is already requiring that CO emissions be controlled for ECF at a level four times more stringent than that required of industrial boilers, plus imposing many other conditions, requiring continuous CO emission monitoring for all combustion units is a costly requirement that would not result in any additional margin of safety for ECF combustion units. The commenter notes that the cost for installing a CO CEMS (continuous emission monitoring system) with an automatic ECF feed cutoff system would be approximately $800,000, and operating and maintenance cost would be approximately $50,000.

*Response:* As we stated in the proposal, the Agency needed information from commenters that would explain and provide support on why periodic monitoring was sufficient. No such information was provided that explained how the owner or operator would ensure that the boiler is operating under good combustion conditions during those times that the boiler is not being monitored for CO. Consequently, the final rule requires continuous CO monitoring.

We also disagree with the commenter that provided cost information. Specifically, we estimated the costs of a CO CEMS and automatic ECF feed cutoff system to be relatively modest.[99] That is, we estimated the annualized cost of a CO CEMS is approximately $5,800 for a boiler that is not already equipped with the system, while the annualized cost of an automatic ECF feed cutoff system is approximately $3,800. The commenter did not provide comments on our cost estimates.

*H. Request That Additional Operating Parameters Should Be Linked to the ECF Automatic Feed Cutoff System*

*Comment:* A commenter states that additional operating parameters must be linked to the ECF AFCOS to ensure that the boiler continuously complies with the operating conditions and that emissions will remain comparable to fuel oil emissions. The commenter notes that boiler operators may not be in attendance at all times, and therefore parameters in addition to CO and gas temperature at the inlet to a fabric filter or electrostatic precipitator (if primary fuel other than coal is burned) must be linked to the ECF AFCOS. Specifically:

- To ensure compliance with the minimum boiler load limit of 40 percent, an indicator of boiler load (*e.g.*, steam production rate) must be linked to the ECF AFCOS;
- To ensure compliance with the minimum primary fuel firing rate, an indicator of the primary fuel firing rate must be linked to the ECF AFCOS;
- To ensure compliance with the ECF constituent feedrate limits, an indicator of the ECF feedrate must be linked to the ECF AFCOS.

*Response:* We agree with the commenter for the reasons the commenter provides. The final rule, therefore, requires that five parameters must be linked to the ECF AFCOS: (1) CO CEMS; (2) gas temperature at the inlet to the fabric filter or electrostatic precipitator (if primary fuel other than coal is burned); (3) indicator of boiler load; (4) indicator of primary fuel feedrate; and (5) indicator for ECF feedrate. See § 261.38(c)(2)(ii)(G).

*I. Request That Burner Conditions Should Not Apply to MEK and Isobutanol*

*Comment:* EPA received comments that it should consider eliminating constituent limits and other burner controls for methyl ethyl ketone and isobutanol because neither contaminate is considered a HAP under the CAA.

*Response:* EPA's framework for this rule, as proposed, is based on the comparability of emissions of RCRA hazardous constituents from hazardous secondary materials to such emissions from fuel oil, as opposed to risk, and we did not take comment on an exclusion approach based on zero or *de minimis* risk. Therefore, we do not believe it is appropriate to make this change for purposes of this final rule without seeking additional comment from other interested parties. Therefore, we are not including any change to the rule based on this comment. However, EPA may consider expanding its emission-comparable fuel approach to include this concept in future rulemaking for these chemicals and others that are not listed as hazardous air pollutants.

## VI. Implementation of the ECF Exclusion

*A. Reasonable Efforts To Ensure Compliance With the Conditions of Exclusion by Off-Site, Unaffiliated Burners*

At proposal, we requested comment on whether the final rule should include a ''reasonable efforts'' provision that would provide that the failure of an off-site, unaffiliated burner to meet the proposed conditions or restrictions of the exclusion would not mean that ECF was considered a hazardous waste when handled by the generator, as long as the generator can adequately demonstrate that he has made reasonable efforts to ensure that the hazardous secondary material will be managed by the burner under the conditions of the exclusion. Although the ECF exclusion requires the generator to obtain a certification from the burner that the ECF will be stored and burned under the conditions of the exclusion, a ''reasonable efforts'' provision would require the generator to take reasonable independent and proactive measures to ensure that the burner will manage ECF under the conditions of the exclusion. 72 FR at 33312.

We explained that, to achieve this benefit, the generator would have to exercise a type of ''environmental due diligence'' in reviewing the operations of the burner in advance of transferring the hazardous secondary materials. We stated that we believe that a reasonable efforts provision might involve methods, such as audits (including site visits), that a number of generators of hazardous secondary materials now use to maintain their commitment to sound environmental stewardship, and to minimize their potential regulatory and liability exposures. These audits are frequently performed by third parties.

We also requested comment on whether a reasonable efforts provision should include criteria that define

[98] Please note that we requested comment at proposal on whether periodic CO monitoring should be allowed rather than continuous monitoring. 72 FR at 33295–96. We stated that commenters must explain and provide supporting information why periodic monitoring is sufficient, including how the owner or operator would ensure that the boiler is operating under good combustion conditions during those times that the boiler is not being monitored for CO.

[99] See USEPA, ''Draft Technical Support Document for the Expansion of the Comparable Fuels Exclusion,'' May 2007, Section 7.5.

reasonable efforts, and what those criteria should be.

1. Reasonable Efforts Provision in the Final Rule

The final rule states that an excluded fuel—ECF, comparable fuel, and synthesis gas fuel—loses its exclusion if any person managing the fuel fails to comply with the conditions of the exclusion, in which case the hazardous secondary material must be managed as a hazardous waste from the point of generation. In such situations, EPA or an authorized state agency may take enforcement action under RCRA section 3008(a). See § 261.38(d)(2).

The rule states further, however, that the burner rather than the generator will be liable for discarding a hazardous waste if an off-site, unaffiliated burner [100] fails to comply with a condition of the exclusion, provided that the generator has made reasonable efforts to ensure that the burner complies with the conditions of the exclusion. The reasonable efforts must be based on an objective evaluation by the generator, both prior to the first shipment of ECF and every three years thereafter, that the burner will manage the ECF under the conditions of the exclusion.

Specifically, reasonable efforts by the generator must include, at a minimum, affirmative answers to the following questions prior to shipping ECF to a burner, and must be repeated at a minimum of every three years thereafter: (1) Has the burner submitted the notification to the RCRA and CAA Directors required under § 261.38(c)(5)(i), and has the burner published the public notification of burning activity as required under § 261.38(b)(2)(i); (2) does publicly available information indicate that the burner facility has had any formal enforcement actions taken against the facility in the previous three years for violations of the RCRA hazardous waste regulations and has been classified a significant noncomplier with RCRA Subtitle C, and if yes, does the generator have credible evidence that the burner will nonetheless manage the ECF under the conditions of § 261.38; and (3) does the burner have the equipment and trained personnel to manage the ECF under the conditions of § 261.38? [101]

In making these reasonable efforts, the generator may use any credible evidence available, including information obtained from the burner and information obtained from a third party. The generator must maintain for a minimum of three years documentation and certification that reasonable efforts were made for each burner facility to which ECF is shipped. The documentation and certification must be made available upon request by a regulatory authority within 72 hours, or within a longer period of time as specified by the regulatory authority. The certification statement must be signed and dated by an authorized representative of the generator company; and incorporate the following language: ''I hereby certify in good faith and to the best of my knowledge that, prior to arranging for transport of emission-comparable fuel to [insert name(s) of burner facility], reasonable efforts were made to ensure that the emission-comparable fuel would be burned under the conditions prescribed by § 261.38, and that such efforts were based on current and accurate information.''

The reasonable efforts provisions for ECF parallels the reasonable efforts provisions in the recently promulgated Revisions to the Definition of Solid Waste,[102] as they would reasonably apply to ECF.

*Rationale for the Questions.* The first question addresses whether the burner has submitted the initial notification to the RCRA and CAA regulatory authorities required under § 261.38(c)(5)(i), and whether the burner has published the public notification of burning activity as required under § 261.38(b)(2)(ii). The notification to the regulatory authorities documents the burner's intention to burn ECF, describes the ECF burning activities, and certifies that the burner will store and burn ECF under the conditions of the exclusion. This notification is a one-time notification unless there is a substantive change in the information provided in the notice. It is important that the generator confirm that the burner has complied with this condition of the exclusion because the notification identifies the burner to the regulatory authorities and confirms that the burner is aware of their responsibilities to comply with the conditions of the exclusion.

The public notification of burning activity required under § 261.38(b)(2)(ii) must be submitted for publication in a major newspaper of general circulation local to the site where the ECF will be burned and must contain general facility information and: (1) An estimate of the average and maximum monthly and annual quantity of the ECF to be burned; and (2) the name and mailing address of the regulatory authorities to whom the generator submitted a claim for the exclusion. This notice is important because it gives the public the opportunity to bring to the regulatory authority's attention any circumstance that might aid the authority in its monitoring and enforcement efforts.[103]

The second question focuses on the compliance history of the burner. Although consideration of compliance data is an imperfect tool for determining whether a burner would comply fully with the conditions of the exclusion, we believe that publicly available compliance data are a reasonable starting point for evaluating a facility's performance. Facility-specific enforcement data on compliance status, ongoing enforcement actions by both EPA and the states, and specific case information for formal enforcement actions are readily available on EPA's public Web site at *http://www.epa.gov/echo/*. ''Formal enforcement'' is a written document that mandates compliance and/or initiates a civil or administrative process, with or without appeal rights before a trier of fact that results in an enforceable agreement or order and an appropriate sanction. For EPA, formal enforcement action is a referral to the U.S. Department of Justice for the commencement of a civil action in the appropriate U.S. District Court, or the filing of an administrative complaint, or the issuance of an order, requiring compliance and a sanction. For states, formal enforcement action is a referral to the state's Attorney General for the commencement of a civil or administrative action in the appropriate forum, or the filing of an administrative

[100] An unaffiliated burner is a boiler or hazardous waste combustor located at a facility that is not owned by the same parent company that generated the ECF.

[101] In the final definition of solid waste rulemaking, the reasonable efforts provision also asked several additional questions, including: (1) Does the reclamation facility intend to reclaim the hazardous secondary materials legitimately pursuant to § 261.2(g); (2) has the reclamation facility notified the appropriate authorities that the financial assurance condition is satisfied per § 261.4(a)(24)(v)(F); and (3) if residuals are generated by the reclamation facility, is the facility prepared to manage them properly as hazardous waste. These questions are not appropriate in this instance because: (1) The specifications and conditions in the ECF exclusion define the legitimacy of the operation and thus, an independent determination does not need to be made; (2) there is no financial assurance requirement in this final rule; and (3) any residuals that are generated by the combustion of ECF are not expected to contain levels of containments above those found in residuals from the burning of fuel oil, including hydrocarbons and oxygenates as they themselves have fuel value and will be combusted.

[102] See § 261.4(a)(24(v)(B) and the discussion in the preamble to the final rule for the Revisions to the Definition of Solid Waste in Section VIII.C.2 (see 73 FR 64668, October 30, 2008).

[103] The public, furthermore, would have the ability to bring a citizen suit for failure to comply with a condition of the exclusion.

complaint, or the issuance of an order, requiring compliance and a sanction. ''Significant non-complier'' is a defined term in EPA's *Hazardous Waste Civil Enforcement Response Policy* and means the violators have caused actual exposure or a substantial likelihood of exposure to hazardous waste or hazardous waste constituents; are chronic or recalcitrant violators; or deviate substantially from the terms of a permit, order, agreement, or from the RCRA statutory or regulatory requirements. In evaluating whether there has been actual or likely exposure to hazardous waste or hazardous waste constituents, EPA and the states consider both the environmental and human health concerns, including the potential exposure of workers to hazardous waste or hazardous waste constituents. For both terms, see EPA's *Hazardous Waste Civil Enforcement Response Policy (Dec. 2003)* at *http://www.epa.gov/compliance/resources/policies/civil/rcra/finalerp1203.pdf.*

We do not believe that evaluating this publicly available information, which a generator would likely already be familiar with based on its own regulated activities, is difficult for a generator, nor is interpreting the data and deriving conclusions about facilities, since the data base specifically notes whether a facility is alleged to be a ''significant non-complier'' (*i.e.*, identified as a ''SNC'' or in ''significant noncompliance''). We also note that since many states already provide compliance information to EPA and the public through the EPA Web site, we do not believe that a generator's review of such information would pose a significant new burden for state agencies.

While a facility designated as a significant non-complier and the subject of a formal enforcement action does not mean that the facility would not comply with the conditions of the exclusion, it does raise questions that we believe the emission-comparable fuel generator should investigate. That is, if any formal enforcement actions were taken against the facility in the previous three years for such noncompliance and the facility was alleged to be a significant noncomplier, we would expect that the burner would adequately explain to the emission-comparable fuel generator how it has resolved any issues or how the issues are unrelated to managing emission-comparable fuel under the conditions of the exclusion. Additionally, if the generator obtains reasonable information that the enforcement matters have been corrected and the facility is back in compliance, then that would satisfy this aspect of the reasonable efforts determination. The generator also may wish to make a similar investigation of facilities designated as significant noncompliers by EPA or a state even if no formal enforcement action has been taken.

The third question focuses on the technical capability of the burner to comply with the conditions of the exclusion. If a burner was found not to have the storage and burner equipment necessary to comply with the conditions of the exclusion, or not to be in conformance with the storage and burner personnel training conditions of the exclusion or otherwise not to have adequately trained personnel to operate and maintain the equipment, the generator should not ship ECF to the facility. A generator may answer this question using audit reports, information provided by industry or waste management associations, documents provided by the burner, and other relevant information, which could include an evaluation by a qualified engineer. A generator may also make a common sense inquiry of a burner that includes requesting an explanation of the kind of equipment used for ECF storage and burning; review of equipment specifications; and demonstrations of the facility training program, and training records. Specific questions and/or a site visit also may be appropriate.

*Credible Evidence.* We believe that a generator should be allowed to use any credible evidence available in making reasonable efforts, including information provided by the burner and/or by a third party, in lieu of personally performing an assessment. For example, the generator might hire an independent auditor to review the burner's operations, produce audit reports as a consortium of generators using the same burners, or rely on an assessment by a trade association. We encourage this type of pooling of information to reduce the burden on generators and to take advantage of specialized technical expertise.

2. Consequence of Failure to Comply With a Condition of Exclusion

*Comment:* A commenter argued that the provision that ''noncompliance with the operating conditions by a burner renders the ECF a hazardous waste from the point of generation'' is a poison pill, draconian enough that it may prevent facilities from using the exclusion. The commenter believes that noncompliance by the burner of an operating condition should be handled simply as a violation by the burner without consequences to the generator.

*Response:* Noncompliance with a condition for exclusion of a hazardous waste simply means that the material remains a hazardous waste. EPA uses RCRA Section 3007 authority to inspect facilities that manage excluded materials. If a condition of the exclusion is not being satisfied, the material is no longer excluded. Any related enforcement action would involve noncompliance with the handling and management requirements for hazardous waste.[104]

3. Reasonable Efforts

*Comment:* Several commenters support a reasonable efforts provision, but state that EPA should not prescribe the criteria that qualify as reasonable efforts. These commenters believe that differences in operations (*e.g.*, ECF quantity; ECF composition and firing rate; boiler size) at ECF burner facilities should dictate the level of effort that is needed to meet the ''reasonable efforts'' provision.

Other commenters do not support a reasonable efforts provision. They believe that the best way to ensure adherence with the burner operating conditions under the potentially limited oversight of an exclusion is to provide an incentive for the generator to ensure that the burner complies with the conditions. They believe the provision that noncompliance by a burner renders the ECF a hazardous waste from the point of generation provides that incentive. Several of these commenters also believe that the examples of reasonable efforts EPA provided at proposal (e.g., frequency of audits) should be added as conditions of the exclusion to help ensure compliance by burners.

*Response:* We agree with those commenters that state that a reasonable efforts provision is warranted because the generator should not be liable for actions by a burner that are truly beyond the control of the generator. Although we understand the argument made by those commenters that believe holding the generator liable (*i.e.*, via the provision that failure to comply with the conditions of the exclusion renders the ECF a hazardous waste from the point of generation) provides a good incentive to ensure that only burners that are willing and capable of managing ECF under the conditions of the exclusion will manage ECF, we believe that the measures required by this rule to document and certify that reasonable

[104] Please note, however, that a generator who complies with the reasonable efforts provisions of § 261.38(d) would not be liable for management of a hazardous waste if an off-site unaffiliated burner fails to comply with a condition of the exclusion.

efforts have been made to ensure that an off-site, unaffiliated burner complies with the conditions of the exclusion will also ensure that responsible and capable burners manage ECF. (Of course, in most instances, we project that the generator and burner are the same entity, in which case failure to satisfy a condition results in that entity being held accountable for managing ECF as a waste, without exception.)

We do not agree with those commenters that believe the rule should require prescriptive measures (rather than the generic questions required by this rule) to implement a reasonable efforts provision, or that such prescriptive measures should be included as a condition of the exclusion. The measures necessary for generators to make reasonable efforts that an ECF burner is willing and capable of complying with the conditions of the exclusion, and, in fact, is complying with the conditions over time, will be specific to each situation (*e.g.*, relationship of the burner to the generator; experience of the burner with managing hazardous waste; ECF quantity; ECF composition and firing rate; boiler size). Specifying prescriptive measures, such as requiring that the generator conduct an audit of the burner's operations and that the audits must be conducted annually, may not provide adequate measures in some situations, and may be unnecessary in others.

*B. Fuel Analysis Plans*

1. Use of Process Knowledge

*Comment:* A commenter states that fuel analysis plans for ECF should require testing for all ECF constituents and there must be no allowance for the use of process knowledge in lieu of analysis.

*Response:* Sampling and analysis provisions for ECF are the same as for existing comparable fuels, which allow the generator to use process knowledge to determine whether the fuel meets the ECF specifications, except for constituents listed under § 261.38(b)(6)(i). Allowing process knowledge to determine whether ECF meets the specifications is reasonable given that generators of solid waste may use process knowledge to determine if the waste exhibits a characteristic of hazardous waste, including the toxicity characteristic. See § 262.11(c)(2). If a generator uses process knowledge to make the determination that ECF meets the specifications, any information used to make that determination must be included in the ECF fuel analysis plan. See § 261.38(b)(4)(i)(E).

2. Quarterly Waste Analysis Testing

*Comment:* A commenter states that the frequency of analysis of ECF needs to be on a quarterly basis rather than an annual basis given the higher loading of hazardous constituents allowed under this exclusion.

*Response:* The rule requires retesting annually, at a minimum, or after a process change that could change the chemical or physical properties of the ECF. See § 261.38(b)(6)(ix). We do not believe that a generic requirement to retest quarterly is warranted. The consequences of improperly claiming the ECF exclusion are severe-if the ECF fails to meet the specification under § 261.38(a)(2), it loses the exclusion and must be managed as hazardous waste from the point of generation. In addition, the owner or operator of the facility may also be subject to an enforcement action if management of the hazardous secondary material was not in compliance with the regulations.

*C. Intermediate Handlers*

*Comment:* The rule requires ECF to be handled only by a generator, transporter, or a burner; ECF must not be handled by a broker or an intermediate handler. A commenter notes that small volume generators would be able to participate in the ECF program if an intermediary handler would be allowed to accumulate ECF from several small generators, perform allowable blending, complete the analysis, and market the ECF to the burner.

*Response:* Because blending of the hazardous secondary materials to meet the ECF specifications is specifically prohibited under § 261.38(a)(4) and (b)(7), the Agency continues to exclude brokers or intermediate handlers from handling ECF and being eligible for the conditional exclusion. See 63 FR at 33801 for a discussion of the rationale for prohibiting dilution to meet the specifications.[105]

## VII. Costs and Benefits of the ECF Exclusion

During the public comment period for the proposed rule, we received several comments related to the economic analysis. These comments were submitted primarily from four organizations and raised concerns about ten specific aspects of our economic assessment. Presented below are brief individual summaries of the ten key issues raised by the commenters, followed by our responses. For a more complete discussion of these comments, see USEPA, ''Assessment of the Potential Costs, Benefits, and other Impacts of the Expansion of the RCRA Comparable Fuel Exclusion,'' April 2008, a copy of which is in the Docket to this final rule.

*A. Concern That the Economic Analysis Did Not Account for the Increased Risk Likely To Result From the Exclusion*

*Comment:* The economic analysis did not account for the increased risk likely to result from the exclusion. Several commenters allege that emissions of criteria pollutants, greenhouse gases, and hazardous air pollutants will increase as a result of the rule and that occupational risk will also increase under the proposed exclusion. Therefore, commenters submit that the Agency does not fully capture the social costs associated with the rule.

*Response:* The commenters argue that the economic analysis did not fully address the social costs associated with the rule, because of the increased risk likely to result from the exclusion. While we will address each of the emission categories that the commenters identify, it should also be noted that the final rule allows hazardous waste combustors to continue to burn ECF. Thus, the amount of ECF that may eventually be diverted from hazardous waste combustors is a function of the combustors' fuel pricing procedures, and is probably less than what we estimated at proposal.

With respect to $SO_X$ and $NO_X$ emissions, the increase is based on the potential for cement kilns to substitute coal for the hazardous secondary materials that may be diverted to other facilities as a result of the exclusion. As outlined above in Section IV.B of this Part, we recognize that cement kilns' $SO_X$ emissions could increase if the exclusion causes them to increase their consumption of coal. The magnitude of such an increase will depend on the quantity of ECF diverted from cement kilns. We estimate that $SO_X$ emissions will increase by 570 tpy nationwide under our estimate of the ECF quantity that could potentially be diverted from cement kilns, and by 2,300 tpy under the commenter's estimate of the quantity of ECF and hazardous waste fuels that may be diverted. The Economic Assessment for the final rule addresses the cost of controlling these emissions.

Regarding $NO_X$, although we agree that cement kilns' $NO_X$ emissions could increase as a result of the exclusion, we believe that such an increase is unlikely.

[105] Note that, as with hazardous waste and consistent with the recently promulgated Revisions to the Definition of Solid Waste in the context of hazardous secondary materials, ECF can be held up to 10 days at a transfer facility and still be considered as being in transport.

As described in Section IV.B of this Part, we believe that cement kilns could operate at a fractionally lower oxygen concentration without significant cost to prevent their $NO_X$ emissions from increasing. Similarly, EPA does not believe that the commenters' concerns with respect to $CO_2$ emissions are valid. See Section IV.B of this Part for a detailed discussion of this issue as well.

With respect to hazardous air pollutants, the commenters' argument that burning ECF as a replacement for natural gas in boilers will result in an increase in emissions of toxic metals assumes that ECF contains the maximum metals concentrations allowed by the comparable fuel specifications provided in Table 1 to § 261.38 and that boilers' emissions will be uncontrolled. In many cases, however, the metals concentrations of ECF are likely to be below the § 261.38 fuel specifications. Moreover, even in a worst case, metals emissions from burning ECF will be no higher than if the boiler chose to burn fuel oil.

The commenters' argument that burning ECF as a replacement for natural gas in boilers will result in an increase in emissions of organic HAP is based on the differences between the AP–42 emission factors for fuel oil and natural gas. As discussed in Section IV.B of this Part, however, facilities can choose which fuels to burn in their boilers. The fact that burning fuel oil, or ECF with emissions comparable to fuel oil, in lieu of natural gas or coal may result in higher or lower emissions of air pollutants has no bearing on whether hazardous secondary materials should be excluded from the definition of solid waste if they are managed similar to fossil fuels, their emissions are comparable to those from burning fuel oil, and they are physically identical with respect to most hazardous constituents (and there is no aspect of discard in other management phases, *e.g.*, storage and transport).

Finally, any potential occupational impacts associated with this action would be addressed under the jurisdiction of OSHA and DOT authorities.

*B. Impacts Associated With Hazardous Waste Currently Blended With ECF*

*Comment:* A commenter asserts that to produce waste fuel that meets the specifications required by cement kilns, fuel blenders (and, to a lesser extent, kilns themselves) currently blend ECF with lower-Btu, more highly contaminated waste. The resulting fuel mixture takes the place of coal in the cement production process. If ECF is diverted away from fuel blenders as a result of the rule, the commenter claims that the low-Btu waste that blenders currently mix with ECF will be diverted away from blenders and cement kilns to commercial incinerators. The economic analysis does not account for this effect and therefore, according to commenters, underestimates economic impacts likely to be realized by blenders and cement kilns as a result of the rule.

*Response:* EPA acknowledges that, if cement kilns' fuel pricing procedures result in ECF being diverted from cement kilns, the diversion of ECF could preclude them from accepting wastes that are currently blended with ECF. These wastes, which must be blended with higher quality fuels (*e.g.*, ECF) to meet the fuel requirements for cement kilns, could be diverted from cement kilns to commercial hazardous waste incinerators, according to the commenter. The Economic Assessment for the final rule evaluates the potential economic impacts associated with such transfers. These impacts include reduced revenues for cement kilns, increased fuel costs for cement kilns, and increased revenues for commercial incinerators.

*C. Concern That the Economic Analysis Underestimates the Quantity of Hazardous Secondary Materials Qualifying for the Exclusion*

*Comment:* Based on the results of a survey of Cement Kiln Recycling Coalition (CKRC) members, CKRC and Environomics estimate that as much as 146,000 tpy of hazardous secondary materials managed by cement kilns may be excluded as ECF, as opposed to the 48,400 tpy presented in EPA's economic analysis for the proposed rule.

*Response:* We recognize that the quantity of ECF burned by cement kilns may be different than suggested by the National Biennial Report data available for the proposed rule. However, because this database represents the only comprehensive source of data for ECF generators, the Agency relies on the Biennial Report data to assess the impacts of the exclusion. We will use the most recently available quality-controlled nationwide data to prepare the assessment for the final rule.

*D. Concern That the Economic Analysis Underestimates the Percentage of Qualifying Hazardous Secondary Materials That Would Be Excluded From RCRA Subtitle C Regulation Under the Exclusion*

*Comment:* EPA's analysis of the proposed rule suggests that 39.9 percent of the qualifying waste managed by cement kilns would be excluded under the rule. To develop this estimate, EPA simulated the decision-making process of ECF generators based, in part, on the fuel savings that generators would realize if they use the exclusion. For each generator with an eligible boiler onsite, EPA estimated these fuel savings based on the weighted average price of the fuels used by the generator. The commenter suggests that this approach leads to an underestimation of the fuel savings realized by generators because generators would likely use ECF to displace their most expensive fuel. Therefore, EPA is also likely to underestimate the percentage of eligible waste excluded under the proposed rule and the corresponding economic losses experienced by cement kilns. Thus, the commenter asserts that as much as 100 percent of the waste qualifying for the exclusion will be excluded.

*Response:* To the extent that the quantity of hazardous secondary materials diverted from kilns may be different than that estimated in the economic assessment for the proposed rule, we agree that the corresponding impacts may also be different than estimated. However, it remains unclear how low and moderate-Btu waste currently mixed with ECF will necessarily be diverted to incinerators.[106] It is our understanding that such wastes could be blended with other fuels such as diesel, kerosene, used motor oil, or used lubricants to create fuel blends suitable for cement kilns. In addition, as discussed previously, the final rule allows ECF to continue to be burned in cement kilns. The amount of ECF that may be diverted from cement kilns will be a function of their fuel pricing procedures.

*E. Concern That the Economic Analysis Does Not Consider Joint Impacts With the Proposed Definition of Solid Waste Rule*

*Comment:* A commenter expressed concern that the Agency's economic assessment of the proposed ECF exclusion does not consider potential joint impacts with the proposed revisions to the Definition of Solid Waste Rule. Because several facilities may be affected by both rules, the commenter alleges that the combined impacts of the rules may be greater than the summed impacts of each rule alone.

*Response:* We disagree with this comment. The revisions to the Definition of Solid Waste Rule, in both the proposal and supplemental proposal, have reiterated that ''no

[106] Moreover, any such waste fuels that may be diverted from cement kilns to incinerators would be used for their fuel value (as is the case for cement kilns) in the incinerator to combust wastes with little or no heating value.

changes are proposed for recycling materials that are: * * * (3) burned for energy recovery.'' Neither the burning of hazardous secondary materials for energy recovery nor the blending of hazardous secondary materials for use as fuel are eligible for exclusion from RCRA regulations under the Definition of Solid Waste proposals. Thus, no meaningful joint impacts are expected. It is important to note, however, that some waste streams could potentially be excluded from the full RCRA Subtitle C regulations under either the Definition of Solid Waste rule or the emission comparable fuels exclusion. Therefore, the joint impact of the two rules could be less than (rather than greater than, as suggested by the comment) the sum of the impacts of each rule when estimated individually.

*F. Concern That the Economic Analysis Underestimates the Value of Coal*

*Comment:* EPA's economic analysis of the proposed rule underestimates the cost of coal. While EPA assumes the cost of coal to be $1.80 per MMBtu, a commenter estimates that cement kilns pay approximately $2.56 to $3.00 per MMBtu of coal, based on a survey of those cement kilns that burn hazardous waste as a fuel. Therefore, EPA's analysis underestimates the coal replacement costs incurred by cement kilns as a result of the rule.

*Response:* We agree that the cost of coal used for the proposed rule may be lower than the current cost. When we conducted the economic analysis at proposal, we used coal pricing information from the Energy Information Administration's (EIA's) *Annual Coal Report 2004.* This was the most recent publicly available source of annual coal prices at the time. Because coal prices have been trending upward, the coal pricing data in this publication are lower than current prices. For the economic assessment of the final rule, we use coal pricing data from EIA's *Annual Coal Report 2006.* Adjusting the data in this document for inflation, we assume a coal price of approximately $2.23 per MMBtu for the economic analysis of the final rule.

*G. Concern That the Economic Analysis Overestimates the Per Unit Cost of Incineration*

*Comment:* A commenter alleges that EPA's incineration cost estimate of $0.96 per gallon is an overestimate. The commenter argues that these data are outdated and do not reflect current market conditions and that incinerators currently charge $0.10 to $0.15 per gallon to manage waste with properties consistent with ECF. Because this cost is significantly lower than the unit cost used in the analysis, the commenter claims that the Agency overestimates the management cost savings associated with the rule.

*Response:* We note that the price of incinerating ECF is subject to uncertainty. At the time of our analysis for the proposed rule, ETC's 2004 price information from the hazardous waste incineration industry represented the most recent publicly available data on the cost of incineration, and it is still the most recent publicly available data on the cost of incineration. The Agency prefers, when possible, to use the most recent publicly available data when conducting our economic assessments. However, to address the commenter's concerns regarding our potential overestimation of the cost of incinerating ECF, we use the low end of the reported range of costs in the Environmental Technology Council's 2004 data release ($0.41 per gallon) for our economic assessment of the final rule.

*H. Concern That EPA Overestimates the Price That ECF Would Command on the Open Market*

*Comment:* In its economic assessment of the proposed rule, EPA estimates that the market price of ECF ($5.58 per MMBtu) will be approximately 26 percent less than that of conventional fuel (*i.e.*, a composite of natural gas, fuel oil, and coal). A commenter asserts that the market price of ECF is likely to be considerably lower than this value and that EPA has overestimated the fuel savings of the rule. To support this point, the commenter cites the market price of $0.50–$3.00 per MMBtu for used oil. Because used oil is a cleaner fuel than ECF, the market price for ECF is likely to be no higher than the price of used oil.

*Response:* We understand that the market price of ECF would be uncertain because of the regulatory requirements associated with storing and burning this hazardous secondary material. The Agency disagrees, however, with the commenter's assessment of the price that ECF would command on the open market. Although the commenter claims that the price of used fuel oil is between $0.50 and $3.00 per MMBtu, the 2005 Department of Energy Study entitled, ''Used Oil Study and Recommendations to Address Energy Policy Act of 2005 Section 1838'' indicates that the price of used oil is discounted 25 to 35 percent from the price of residual oil. Based on the 2006 residual oil price of $1.22 per gallon reported in DOE's *Petroleum Marketing Annual 2006* and an assumed thermal value of 6.287 MMBtu per barrel, this translates to a used oil price of $5.28 to $6.10 per MMBtu. EPA's estimated value of $5.58 per MMBtu for ECF, therefore, falls within this range.

*I. Concern That Revenue Losses for Commercial Incinerators and Cement Kilns Are Not Reflected in EPA's Estimates of the Social Costs (Savings) of the Rule*

*Comment:* EPA estimates that commercial incinerators and cement kilns, combined, will experience annual revenue losses of approximately $5 million as a result of the rule. Because these losses are not incorporated into the estimated costs of the rule, a commenter states that EPA overestimates the cost savings likely to result from the exclusion.

*Response:* EPA disagrees with the commenter's suggestion that the Agency should deduct the reduction in commercial incinerator and cement kiln revenues from the estimated net cost value presented in the economic assessment document. As described in the methodology section of the economic assessment document, these reductions in revenues do not represent an expenditure of resources and, therefore, are not a social cost.

*J. Concern That EPA Has Not Evaluated the Adverse Consequences to National Waste Management Networks That Might Result if Some States Adopt the Rule and Others Do Not*

*Comment:* To the extent that some states do not adopt the regulation, the ECF rule will lead to inconsistent requirements across state lines, according to a commenter. The commenter asserts that EPA's analysis fails to account for the adverse consequences associated with the patchwork of state regulations that will likely emerge as a result of the exclusion.

*Response:* We agree with the commenter that inconsistencies in waste management regulations across state lines may create inefficiencies within the national hazardous waste management system. For this reason, we encourage all states to adopt the ECF rule. Because adoption of the rule must occur at the state level, however, determinations with respect to adoption are outside of EPA's authority.[107]

We disagree, however, with the commenter's characterization of the Agency's analysis of the partial implementation scenario in the

[107] We note also that the current exclusion for comparable fuel, as well as other exclusions or exemptions, must also be adopted at the state level to become effective. Thus, the fact that some states may not adopt the ECF exclusion is not unexpected.

*Economic Assessment* document. Although the analysis estimates impacts when only a limited number of states adopt the proposed rule, the commenter's characterization of this assessment as a scaling analysis is incorrect. Rather than scaling the national results, we focused this partial implementation analysis on 16 states with laws that either: (a) Prohibit them from promulgating standards that are more stringent than the federal regulations; or (b) require them to undertake additional legislative action to enact standards more stringent than federal regulations.

**Part Five: State Authority**

**I. Applicability of the Rule in Authorized States**

Under section 3006 of RCRA, EPA may authorize qualified states to administer their own hazardous waste programs in lieu of the federal program within the state. When EPA authorizes a state to implement the RCRA hazardous waste program, EPA determines whether the state program is consistent with the federal program, and whether it is no less stringent. This process, codified in 40 CFR 271, ensures national consistency and minimum standards, while providing flexibility to the states in implementing rules. Following authorization, EPA retains enforcement authority under sections 3008, 3013, and 7003 of RCRA, although authorized states have primary enforcement responsibility. In making this determination, EPA evaluates the state requirements to ensure they are no less stringent than the federal requirements.

Prior to enactment of the Hazardous and Solid Waste Amendments of 1984 (HSWA), a State with final RCRA authorization administered its hazardous waste program entirely in lieu of EPA administering the federal program in that state. The federal requirements no longer applied in the authorized state, and EPA could not issue permits for any facilities in that state, since only the state was authorized to issue RCRA permits. When new, more stringent federal requirements were promulgated, the state was obligated to enact equivalent authorities within specified time frames. However, the new federal requirements did not take effect in an authorized state until the state adopted the federal requirements as state law.

In contrast, under RCRA section 3006(g) (42 U.S.C. 6926(g)), which was added by HSWA, new requirements and prohibitions imposed under HSWA authority take effect in authorized states at the same time that they take effect in unauthorized states. EPA is directed by the statute to implement these requirements and prohibitions in authorized states, including the issuance of permits, until the state is granted authorization to do so. While states must still adopt HSWA related provisions as state law to retain final authorization, EPA implements the HSWA provisions in authorized states until the states do so.

RCRA section 3009 allows the states to impose standards more stringent than those in the federal program (see also 40 CFR 271.1). Therefore, authorized states are required to modify their programs only when EPA enacts federal requirements that are more stringent or broader in scope than the existing federal requirements. Authorized states may, but are not required to, adopt federal regulations that are considered less stringent than previous federal regulations. Because this rule would eliminate specific requirements for hazardous secondary materials that are currently managed as hazardous waste, state programs would no longer need to include those specific requirements in order to be consistent with EPA's regulations.

**II. Effect on State Authorization**

These regulations are not promulgated under the authority of HSWA. Thus, this exclusion is applicable on the effective date only in those states that do not have final RCRA authorization. Moreover, authorized states are required to modify their program only when EPA promulgates Federal regulations that are more stringent or broader in scope than the authorized state regulations. For those changes that are less stringent or reduce the scope of the Federal program, states are not required to modify their program. This is a result of section 3009 of RCRA, which allows states to impose more stringent regulations than the Federal program. This final rule is considered to be less stringent than the current standards. Therefore, authorized states are not required to modify their programs to adopt regulations consistent with and equivalent to today's standards, although EPA strongly encourages states to do so.

Some states incorporate the federal regulations by reference or have specific state statutory requirements that their state program can be no more stringent than the federal regulations. In those cases, EPA anticipates that the exclusions in this notice would be adopted by these states, consistent with state laws and state administrative procedures, unless they take explicit action as specified by their respective state laws to decline the proposed revisions.

**Part Six: Costs and Benefits of the Final Rule**

**I. Introduction**

The value of any regulatory action is traditionally measured by the net change in social welfare that it generates. The Agency's economic assessment conducted as part of EPA's obligations under Executive Order 12866 evaluates costs, cost savings (benefits), waste quantities affected, and other impacts, such as environmental justice, children's health, unfunded mandates, regulatory takings, and small entity impacts. To conduct this analysis, we prepared a baseline characterization for ECF, developed and implemented a methodology for examining impacts, and followed appropriate guidelines and procedures for examining equity considerations, children's health, and other impacts. Because EPA's data were limited, the estimated findings from these analyses should be viewed as national, not site-specific impacts.

**II. Baseline Specification**

Proper baseline specifications are vital to the accurate assessment of incremental costs, benefits, and other economic impacts associated with a rule that would expand the exclusion for hazardous secondary materials used as a fuel. The baseline essentially describes the world absent any expanded exclusion. The incremental impacts of this action are evaluated by assessing post-rule responses with respect to baseline conditions and actions. The baseline, as applied in this analysis, is assumed to be the point at which the final rule is published. A full discussion of the baseline specification is presented in the *Assessment*[108] document completed for this action.

**III. Analytical Methodology, Primary Data Sources, and Key Assumptions**

We developed a simplified four-step approach for assessing the cost and economic impacts associated with this action. First, we identified all potentially eligible hazardous secondary materials currently generated in the U.S. We next determined the tonnage of such material that is likely to qualify for the exclusion. An economic threshold analysis was next applied to the likely eligible hazardous secondary material (*i.e.* currently-classified waste) to

[108] USEPA, ''Assessment of the Potential Costs, Benefits, and Other Impacts of the Expansion of the RCRA Comparable Fuel Exclusion—Final Rule,'' April 2008.

determine which facilities could be expected to benefit from the exclusion. For example, for a generator with a fossil fuel boiler on-site, the model assumes that the facility will use the exclusion if the total benefits (cost savings) realized by the generator are projected to exceed the total costs incurred to take advantage of the exclusion. Finally, we aggregated all facilities that are likely to use the exclusion to derive estimates for total costs, cost savings, and economic impacts (ECF quantities affected).

The analytical model for this analysis derives both cost savings and costs associated with the exclusion. Cost savings include: fuel cost savings (net of baseline fuel recovery), avoided hazardous waste management costs, transportation cost savings, tracking cost savings, and storage cost savings. These factors may be considered economic benefits of the action. The model also assesses relevant costs of the exclusion. These include: burner storage costs, boiler retrofit costs, hazardous secondary material analytical costs, raw materials replacement cost (related to the hazardous secondary material that is recycled in the baseline), recordkeeping costs, and transport costs.

The net social benefits are calculated as the difference between the social benefits (cost savings) and social costs. The *total* net social benefits of the rule are then calculated by aggregating the net social impacts associated with each facility expected to use the exclusion. Because this rule establishes ''emissions'' comparable fuels, impacts to human health and the environment are assumed to be comparable, or generally unchanged as compared to virgin fuels, and are therefore not included in our monetized assessment.

The primary data sources used in this analysis are the 2005 Biennial Report (2005 BR),[109] the 1996 National Hazardous Waste Constituent Survey (NHWCS),[110] the 2002 National Emissions Inventory (NEI),[111] the ACC Survey data,[112] and information provided in the engineering analysis developed by EERGC. The 2005 BR data were used to derive the potentially eligible hazardous secondary materials currently generated in the U.S. This is the only national database available that has been reviewed by the Agency to ensure data quality. The 1996 NHWCS reflects dated information, but was the only quality controlled data source available that provided the necessary constituent information on a nationwide basis, across all industries. The NEI data were used to make a determination of whether an eligible boiler is located at each facility. The EERGC engineering analysis provided all necessary engineering cost information.[113]

Data limitations have required us to apply several assumptions in our analysis. The most critical assumptions are:

- The ECF is assumed to be burned in nonhazardous waste boilers that meet the conditions of the exclusion;
- The ECF is assumed to have an average heating value of 12,200 Btu/lb. (This is based on our assessment of the National Hazardous Waste Constituent Survey);
- A facility that can use the exclusion, and has a nonhazardous waste boiler on-site that could burn ECF, would burn this material on-site rather than sending it off-site;
- The number of facilities purchasing ECF is assumed to equal the number of generating facilities expected to send their ECF off-site; and,
- All excluded ECF generated in a particular state that is sent offsite by the generating facility is assumed to be shipped the same distance. (Average shipment distances for each state are derived from hazardous waste shipped off-site, as reported in the Biennial Report database.)

## IV. Key Analytical Limitations

The primary analytical limitations are associated with our estimate of the availability of on-site boilers, and our estimate of ECF qualifying for the exclusion. Nationwide data are not available to indicate whether each affected generating facility has a boiler on-site that can burn ECF. Using the NEI data, we made a determination of whether an eligible boiler is located at each facility. This determination may misrepresent which boilers could burn ECF and which boilers could not. To estimate how much hazardous secondary material qualifies as ECF, we used the ACC survey data, and data derived from the NHWCS. The data presented in the NHWCS are the most comprehensive nationwide data available. However, these data are from 1993, and may not fully reflect the characteristics of today's hazardous secondary materials.

## V. Findings

This rule is projected to result in a benefit to society in the form of net cost savings to the private sector, on a nationwide basis, thereby allowing for the more efficient use of limited resources elsewhere in the economy. This is accomplished without compromising protection of human health and the environment by ensuring comparable emissions from the burning of high Btu value hazardous secondary materials.

The total net social benefits projected as a result of this rule are estimated at $13.4 million per year. Avoided waste management and fuel costs represent the vast majority of all benefits (cost savings). Transportation, boiler retrofits, and burner storage costs represent the majority of the costs. This estimate assumes all 50 states adopt the rule, which is unlikely to occur. As a sensitivity analysis, we estimated impacts to only those 16 states that have statutes prohibiting them from promulgating standards that are more stringent than the Federal regulations or with statutes that require additional legislative action to enact standards more stringent than the Federal regulations. The total net social benefits under this scenario are estimated at $10.1 million per year.

Approximately 222,500 tons (U.S. short tons) of currently-classified hazardous secondary materials are expected to qualify for the exclusion with approximately 118,500 tons/year actually excluded. Of the excluded total, our data indicate that approximately 48,900 tons are not burned for energy recovery in the baseline. Of this total, the vast majority is reported under BR management code H040—Incineration for thermal destruction other than use as a fuel.[114]

We also analyzed the two primary regulatory options considered by the Agency.[115] Annual net social benefits

[109] U.S. EPA, 2005 National Biennial Report, database and supporting documentation available for download at *http://www.epa.gov/epaoswer/hazwaste/data/biennialreport/*

[110] U.S. EPA, National Hazardous Waste Constituent Survey, database and supporting documentation available for download at *http://www.epa.gov/epaoswer/hazwaste/id/hwirwste/economic.html*

[111] U.S. EPA, 2002 National Emissions Inventory, databases and supporting documentation available for download at *http://www.epa.gov/ttn/chief/net/2002inventory.html*

[112] American Chemistry Council (ACC) voluntary membership survey of waste generation and management.

[113] USEPA, ''Draft Technical Support Document for Expansion of the Comparable Fuel Exclusion,'' May 2007, Section 7.

[114] We note that the BR does not identify a management method code for wastes that are combusted in an incinerator and where the heating value of the wastes is used beneficially in lieu of fossil or other fuels to combust other waste with little or no heating value. Thus, it is probable that the vast majority of the waste that we identify as likely to be excluded as ECF, and which is currently combusted in incinerators, is currently being burned for energy recovery.

[115] Alternative Option A would impose conditions that are less stringent than those under the final rule (e.g., boiler operator training would

under the first option (less stringent requirements) were found to be $14.1 million. The additional cost savings primarily reflect reduced burner and generator storage requirements. Under the second option (more stringent requirements), net social benefits are estimated at $10.9 million per year. The reduced net benefits are largely reflected in increased burner storage requirements and greater tracking costs. Reduced fuel and management costs account for the vast majority of all cost savings under both options, as with the final rule. Under these two options, generators are projected to exclude an estimated 100,200 to 118,800 tons of ECF per year, out of the 222,500 tons/year qualifying.

We believe that it is important to not only understand the change in economic efficiency, as presented above, but to also understand the primary distributional effects associated with this change. Hazardous waste commercial incinerators and cement kilns are projected to experience impacts associated with this action. These effects include revenue losses and fuel replacement costs for cement kilns, plus revenue increases for commercial incinerators. Commercial kilns and blenders are projected to experience estimated revenue losses ranging from $3.2 to $6.5 million per year, while commercial incinerators may experience revenue changes from a decrease of $0.4 million to an increase of approximately $2.8 million per year. The losses for cement kilns represent less than 1 percent of the current annual waste management revenues earned by these facilities. In addition, the shift of ECF and hazardous wastes with which ECF is currently blended away from commercial kilns represents a fuel loss to these facilities. We estimate that the annual cost of replacing this hazardous waste fuel is approximately $1.7 to 2.9 million per year.

Although impacts to these groups may be considered a cost in accounting terms, they do not represent a real resource cost of the rule. The actual net benefits of this action reflect the impacts to these groups to the extent that there are real resource impacts, but do not include transfers from one facility to another.

not be required; dikes and berms would be allowed for secondary containment for tanks rather than a liner, double-wall, or vault). Alternative Option B would impose conditions that are more stringent than those under the final rule (e.g., closure and financial requirements for storage units; manifests for shipments). See USEPA, ''Assessment of the Potential Costs, Benefits, and other Impacts of the Expansion of the RCRA Comparable Fuel Exclusion,'' April 2008, Exhibit ES–1.

The findings presented here reflect numerous analytical assumptions and limitations. Furthermore, we have analyzed additional scenarios and sensitivity analyses that are not presented in this Preamble. Readers wishing to gain a full understanding of our analytical methodology, data, findings, assumptions, and limitations are encouraged to read the *Assessment* document prepared in support of this final rule, and available in the Docket to this rule.

## Part Seven: Statutory and Executive Order Reviews

### I. Executive Order 12866: Regulatory Planning and Review

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action,'' since this action may raise novel legal or policy issues [3(f)(4)]. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866. Any changes made in response to OMB recommendations have been documented in the docket for this action.

This rule is projected to result in benefits to society in the form of cost savings. The total net cost savings are estimated at $13.4 million per year. This figure is significantly below the $100 million threshold [116] established under part 3(f)(1) of the Order. Thus, this rule is not considered to be an economically significant action. However, in an effort to comply with the spirit of the Executive Order, we have prepared an economic assessment in support of this action. This document is entitled: *Assessment of the Potential Costs, Benefits, and Other Impacts of the Expansion of the RCRA Comparable Fuel Exclusion-Final Rule.* The RCRA docket established for this rulemaking maintains a copy of this *Assessment* for public review. Interested persons are encouraged to read this document.

### II. Paperwork Reduction Act

The information collection requirements in this rule have been submitted for approval to OMB under the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* The information collection requirements are not enforceable until OMB approves them.

The information under this rule is planned to be collected in order to ensure that the conditions of the exclusion from RCRA under 40 CFR 261.38 are being met. The responses to the collection of information are mandatory under 40 CFR 261.38, and are necessary for EPA to fulfill its congressional mandate to protect public health and the environment. The information will, however, be collected only to the extent necessary for the implementation of this rule, and will not collect any information related to the trade secrets of the stakeholders. EPA will protect from public disclosure all confidential business information obtained under this rule.

This promulgated rule is deregulatory. The 64 respondents generating and burning excluded ECF would be subject to an annual public reporting and recordkeeping burden for the collection of information required under this rule of 37,373 hours, and a capital, and operation and maintenance cost of $1.4 million. However, because the excluded fuel would no longer be considered hazardous waste, the generator would not be required to comply with the paperwork, reporting, and recordkeeping requirements under the Subtitle C hazardous wastes regulations. Therefore, the reporting and recordkeeping burden associated with ECF would result in a net annual reduction of 32,899 hours and savings of $1.3 million in capital, and operation and maintenance costs. The frequency of responses varies with the type of response. Burden is defined at 5 CFR 1320.3(b).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9. When this ICR is approved by OMB, the Agency will publish a technical amendment to 40 CFR part 9 in the **Federal Register** to display the OMB control number for the approved information collection requirements contained in this final rule.

### III. Regulatory Flexibility Act

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

The RFA provides default definitions for each type of small entity. Small entities are defined as: (1) A small business as defined by the Small

[116] This $100 million threshold applies to both costs, and cost savings.

Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this 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. We have determined that the affected ECF generators are not owned by small governmental jurisdictions or nonprofit organizations. Therefore, only small businesses were analyzed for small entity impacts. For the purposes of the impact analyses, small entity is defined either by the number of employees or by the dollar amount of sales. The level at which a business is considered small is determined for each North American Industrial Classification System (NAICS) code by the Small Business Administration.

This rule is projected to result in benefits in the form of cost savings to companies that use the exclusion. As a result, the rule would not result in adverse impacts for any small businesses that generate ECF. Our analysis indicates that one or two cement kilns may be owned by small businesses, as defined by the SBA for the relevant NAICS code. Lost revenue plus fuel replacement costs to these facilities have been found to represent less than 3% of the average annual waste receipt revenues to these facilities, and considerably less impacts when clinker/cement revenues are included. As a result, these impacts are not significant. Furthermore, these impacts are not a direct economic impact of the rule.

The reader is encouraged to review our regulatory flexibility screening analysis prepared in support of this determination. This analysis is incorporated into the *Assessment* document, which is available in the Docket to this final rule.

## IV. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

This final rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or tribal governments or the private sector. The UMRA generally excludes from the definition of ''Federal intergovernmental mandate'' duties that arise from participation in a voluntary federal program. This rule is a voluntary program because the States are not required to adopt these requirements as a condition of authorization (or otherwise). In any event, EPA has determined that 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. The total net benefits (cost savings) of this action are estimated to be $13.4 million per year.

Finally, EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. Small governments are not affected by this action.

## V. 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 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. The rule focuses on modified requirements for facilities generating ECF, without affecting the relationships between Federal and state governments. Thus, Executive Order 13132 does not apply to this rule.

Although section 6 of Executive Order 13132 does not apply, EPA did consult with representatives of state governments in developing this rule. Representatives from the states of North Carolina, Georgia, Missouri, Louisiana, and Oregon provided valuable input and review.

## VI. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This final rule does not have tribal implications, as specified in

Executive Order 13175. No Tribal governments are known to own or operate facilities generating or burning hazardous secondary materials subject to this rule. Thus, Executive Order 13175 does not apply to this rule.

**VII. EO 13045 ''Protection of Children From Environmental Health Risks and Safety Risks''**

This action is not subject to Executive Order 13045 (62 F.R. 19885, April 23, 1997) because it is not economically significant as defined in Executive Order 12866, and because the Agency does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. A health and risk assessment in support of this action is unnecessary due to the comparable emission nature of this action.

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

This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866.

This rule will not seriously disrupt energy supply, distribution patterns, prices, imports or exports. Furthermore, this rule is designed to improve economic efficiency by expanding the use of fuels that are hazardous secondary materials.

**IX. National Technology Transfer Advancement Act**

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This rulemaking involves environmental monitoring or measurement. Consistent with the Agency's Performance Based Measurement System (''PBMS''), EPA has decided not to require the use of specific, prescribed analytic methods. Rather, the rule will allow the use of any method that meets the prescribed performance criteria. The PBMS approach is intended to be more flexible and cost-effective for the regulated community; it is also intended to encourage innovation in analytical technology and improved data quality. EPA is not precluding the use of any method, whether it constitutes a voluntary consensus standard or not, as long as it meets the performance criteria specified.

**X. Executive Order 12898: Federal Actions to Address Environmental Justice in 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. This rule is designed to allow for the use of hazardous secondary materials as fuel under a comparable emission standard, resulting in no incremental increase in risk to human health and the environment, when compared to the burning of virgin fuels.

**XI. 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 the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of 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 January 20, 2009.

**List of Subjects in 40 CFR Part 261**

Hazardous waste, Recycling, Reporting and recordkeeping requirements.

Dated: December 12, 2008.

**Stephen L. Johnson,**

*Administrator.*

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

## PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

■ 1. The authority citation for part 261 continues to read as follows:

**Authority:** 42 U.S.C. 6903, 6912(b), 6925.

■ 2. Section 261.4 is amended by revising paragraph (a)(16) to read as follows:

**§ 261.4 Exclusions.**

(a) * * *

(16) Comparable fuels, emission-comparable fuels, or comparable syngas fuels that meet the requirements of § 261.38.

* * * * *

■ 3. Section 261.38 is revised to read as follows:

**§ 261.38 Exclusion of comparable fuel, emission-comparable fuel, and syngas fuel.**

(a) *Specifications for excluded fuels.* Materials that meet the specifications for comparable fuel, emission-comparable fuel, or syngas fuel under paragraphs (a)(1), (a)(2), or (a)(3) of this section, respectively, and the other requirements of this section, are not solid wastes.

(1) *Comparable fuel specifications.*—(i) *Physical specifications.*—(A) *Heating value.* The heating value must exceed 5,000 BTU/lbs. (11,500 J/g).

(B) *Viscosity.* The viscosity must not exceed: 50 cs, as-fired.

(ii) *Constituent specifications.* For compounds listed in Table 1 to this section, the specification levels and, where non-detect is the specification, minimum required detection limits are: (*see* Table 1 of this section).

(2) *Emission-comparable fuel specifications*—The specifications shall be met as-generated. (i) *Physical specifications.*—(A) *Heating value.* The heating value must be 8,000 BTU/lbs (18,400 J/g) or greater.

(B) *Viscosity.* The viscosity must not exceed 50 cs.

(ii) *Constituent specifications*—(A) Except as provided by paragraph (a)(2)(ii)(B) of this section, for

compounds listed in Table 1 of this section the specification levels and, where nondetect is the specification, minimum required detection limits, are: (*see* Table 1 of this section).

(B) *Specifications not applicable.* The specification levels in Table 1 to this section do not apply for the following hydrocarbons and oxygenates under the special conditions provided under this section for emission-comparable fuel:

(*1*) Benzo(a)anthracene (CAS No. 56–55–3).

(*2*) Benzene (CAS No. 71–43–2).

(*3*) Benzo(b)fluoranthene (CAS No. 205–99–2)

(*4*) Benzo(k)fluoranthene (CAS No. 207–08–9)

(*5*) Benzo(a)pyrene (CAS No. 50–32–8)

(*6*) Chrysene (CAS No. 218–01–9)

(*7*) Dibenzo(a,h)anthracene (CAS No. 52–70–3)

(*8*) 7,12–Dimethylbenz(a)anthracene (CAS No. 57–97–6)

(*9*) Flouranthene (CAS No. 206–44–0)

(*10*) Indeno(1,2,3-cd)pyrene (CAS No. 193–39–5)

(*11*) 3-Methlycholanthrene (CAS No. 56–49–5)

(*12*) Naphthalene (CAS No. 91–20–3)

(*13*) Toluene (CAS No. 108–88–3).

(*14*) Acetophenone (CAS No. 98–86–2).

(*15*) Acrolein (CAS No. 107–02–8).

(*16*) Allyl alcohol (CAS No. 107–18–6).

(*17*) Bis(2-ethylhexyl)phthalate [Di-2-ethylhexyl phthalate] (CAS No.117–81–7).

(*18*) Butyl benzyl phthalate (CAS No. 85–68–7).

(*19*) o-Cresol [2-Methyl phenol] (CAS No. 95–48–7).

(*20*) m-Cresol [3-Methyl phenol] (CAS No. 108–39–4).

(*21*) p-Cresol [4-Methyl phenol] (CAS No.106–44–5).

(*22*) Di-n-butyl phthalate (CAS No. 84–74–2).

(*23*) Diethyl phthalate (CAS No. 84–66–2).

(*24*) 2,4-Dimethylphenol (CAS No. 105–67–9).

(*25*) Dimethyl phthalate (CAS No. 131–11–3).

(*26*) Di-n-octyl phthalate (CAS No. 117–84–0).

(*27*) Endothall (CAS No. 145–73–3).

(*28*) Ethyl methacrylate (CAS No. 97–63–2).

(*29*) 2-Ethoxyethanol [Ethylene glycol monoethyl ether] (CAS No. 110–80–5).

(*30*) Isobutyl alcohol (CAS No. 78–83–1).

(*31*) Isosafrole (CAS No. 120–58–1).

(*32*) Methyl ethyl ketone [2-Butanone] (CAS No. 78–93–3).

(*33*) Methyl methacrylate (CAS No. 80–62–6).

(*34*) 1,4-Naphthoquinone (CAS No. 130–15–4).

(*35*) Phenol (CAS No. 108–95–2).

(*36*) Propargyl alcohol [2-Propyn-1-ol] (CAS No. 107–19–7).

(*37*) Safrole (CAS No. 94–59–7).

(3) *Synthesis gas fuel specifications.*—Synthesis gas fuel (*i.e.*, syngas fuel) that is generated from hazardous waste must:

(i) Have a minimum Btu value of 100 Btu/Scf;

(ii) Contain less than 1 ppmv of total halogen;

(iii) Contain less than 300 ppmv of total nitrogen other than diatomic nitrogen ($N_2$);

(iv) Contain less than 200 ppmv of hydrogen sulfide; and

(v) Contain less than 1 ppmv of each hazardous constituent in the target list of appendix VIII constituents of this part.

(4) *Blending to meet the specifications. (i) Comparable fuel.* (A) Hazardous waste shall not be blended to meet the comparable fuel specification under paragraph (a)(1) of this section, except as provided by paragraph (a)(4)(i)(B) of this section:

(B) *Blending to meet the viscosity specification.* A hazardous waste blended to meet the viscosity specification for comparable fuel shall:

(*1*) As generated and prior to any blending, manipulation, or processing, meet the constituent and heating value specifications of paragraphs (a)(1)(i)(A) and (a)(1)(ii) of this section;

(*2*) Be blended at a facility that is subject to the applicable requirements of parts 264 and 265, or § 262.34 of this chapter; and

(*3*) Not violate the dilution prohibition of paragraph (a)(7) of this section.

(ii) *Emission-comparable fuel.* Hazardous waste shall not be treated by blending or other means to meet the emission-comparable fuel specifications under paragraph (a)(2) of this section. Emission-comparable fuel must meet those specifications as-generated by the original generator of the material. Emission-comparable fuel that has met the specifications under paragraph (a)(2) of this section as-generated, and that is subsequently commingled with other materials, must continue to meet the specifications.

(5) *Treatment to meet the comparable fuel specifications.* (i) A hazardous waste may be treated to meet the specifications for comparable fuel under paragraph (a)(1) of this section provided the treatment:

(A) Destroys or removes the constituent listed in the specification or raises the heating value by removing or destroying hazardous constituents or materials;

(B) Is performed at a facility that is subject to the applicable requirements of parts 264 and 265, or § 262.34 of this chapter; and

(C) Does not violate the dilution prohibition of paragraph (a)(7) of this section.

(ii) Residuals resulting from the treatment of a hazardous waste listed in subpart D of this part to generate a comparable fuel remain a hazardous waste.

(6) *Generation of a syngas fuel.* (i) A syngas fuel can be generated from the processing of hazardous wastes to meet the exclusion specifications of paragraph (a)(3) of this section provided the processing:

(A) Destroys or removes the constituent listed in the specification or raises the heating value by removing or destroying constituents or materials;

(B) Is performed at a facility that is subject to the applicable requirements of parts 264 and 265, or § 262.34 of this chapter or is an exempt recycling unit pursuant to § 261.6(c); and

(C) Does not violate the dilution prohibition of paragraph (a)(7) of this section.

(ii) Residuals resulting from the treatment of a hazardous waste listed in subpart D of this part to generate a syngas fuel remain a hazardous waste.

(7) *Dilution prohibition for comparable fuel, emission-comparable fuel, and syngas fuel.* (i) *Comparable fuel and syngas fuel.* No generator, transporter, handler, or owner or operator of a treatment, storage, or disposal facility shall in any way dilute a hazardous waste to meet the specifications of paragraphs (a)(1)(i)(A) or (a)(1)(ii) of this section for comparable fuel or paragraph (a)(3) of this section for syngas.

(ii) *Emission-comparable fuel.* Emission-comparable fuel shall not be generated by means of dilution.

(b) *Implementation.*—(1) *General.*—(i) Materials that meet the specifications provided by paragraph (a) of this section for comparable fuel, emission-comparable fuel, or syngas fuel are excluded from the definition of solid waste provided that the conditions under this section are met. For purposes of this section, such materials are called excluded fuel, and the person claiming and qualifying for the exclusion is called the excluded fuel generator and the person burning the excluded fuel is called the excluded fuel burner.

(ii) The person who generates the excluded fuel must claim the exclusion by compliance with the conditions of this section and keep records necessary to document compliance with those conditions.

(2) *Notices.* (i) *Notices to State RCRA and CAA Directors in authorized States or regional RCRA and CAA Directors in unauthorized States.* (A) The generator must submit a one-time notice, except as provided by paragraph (b)(2)(i)(C) of this section, to the Regional or State RCRA and CAA Directors, in whose jurisdiction the exclusion is being claimed and where the excluded fuel will be burned, certifying compliance with the conditions of the exclusion and providing the following documentation:

(1) The name, address, and RCRA ID number of the person/facility claiming the exclusion;

(2) The applicable EPA Hazardous Waste Codes that would otherwise apply to the excluded fuel;

(3) The name and address of the units meeting the requirements of paragraphs (b)(3) and (c) of this section, that will burn the excluded fuel;

(4) An estimate of the average and maximum monthly and annual quantity of material for which an exclusion would be claimed, except as provided by paragraph (b)(2)(i)(D) of this section; and

(5) The following statement, which shall be signed and submitted by the person claiming the exclusion or his authorized representative:

Under penalty of criminal and civil prosecution for making or submitting false statements, representations, or omissions, I certify that the requirements of 40 CFR 261.38 have been met for all emission-comparable fuel/comparable fuel (specify which) identified in this notification. Copies of the records and information required at 40 CFR 261.38(b)(8) are available at the generator's facility. Based on my inquiry of the individuals immediately responsible for obtaining the information, the information is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

(B) Generators of emission-comparable fuel must also include in the notices:

(1) An estimate of the annual quantity of each material for which an emission-comparable fuel exclusion would be claimed; and

(2) An estimate of the maximum concentration of each compound in Table 2 to this section in each emission-comparable fuel stream for which the fuel exceeds the comparable fuel specifications for those compounds in Table 1 to this section.

(C) If there is a substantive change in the information provided in the notice required under this paragraph (b)(2)(i), the generator must submit a revised notification.

(D) Comparable fuel and syngas fuel generators must include an estimate of the average and maximum monthly and annual quantity of material for which an exclusion would be claimed only in notices submitted after December 19, 2008 for newly excluded comparable fuel or syngas fuel or for revised notices as required by paragraph (b)(2)(i)(C) of this section.

(ii) *Public notice.* Prior to burning an excluded fuel, the burner must publish in a major newspaper of general circulation local to the site where the fuel will be burned, a notice entitled ''Notification of Burning a Fuel Excluded Under the Resource Conservation and Recovery Act'' and containing the following information:

(A) Name, address, and RCRA ID number of the generating facility(ies);

(B) Name and address of the burner and identification of the unit(s) that will burn the excluded fuel;

(C) A brief, general description of the manufacturing, treatment, or other process generating the excluded fuel;

(D) An estimate of the average and maximum monthly and annual quantity of the excluded fuel to be burned; and

(E) Name and mailing address of the Regional or State Directors to whom the generator submitted a claim for the exclusion.

(3) *Burning.* (i) *Comparable fuel and syngas fuel.* The exclusion for fuels meeting the specifications under paragraphs (a)(1) or (a)(3) of this section applies only if the fuel is burned in the following units that also shall be subject to Federal/State/local air emission requirements, including all applicable requirements implementing Section 112 of the Clean Air Act:

(A) Industrial furnaces as defined in § 260.10 of this chapter;

(B) Boilers, as defined in § 260.10 of this chapter, that are further defined as follows:

(*1*) Industrial boilers located on the site of a facility engaged in a manufacturing process where substances are transformed into new products, including the component parts of products, by mechanical or chemical processes; or

(*2*) Utility boilers used to produce electric power, steam, heated or cooled air, or other gases or fluids for sale;

(C) Hazardous waste incinerators subject to regulation under subpart O of parts 264 or 265 of this chapter or applicable CAA MACT standards.

(D) Gas turbines used to produce electric power, steam, heated or cooled air, or other gases or fluids for sale.

(ii) *Emission-comparable fuel.* The exclusion for fuel meeting the specifications under paragraph (a)(2) of this section applies only if the fuel is burned under the conditions provided by paragraph (c) of this section.

(4) *Fuel analysis plan for generators.* The generator of an excluded fuel shall develop and follow a written fuel analysis plan which describes the procedures for sampling and analysis of the material to be excluded. The plan shall be followed and retained at the site of the generator claiming the exclusion.

(i) At a minimum, the plan must specify:

(A) The parameters for which each excluded fuel will be analyzed and the rationale for the selection of those parameters;

(B) The test methods which will be used to test for these parameters;

(C) The sampling method which will be used to obtain a representative sample of the excluded fuel to be analyzed;

(D) The frequency with which the initial analysis of the excluded fuel will be reviewed or repeated to ensure that the analysis is accurate and up to date; and

(E) If process knowledge is used in the determination, any information prepared by the generator in making such determination.

(ii) For each analysis, the generator shall document the following:

(A) The dates and times that samples were obtained, and the dates the samples were analyzed;

(B) The names and qualifications of the person(s) who obtained the samples;

(C) A description of the temporal and spatial locations of the samples;

(D) The name and address of the laboratory facility at which analyses of the samples were performed;

(E) A description of the analytical methods used, including any clean-up and sample preparation methods;

(F) All quantitation limits achieved and all other quality control results for the analysis (including method blanks, duplicate analyses, matrix spikes, etc.), laboratory quality assurance data, and the description of any deviations from analytical methods written in the plan or from any other activity written in the plan which occurred;

(G) All laboratory results demonstrating whether the exclusion specifications have been met; and

(H) All laboratory documentation that support the analytical results, unless a contract between the claimant and the laboratory provides for the documentation to be maintained by the laboratory for the period specified in paragraph (b)(9) of this section and also provides for the availability of the documentation to the claimant upon request.

(iii) Syngas fuel generators shall submit for approval, prior to performing sampling, analysis, or any management of an excluded syngas fuel, a fuel analysis plan containing the elements of paragraph (b)(4)(i) of this section to the appropriate regulatory authority. The approval of fuel analysis plans must be stated in writing and received by the facility prior to sampling and analysis to demonstrate the exclusion of a syngas. The approval of the fuel analysis plan may contain such provisions and conditions as the regulatory authority deems appropriate.

(5) *Analysis plans for burners of emission-comparable fuel.* An emission-comparable fuel burner is subject to the fuel analysis plan requirements under paragraph (b)(4) of this section to determine, for each fuel fed to the boiler when burning emission-comparable fuel, the as-fired heating value and the as-fired concentration of each compound listed in paragraph (a)(2)(ii)(B) of this section, except for fuels under the situations described below:

(i) Coal or fuel oil used as primary fuels, when the burner uses the heating values and compound concentrations for these fuels provided in paragraph (c)(2)(ii)(C) of this section and Tables 3 and 4 to § 261.38;

(ii) Emission-comparable fuel, when the burner receives documentation of this information from the generator for each shipment of emission-comparable fuel, provided that the emission-comparable fuel is not blended with other fuels before firing to the burner.

(iii) Emission-comparable fuel, when the burner receives documentation of this information from the generator for each shipment of emission-comparable fuel, and the emission-comparable fuel is blended with other fuels before firing to the burner, provided that:

(A) The burner has determined the heating value of the other fuels and the concentration of each compound listed in paragraph (a)(2)(ii)(B) of this section for the other fuels; and;

(B) The burner determines by calculation the as-fired heating value of the blended emission-comparable fuel and the as-fired concentration of each compound listed in paragraph (a)(2)(ii)(B) of this section of the blended emission-comparable fuel.

(6) *Excluded fuel sampling and analysis.* (i) *General.* For comparable fuel, emission-comparable fuel, and syngas for which an exclusion is claimed under the specifications provided by paragraphs (a)(1), (a)(2), or (a)(3) of this section, the generator of the material must test for all the constituents in appendix VIII to this part, except those that the generator determines, based on testing or knowledge, should not be present in the fuel. The generator is required to document the basis of each determination that a constituent with an applicable specification should not be present. The generator may not determine that any of the following categories of constituents with a specification in Table 1 to this section should not be present:

(A) A constituent that triggered the toxicity characteristic for the constituents that were the basis for listing the hazardous secondary material as a hazardous waste, or constituents for which there is a treatment standard for the waste code in 40 CFR 268.40;

(B) A constituent detected in previous analysis of the material;

(C) Constituents introduced into the process that generates the material; or

(D) Constituents that are byproducts or side reactions to the process that generates the material.

**Note to paragraph (b)(6)(i):** Any claim under this section must be valid and accurate for all hazardous constituents; a determination not to test for a hazardous constituent will not shield a generator from liability should that constituent later be found in the fuel/syngas above the exclusion specifications.

(ii) *Use of process knowledge.* (A) *Comparable fuel and syngas.* For each material for which the comparable fuel or syngas exclusion is claimed where the generator of the excluded fuel is not the original generator of the hazardous waste, the generator of the excluded fuel may not use process knowledge pursuant to paragraph (b)(6)(i) of this section and must test to determine that all of the constituent specifications of paragraphs (a)(1) and (a)(3) of this section, as applicable, have been met.

(B) *Emission-comparable fuel.* Emission-comparable fuel must meet the specifications for exclusion as-generated. Thus, the generator may use process knowledge to determine that compounds listed in Appendix VIII to this part are not present in the emission-comparable fuel.

(iii) The excluded fuel generator may use any reliable analytical method to demonstrate that no constituent of concern is present at concentrations above the specification levels. It is the responsibility of the generator to ensure that the sampling and analysis are unbiased, precise, and representative of the excluded fuel. For the fuel to be eligible for exclusion, a generator must demonstrate that:

(A) The 95% upper confidence limit of the mean concentration for each constituent of concern is not above the specification level; and

(B) The analyses could have detected the presence of the constituent at or below the specification level.

(iv) Nothing in this paragraph (b)(6) preempts, overrides or otherwise negates the provision in § 262.11 of this chapter, which requires any person who generates a solid waste to determine if that waste is a hazardous waste.

(v) In an enforcement action, the burden of proof to establish conformance with the exclusion specification shall be on the generator claiming the exclusion.

(vi) The generator must conduct sampling and analysis in accordance with the fuel analysis plan developed under paragraph (b)(4) of this section.

(vii) *Viscosity condition for comparable fuel.* (A) Excluded comparable fuel that has not been blended to meet the kinematic viscosity specification shall be analyzed as-generated.

(B) If hazardous waste is blended to meet the kinematic viscosity specification for comparable fuel, the generator shall:

(1) Analyze the hazardous waste as-generated to ensure that it meets the constituent and heating value specifications of paragraph (a)(1) of this section; and

(2) After blending, analyze the fuel again to ensure that the blended fuel meets all comparable fuel specifications.

(viii) Excluded fuel must be re-tested, at a minimum, annually and must be retested after a process change that could change its chemical or physical properties in a manner that may affect conformance with the specifications.

(ix) An emission-comparable fuel burner must determine, for each fuel fired to the burner, the as-fired heating value of the emission-comparable fuel and the as-fired concentration of each compound listed in paragraph (a)(2)(ii)(B) of this section using information provided by the generator, information provided by paragraph (c)(2)(ii)(C) of this section and Tables 3 and 4 to this section, by sampling and analysis, or by calculation when emission-comparable fuel is commingled with other fuels and the heating value of the emission comparable fuel and the concentration of each compound listed in paragraph (a)(2)(ii)(B) of this section is known for the fuels prior to commingling.

(7) *Speculative accumulation.* Excluded fuel must not be accumulated speculatively, as defined in § 261.1(c)(8).

(8) *Operating record.* The generator must maintain an operating record on

site containing the following information:

(i) All information required to be submitted to the implementing authority as part of the notification of the claim:

(A) The owner/operator name, address, and RCRA ID number of the person claiming the exclusion;

(B) For each excluded fuel, the EPA Hazardous Waste Codes that would be applicable if the material were discarded; and

(C) The certification signed by the person claiming the exclusion or his authorized representative.

(ii) A brief description of the process that generated the excluded fuel. If the comparable fuel generator is not the generator of the original hazardous waste, provide a brief description of the process that generated the hazardous waste;

(iii) The monthly and annual quantities of each fuel claimed to be excluded;

(iv) Documentation for any claim that a constituent is not present in the excluded fuel as required under paragraph (b)(6) of this section;

(v) The results of all analyses and all detection limits achieved as required under paragraph (b)(4) of this section;

(vi) If the comparable fuel was generated through treatment or blending, documentation of compliance with the applicable provisions of paragraphs (a)(4) and (a)(5) of this section;

(vii) If the excluded fuel is to be shipped off-site, a certification from the burner as required under paragraph (b)(10) of this section;

(viii) The fuel analysis plan and documentation of all sampling and analysis results as required by paragraph (b)(4) of this section; and

(ix) If the generator ships excluded fuel off-site for burning, the generator must retain for each shipment the following information on-site:

(A) The name and address of the facility receiving the excluded fuel for burning;

(B) The quantity of excluded fuel shipped and delivered;

(C) The date of shipment or delivery;

(D) A cross-reference to the record of excluded fuel analysis or other information used to make the determination that the excluded fuel meets the specifications as required under paragraph (b)(4) of this section; and

(E) A one-time certification by the burner as required under paragraph (b)(10) of this section.

(9) *Records retention.* Records must be maintained for a period of three years.

(10) *Burner certification to the generator.*—(i) *Comparable fuel and syngas fuel.* Prior to submitting a notification to the State and Regional Directors, a generator of comparable fuel or syngas fuel excluded under paragraphs (a)(1) or (a)(3) of this section who intends to ship the excluded fuel off-site for burning must obtain a one-time written, signed statement from the burner:

(A) Certifying that the excluded fuel will only be burned in an industrial furnace, industrial boiler, utility boiler, or hazardous waste incinerator, as required under paragraph (b)(3) of this section;

(B) Identifying the name and address of the facility that will burn the excluded fuel; and

(C) Certifying that the state in which the burner is located is authorized to exclude wastes as excluded fuel under the provisions of this section.

(ii) *Emission-comparable fuel.* Prior to submitting a notification to the State and Regional Directors, a generator of emission-comparable fuel who intends to ship the excluded fuel off-site for burning must obtain a one-time written, signed statement from the burner:

(A) Certifying that the excluded fuel will be stored under the conditions of paragraphs (c)(1) or (e) of this section and burned under the conditions of paragraph (c)(2) of this section, and that the burner will comply with the notification, reporting, and recordkeeping conditions of paragraph (c)(5) of this section;

(B) Identifying the name and address of the facility that will burn the excluded fuel; and

(C) Certifying that the state in which the burner is located is authorized to exclude wastes as excluded fuel under the provisions of this section.

(11) *Ineligible waste codes.* Wastes that are listed as hazardous waste because of the presence of dioxins or furans, as set out in appendix VII of this part, are not eligible for these exclusions, and any fuel produced from or otherwise containing these wastes remains a hazardous waste subject to full RCRA hazardous waste management requirements.

(12) *Regulatory status of boiler residues.* Burning excluded fuel that was otherwise a hazardous waste listed under §§ 261.31 through 261.33 does not subject boiler residues, including bottom ash and emission control residues, to regulation as derived-from hazardous wastes.

(13) *Residues in containers and tank systems upon cessation of operations.* (i) Liquid and accumulated solid residues that remain in a container or tank system for more than 90 days after the container or tank system ceases to be operated for storage or transport of excluded fuel product are subject to regulation under parts 262 through 265, 268, 270, 271, and 124 of this chapter.

(ii) Liquid and accumulated solid residues that are removed from a container or tank system after the container or tank system ceases to be operated for storage or transport of excluded fuel product are solid wastes subject to regulation as hazardous waste if the waste exhibits a characteristic of hazardous waste under §§ 261.21 through 261.24 or if the fuel were otherwise a hazardous waste listed under §§ 261.31 through 261.33 when the exclusion was claimed.

(iii) Liquid and accumulated solid residues that are removed from a container or tank system and which do not meet the specifications for exclusion under paragraphs (a)(1) or (a)(2) of this section are solid wastes subject to regulation as hazardous waste if:

(A) The waste exhibits a characteristic of hazardous waste under §§ 261.21 through 261.24; or

(B) If the fuel were otherwise a hazardous waste listed under §§ 261.31 through 261.33. The hazardous waste code for the listed waste applies to these liquid and accumulated solid resides.

(14) *Waiver of RCRA Closure Requirements.* Interim status and permitted storage and combustion units, and generator storage units exempt from the permit requirements under § 262.34 of this chapter, are not subject to the closure requirements of 40 CFR Parts 264, 265, and 267 provided that the storage and combustion unit has been used to manage only hazardous waste that is subsequently excluded under the conditions of this section, and that afterward will be used only to manage fuel excluded under this section.

(15) *Spills and leaks.* (i) Excluded fuel that is spilled or leaked and that therefore no longer meets the conditions of the exclusion is discarded and must be managed as a hazardous waste if it exhibits a characteristic of hazardous waste under §§ 261.21 through 261.24 or if the fuel were otherwise a hazardous waste listed in §§ 261.31 through 261.33.

(ii) For excluded fuel that would have otherwise been a hazardous waste listed in §§ 261.31 through 261.33 and which is spilled or leaked, the hazardous waste code for the listed waste applies to the spilled or leaked material.

(16) Nothing in this section preempts, overrides, or otherwise negates the provisions in CERCLA Section 103, which establish reporting obligations for releases of hazardous substances, or the

Department of Transportation requirements for hazardous materials in 49 CFR parts 171 through 180.

(c) *Special conditions for emission-comparable fuel.* The following additional conditions apply to emission-comparable fuel—fuel that meets the specifications under paragraph (a)(2) of this section.

(1) *Storage.* (i) *General.* Emission-comparable fuel may be stored in a container or tank under the conditions of paragraphs (c)(1)(iii) through (c)(1)(viii) of this section, or alternative conditions under paragraph (e) of this section.

(ii) *Prohibition on underground storage.* Emission-comparable fuel shall not be stored in an underground tank. An underground tank is a tank the volume of which (including the volume of underground pipes connecting thereto) is 10 percent or more beneath the surface of the ground.

(iii) *Spill prevention, control, and countermeasures (SPCC) requirements.* Emission-comparable fuel storage tanks and containers with a capacity equal to or greater than 0.1 $m^3$ (26 gallons) are subject to the following Spill Prevention, Control, and Countermeasures (SPCC) requirements adopted from 40 CFR Part 112. To satisfy the adopted conditions, you must substitute the term ''emission-comparable fuel'' for the term ''oil,'' and by substituting the term ''release of emission-comparable fuel to the environment'' for the term ''discharge as described in § 112.1(b).''

(A) Section 112.2, Definitions. These definitions apply to the adopted SPCC requirements under paragraphs (c)(1)(iii)(B) through (c)(1)(iii)(D) of this section.

(B) Sections 112.3(d) and 112.3(e) of this chapter, Requirement to Prepare and Implement a Spill Prevention, Control, and Countermeasure Plan. (*1*) You must prepare a SPCC Plan in writing, and in accordance with the adopted provisions of §§ 112.7 and 112.8 of this chapter;

(*2*) The SPCC Plan must be reviewed and certified according to the provisions of § 112.3(d) of this chapter and must be made available to the Regional Administrator according to the provisions of § 112.3(e) of this chapter;

(*3*) You must amend your SPCC Plan as directed by the Regional Administrator upon a finding that amendment is necessary to prevent and contain releases of emission-comparable fuel from your facility. You must implement the amended SPCC Plan as soon as possible, but not later than six months after you amend your SPCC Plan, unless the Regional Administrator specifies another date;

(C) Sections 112.5(a) and 112.5(b) of this chapter, Amendment of Spill Prevention, Control, and Countermeasures Plan by Owners or Operators. (*1*) You must comply with the provisions of § 112.5(a) and (b) of this chapter by substituting the term ''release of emission-comparable fuel to the environment'' for the term ''discharge as described in § 112.1(b);''

(*2*) You must have a Professional Engineer certify any technical amendment to your Plan in accordance with § 112.3(d) of this chapter.

(D) Section 112.7 of this chapter, General Requirements for Spill Prevention, Control, and Countermeasure Plans. (*1*) You must comply with the requirements of § 112.7, except for paragraphs (a)(2), (c), (d), and (k) of that section.

(*2*) Your Plan may deviate from the requirements § 112.7(g), (h)(2), (h)(3) and (i), and the adopted provisions of § 112.8, where applicable to a specific facility, if you provide equivalent protection by some other means of spill prevention, control, or countermeasure. Where your Plan does not conform to the applicable requirements in § 112.7(g), (h)(2), (h)(3) and (i) and the adopted provisions of § 112.8 of this chapter, you must state the reasons for nonconformance in your Plan and describe in detail alternate methods and how you will achieve equivalent environmental protection. If the Regional Administrator determines that the measures described in your Plan do not provide equivalent environmental protection, he may require that you amend your Plan.

(E) Section 112.8 of this chapter, Spill Prevention, Control, and Countermeasure Plan Requirements for Onshore Facilities, except for paragraph (b) of this section (facility drainage), paragraph (c)(2) of this section (secondary containment for bulk storage containers), paragraph (c)(4) of this section (protection of completely buried storage tanks), and paragraph (c)(11) of this section (secondary containment for mobile containers), with the following revisions:

(*1*) You must inspect at least weekly areas where portable containers are stored to look for leaking containers and for deterioration of containers and the containment system caused by corrosion or other factors.

(*2*) Section 112.8(d)(1) of this chapter applies to all buried piping irrespective of the installation or replacement date.

(iv) *Containment and detection of releases*—(A) *Tanks.* To prevent the release of emission comparable fuel or hazardous constituents to the environment, you must provide secondary containment for emission-comparable fuel tank systems as prescribed by the following requirements adopted from § 264.193 of this chapter. To satisfy the adopted conditions, you must substitute the term ''emission-comparable fuel'' for the term ''waste,'' and substitute the term ''document in the record'' for the term ''demonstrate to the Regional Administrator.''

(*1*) Section 264.193(b) of this chapter, which prescribes general performance standards for secondary containment systems;

(*2*) Section 264.193(c) of this chapter, which prescribes minimum requirements for secondary containment systems;

(*3*) Section 264.193(d)(1) through (3), which prescribes permissible secondary containment devices;

(*4*) Section 264.193(e) of this chapter, which prescribes design and operating requirements for the permissible secondary containment devices; and

(*5*) Section 264.193(f) of this chapter, which prescribes secondary containment requirements for ancillary equipment.

(B) *Portable containers.* To prevent the release of emission comparable fuel or hazardous constituents to the environment, you must provide containment for emission-comparable fuel container storage units as prescribed by the provisions of § 264.175(b) of this chapter, which are hereby adopted for emission-comparable fuel container storage units. To satisfy the adopted condition, you must substitute the term ''emission-comparable fuel'' for each occurrence of the term ''waste.''

(v) *Preparedness and prevention, emergency procedures and response to releases.*—(A) *Preparedness and prevention.*—(*1*) *Required equipment.* Your facility must be equipped with the equipment required under § 264.32(a) through (d) of this chapter in a manner that it can be used in emergencies associated with storing and handling emission-comparable fuel.

(*2*) *Testing and maintenance of equipment.* You must test and maintain as necessary to assure proper operation in times of emergency all communications or alarm systems, fire protection equipment, spill control equipment, and decontamination equipment required for your emission-comparable fuel tank system or container storage unit.

(*3*) *Access to communications or alarm system.* Whenever emission comparable fuel is distributed into or

out of the tank system or container storage unit, all personnel involved in the operation must have immediate access to an internal alarm or emergency communication device, either directly or through visual or voice contact with another employee.

(*4*) *Arrangements with local authorities.* You must comply with § 264.37(a) of this chapter. If state or local authorities decline to enter into the arrangements prescribed by § 264.37(a) of this chapter, you must keep a record documenting the refusal.

(B) *Emergency procedures.*—(*1*) *Emergency coordinator.* At all times, there must be at least one employee either on the facility premises or on call (*i.e.*, available to respond to an emergency by reaching the facility within a short period of time) with the responsibility for coordinating all emergency response measures. This emergency coordinator must be thoroughly familiar with all aspects of the facility's Spill Prevention, Control, and Countermeasures (SPCC) Plan required under paragraph (c)(1)(iii) of this section, all emission-comparable fuel operations and activities at the facility, the location and characteristics of emission-comparable fuel handled, the location of all records within the facility pertaining to emission-comparable fuel, and the facility layout. In addition, this person must have the authority to commit the resources needed to carry out the SPCC Plan.

(*2*) *Emergency procedures.*—(*i*) Whenever there is an imminent or actual emergency situation relating to the emission-comparable fuel tank system or container storage unit, the emergency coordinator (or his designee when the emergency coordinator is on call) must immediately activate internal facility alarms or communication systems, where applicable, to notify all facility personnel and notify appropriate state or local agencies with designated response roles if their help is needed.

(*ii*) Whenever there is a release, fire, or explosion relating to the emission-comparable fuel tank system or container storage unit, the emergency coordinator must immediately identify the character, exact source, amount, and aerial extent of any released materials. He may do this by observation or review of facility records, and, if necessary, by chemical analysis.

(*iii*) Concurrently, the emergency coordinator must assess possible hazards to human health or the environment that may result from the release, fire, or explosion. This assessment must consider both direct and indirect effects of the release, fire, or explosion (*e.g.*, the effects of any toxic, irritating, or asphyxiating gases that are generated, or the effects of any hazardous surface water run-off from water or chemical agents used to control fire and heat-induced explosions).

(*iv*) If the emergency coordinator determines that the facility has had a release, fire, or explosion associated with the emission-comparable fuel tank system or container storage unit which could threaten human health or the environment outside the facility, he must report his findings as provided by paragraph (c)(1)(v)(B)(*2*)(*v*) of this section.

(*v*) If the emergency coordinator's assessment indicates that evacuation of local areas may be advisable, he must immediately notify appropriate local authorities. He must be available to help appropriate officials decide whether local areas should be evacuated, and he must immediately notify either the government official designated as the on-scene coordinator for that geographical area, (in the applicable regional contingency plan under part 300 of this title) or the National Response Center (using their 24-hour toll free number 800/424–8802). The report must include: the name and telephone number of the reporter; the name and address of the facility; the time and type of incident (*e.g.*, release, fire); the name and quantity of material(s) involved, to the extent known; the extent of injuries, if any; and the possible hazards to human health, or the environment, outside the facility.

(*vi*) During an emergency, the emergency coordinator must take all reasonable measures necessary to ensure that fires, explosions, and releases do not occur, recur, or spread to other materials at the facility. These measures must include, where applicable, stopping processes and operations and collecting and containing released emission-comparable fuel.

(*vii*) If the emission-comparable fuel tank system or container storage unit stops operations in response to a fire, explosion, or release, the emergency coordinator must monitor for leaks, pressure buildup, gas generation, or ruptures in valves, pipes, or other equipment, wherever this is appropriate.

(*viii*) Immediately after an emergency, the emergency coordinator must provide for treating, storing, or disposing of recovered emission-comparable fuel, contaminated soil or surface water, or any other material that results from a release, fire, or explosion at the facility.

(*ix*) The emergency coordinator must ensure that, in the affected area(s) of the facility: materials that may be incompatible with the released emission-comparable fuel is treated, stored, or disposed of until cleanup procedures are completed; and all emergency equipment listed in the SPCC Plan is cleaned and fit for its intended use before operations are resumed.

(*x*) You must note in the record the time, date, and details of any incident that requires implementing the SPCC Plan for the emission-comparable fuel tank system or container storage unit. Within 15 days after the incident, you must submit a written report on the incident to the Regional Administrator. The report must include: the name, address, and telephone number of the owner or operator; the name, address, and telephone number of the facility; the date, time, and type of incident (*e.g.*, fire, explosion); the name and quantity of material(s) involved; the extent of injuries, if any; an assessment of actual or potential hazards to human health or the environment, where this is applicable; and the estimated quantity and disposition of recovered material that resulted from the incident.

(C) *Response to leaks or spills and disposition of leaking or unfit-for-use tank systems.* (*1*) You must comply with the provisions of § 264.196 of this chapter, except for § 264.196(e)(1) and (e)(4) of this chapter.

(*2*) To satisfy the adopted provisions of § 264.196, you must substitute the term ''emission-comparable fuel'' for the terms ''hazardous waste'' and ''waste.''

(*3*) Unless you satisfy the requirements of § 264.196(e)(2) and (3) of this chapter, you must immediately cease using the tank system to store emission-comparable fuel and remove any liquid and solid residues under the conditions of paragraph (b)(13) of this section.

(vi) *Air emissions conditions adopted from part 63, subpart EEEE.*—(A) *Applicability—(1)* If your emission-comparable fuel storage, transfer, and transport equipment is not subject to the controls provided by § 63.2346 of this chapter, you must determine whether you are subject to the provisions of paragraphs (c)(1)(vi)(B) and (C) of this section:

(*2*) If your emission-comparable fuel storage tank is subject to the controls provided by § 63.2346 of this chapter other than those prescribed by item 6 in Table 2 to subpart EEEE, part 63 of this chapter (*i.e.*, requirements for organic liquids with an annual average true vapor pressure of the total listed organic HAP >=76.6 kilopascals (11.1 psia)), you must determine whether the tank would be subject to the controls prescribed by item 6 after considering the vapor pressure of the RCRA oxygenates listed

in paragraph (c)(1)(vi)(B)(*3*) of this section as well as the organic HAP listed in Table 1 to subpart EEEE, part 63 of this chapter. If the annual average true vapor pressure of the total RCRA oxygenates and Table 1 organic HAP in the emission-comparable fuel is >=76.6 kilopascals (11.1 psia), you are subject to the requirements of paragraphs (c)(1)(vi)(B) through (C) of this section.

(B) *Conditions of applicability*. To satisfy the conditions under paragraph (c)(1)(vi)(C) of this section that are adopted from part 63, subpart EEEE of this chapter, you must:

(*1*) Satisfy the conditions irrespective of whether your facility is an area source as defined by § 63.2 of this chapter.

(*2*) Substitute the term ''RCRA oxygenates as well as organic HAP'' for each occurrence of the term ''organic HAP''; the term ''RCRA oxygenates as well as organic HAP listed in Table 1'' for each occurrence of the term ''organic HAP listed in Table 1''; and the term ''RCRA oxygenates as well as Table 1 organic HAP'' for each occurrence of the term ''Table 1 organic HAP''.

(*3*) Use the following definition of RCRA oxygenates: The term ''RCRA oxygenates'' means the following organic compounds:

(*i*) Allyl alcohol (CAS No. 107–18–6);

(*ii*) Bis(2-ethylhexyl)phthalate [Di–2–ethylhexyl phthalate] (CAS No.117–81–7);

(*iii*) 2,4-Dimethylphenol (CAS No. 105–67–9);

(*iv*) Ethyl methacrylate (CAS No. 97–63–2);

(*v*) 2-Ethoxyethanol [Ethylene glycol monoethyl ether] (CAS No. 110–80–5);

(*vi*) Isobutyl alcohol (CAS No. 78–83–1);

(*vii*) Isosafrole (CAS No. 120–58–1);

(*viii*) Methyl ethyl ketone [2-Butanone] (CAS No. 78–93–3);

(*ix*) 1,4-Naphthoquinone (CAS No. 130–15–4);

(*x*) Propargyl alcohol [2-Propyn-1-ol] (CAS No. 107–19–7); and

(*xi*) Safrole (CAS No. 94–59–7).

(*4*) Use the following definition of organic liquid. Organic liquid means emission comparable fuel that:

(*i*) Contains 5 percent by weight or greater of the RCRA oxygenates as well as organic HAP listed in Table 1 to this subpart, as determined using the procedures specified in § 63.2354(c) of this chapter; and

(*ii*) Has an annual average true vapor pressure of 0.7 kilopascals (0.1 psia) or greater.

(*5*) Use the following definition of affected source. Affected source means the collection of activities and equipment used to distribute organic liquids into, out of, or within a facility.

(*6*) Substitute the term ''subject to § 261.38(c)(1)(vi)(C)of this chapter'' for each occurrence of the term ''subject to this subpart''.

(*7*) Satisfy the conditions if:

(*i*) Your organic liquids transfer equipment is exempt from subpart EEEE, part 63 of this chapter, under the provisions of § 63.228(c)(1) of this chapter, which exempts organic liquids transfer equipment at facilities subject to a NESHAP other than subpart EEEE, part 63; and

(*ii*) The requirements applicable to the organic liquids transfer equipment under the other NESHAP are not equivalent to, at a minimum, the conditions under paragraphs (c)(1)(vi)(C), (c)(1)(vii), or (e) of this section. You must document and record your determination whether the requirements under the other NESHAP are less stringent than the conditions under paragraph (c)(1)(vi)(C) of this section. You may contact the RCRA regulatory authority to assist with this determination.

(*8*) Submit all notifications, reports, and other communications to the RCRA regulatory authority rather than the CAA regulatory authority.

(C) *Conditions to control air emissions under provisions adopted from part 63, subpart EEEE of this chapter.* (*1*) The affected source is the equipment identified under § 63.2338(b)(1) through (5) of this chapter, except for equipment identified in § 63.2338(c)(2) through (3) of this chapter.

(*2*) Definitions of new, reconstructed, and existing affected sources are provided under § 63.2338(d) through (f) of this chapter.

(*3*) You must comply with the emission limitations, operating limits, and work practice standards under § 63.2346 of this chapter.

(*4*) You must comply with the general requirements under § 63.2350 of this chapter. The startup, shutdown, and malfunction plan required by § 63.2350(c) of this chapter need not address equipment not subject to paragraph (c)(1)(vi)(C) of this section.

(*5*) You must comply with the performance tests, design evaluation, and performance evaluation requirements under § 63.2354 of this chapter. When complying with § 63.2354(c) of this chapter, however, you must determine the content of RCRA oxygenates as well as organic HAP in the emission-comparable fuel.

(*6*) You must conduct performance tests and other initial compliance demonstrations prior to managing emission-comparable fuel in the storage unit.

(*7*) You must conduct subsequent performance tests by the dates specified in § 63.2362 of this chapter.

(*8*) You must comply with the monitoring, installation, operation, and maintenance requirements under § 63.2366 of this chapter.

(*9*) You must demonstrate initial compliance with the emission limitations, operating limits, and work practice standards as required under § 63.2370 of this chapter.

(*10*) You must monitor and collect data to demonstrate continuous compliance and use the collected data as required by § 63.2374 of this chapter.

(*11*) You must demonstrate continuous compliance with the emission limitations, operating limits, and work practice standards as required by § 63.2378 of this chapter.

(*12*) You must submit the notifications and on the schedule required by § 63.2382 of this chapter, except that initial notifications must be submitted prior to managing emission-comparable fuel in the storage unit. Notifications must be submitted to the RCRA regulatory authority.

(*13*) You must submit the reports and on the schedule required by § 63.2386 of this chapter. Reports must be submitted to the RCRA regulatory authority.

(*14*) You must keep the applicable records required by § 63.2390 of this chapter.

(*15*) You must keep records in the form, and for the duration, required by § 63.2394 of this chapter.

(*16*) The parts of the General Provisions that apply to you are provided by § 63.2398 of this chapter.

(*17*) The definitions that apply to the conditions under paragraph (c)(1)(vi)(C) of this section are provided by § 63.2406 of this chapter, and paragraphs (c)(1)(vi)(B)(3) through (5) of this section.

(*18*) You are subject to the requirements in Tables 1–12 to subpart EEEE, part 63 of this chapter.

(vii) *Air emissions conditions for tanks and containers that are not subject to conditions adopted from part 63, subpart EEEE.* Tank and container storage units that are not subject to the conditions adopted from subpart EEEE, part 63 under paragraph (c)(1)(vi) of this section are subject to the conditions of this paragraph.

(A) *Tanks.* (*1*) *Level 1 control.* (*i*) *Applicability criteria.* Tanks that meet the following vapor pressure limitations for emission-comparable fuel for the tank size designations are subject to the air emission controls under paragraph (c)(1)(vii)(A)(*1*)(*ii*) of this section:

(*A*) For a tank design capacity equal to or greater than 151 $m^3$ (40,000

gallons), the annual average organic vapor pressure limit for the tank is 5.2 kPa (0.75 psia);

(*B*) For a tank design capacity equal to or greater than 75 $m^3$ (20,000 gallons) but less than 151 $m^3$ (40,000 gallons), the annual average organic vapor pressure limit for the tank is 27.6 kPa (4.0 psia); and

(*C*) For a tank design capacity less than 75 $m^3$ (20,000 gallons), the annual average vapor pressure limit for the tank is 76.6 kPa (11.1 psia);

(*ii*) *Conditions to control emissions.* You must comply with the following requirements:

(*A*) *NESHAP provisions for level 1 control under subpart OO, part 63.* Sections 63.901 through 63.907 of this chapter; or

(*B*) *NESHAP provisions for organic liquid distribution under subpart EEEE, part 63.* The provisions under Item 1.a.i or 1.a.ii which require venting to a control device under provisions of subpart SS, part 63 of this chapter, or Level 2 tank emissions control under subpart WW, part 63 of this chapter, or routing emissions to a fuel gas system or back to a process under § 63.984 of subpart SS, part 63 of this chapter, or vapor balancing emissions to the transport vehicle from which the storage tank is filled under § 63.2346(a)(4); or

(*C*) *Hazardous waste tank controls under subpart CC, part 264.* The provisions for additional options provided for hazardous waste tanks under § 264.1084(d)(3), (d)(4), or (d)(5) of this chapter for use of venting to a control device, a pressure tank, or a tank located inside an enclosure that is vented through a closed-vent system to an enclosed combustion control device, and the associated provisions under §§ 63.1081 (definitions), 264.1083(c) (determination of vapor pressure), 264.1084(j) (transfer to a tank), 264.1087 (closed-vent systems and control devices), and 264.89(b) (recordkeeping) of this chapter. To satisfy these adopted provisions, you must substitute the term ''emission-comparable fuel'' for the terms ''hazardous waste'' and ''waste.''

(*2*) *Level 2 control.* (*i*) *Applicability criteria.* Tanks that do not meet the vapor pressure limitations for emission-comparable fuel for the tank size designations under paragraph (c)(1)(vii)(A)(*1*)(*i*) of this section are subject to the air emission controls under paragraph (c)(1)(vii)(A)(*2*)(*ii*) of this section.

(*ii*) *Conditions to control emissions.* To satisfy the conditions to control emissions, you must comply with the requirements under paragraphs (c)(1)(vii)(A)(*1*)(*ii*)(*B*) or (*C*) of this section.

(*3*) *Equipment leaks.* For each valve, pump, compressor, pressure relief device, sampling connection system, open-ended valve or line, or flange or other connector, and any control devices or systems used to manage emission-comparable fuel in a tank system subject to paragraph (c)(1)(vii)(A) of this section, you must comply with the applicable requirements under 40 CFR part 63, subpart TT (control level 1), except for § 63.1000; or subpart UU (control level 2), except for § 63.1019; or subpart H, except for §§ 63.160, 63.162(b) and (e), and 63.183.

(B) *Containers.* (*1*) *Level 1 control.* (*i*) *Applicability criteria.* Containers that meet the following criteria are subject to the air emission controls under paragraph (c)(1)(vii)(B)(*1*)(*ii*) of this section:

(*A*) Containers having a design capacity greater than 0.1 $m^3$ and less than or equal to 0.46 $m^3$;

(*B*) Containers having a design capacity greater than 0.46 $m^3$ that are not in light liquid service, as defined in § 264.1031 of this chapter.

(*C*) Containers having a design capacity greater than 0.46 $m^3$ that are in light liquid service, as defined in § 264.1031 of this chapter.

(*ii*) *Conditions to control emissions.* To satisfy the conditions on Level I control of emissions, you must comply with the following requirements:

(*A*) The NESHAP provisions for containers under subpart PP, part 63 at §§ 63.922 (level 1 control) or 63.923 (level 2 control) of this chapter; and

(*B*) The ancillary provisions under subpart PP, part 63 at §§ 63.921 (definitions), 63.925 (test methods and procedures), 63.926 (inspection and monitoring requirements), 63.927 (recordkeeping requirements), and 63.928 (reporting requirements) of this chapter.

(*2*) *Level 2 control.* (i) *Applicability criteria.* Containers that do not meet the criteria under paragraph (c)(1)(vii)(B)(*1*)(*i*) of this section are subject to the air emission controls under paragraph (c)(1)(vii)(B)(*2*)(*ii*) of this section.

(*ii*) *Conditions to control emissions.* To satisfy the conditions on Level II control of emissions, you must comply with the following requirements:

(*A*) The NESHAP provisions for containers under subpart PP, part 63 at § 63.923 (level 2 control) of this chapter; and

(*B*) The ancillary provisions under subpart PP, part 63 at §§ 63.921 (definitions), 63.925 (test methods and procedures), 63.926 (inspection and monitoring requirements, 63.927 (recordkeeping requirements), and 63.928 (reporting requirements) of this chapter.

(*3*) *Equipment leaks.* For each valve, pump, compressor, pressure relief device, sampling connection system, open-ended valve or line, or flange or other connector, and any control devices or systems used to manage emission-comparable fuel in a container subject to paragraph (c)(1)(vii)(B) of this section, you must comply with the applicable requirements under 40 CFR part 63, subpart TT (control level 1), except for § 63.1000; or subpart UU (control level 2), except for § 63.1019; or subpart H, except for §§ 63.160, 63.162(b) and (e), and 63.183.

(viii) *Management of incompatible fuels and other materials*—(A) Generators and burners of emission-comparable fuel must document in the fuel analysis plan under paragraph (b)(4) of this section how (*e.g.*, using trial tests, analytical results, scientific literature, or process knowledge) precautions will be taken to prevent mixing of excluded fuels and other materials which could result in reactions which:

(*1*) Generate extreme heat or pressure, fire or explosions, or violent reactions;

(*2*) Produce uncontrolled toxic mists, fumes, dusts, or gases;

(*3*) Produce uncontrolled flammable fumes or gases; or

(*4*) Damage the structural integrity of the storage unit or facility.

(B) Burners that blend emission-comparable fuel with other fuels but that are exempt from fuel analysis requirements under paragraphs (b)(4) and (b)(5)(iii) of this section must document in the operating record how precautions will be taken to prevent mixing of emission-comparable fuel with other fuels which could result in the reactions listed in paragraph (c)(viii)(A) of this section.

(C) Incompatible fuels must not be placed in the same tank or container.

(2) *Burning.* (i) *Types of combustors that may burn emission-comparable fuel.* Emission-comparable fuel must be burned in a boiler meeting the conditions of paragraph (c)(2)(i)(A) of this section or a hazardous waste combustor under the conditions of paragraph (c)(2)(i)(B) of this section.

(A) *Boilers.* Emission-comparable fuel may be burned in an industrial or utility boiler as defined in paragraph (b)(3) of this section but that is further restricted by being a watertube type of steam boiler that does not feed fuel using a stoker or stoker-type mechanism.

(B) *Hazardous waste combustors.* (*1*) Emission-comparable fuel may be burned in an incinerator, cement kiln,

lightweight aggregate kiln, boiler, or halogen acid production furnace operating under a RCRA permit issued under part 270 of this chapter and in compliance with the applicable provisions of subpart O of part 264, subpart H of part 266, or subpart EEE of part 63 of this chapter, provided that the emission-comparable fuel is burned under the same operating requirements that apply to hazardous waste burned by the combustor.

(*2*) When emission-comparable fuel is burned in a hazardous waste combustor under the provisions of paragraph (c)(2)(i)(B) of this section, the operating conditions under paragraph (c)(2)(ii) of this section do not apply, except for:

(*i*) The emission-comparable fuel constituent feedrate conditions under paragraph (c)(2)(ii)(C) of this section continue to apply; and

(*ii*) The emission-comparable fuel automatic feed cutoff system requirements under paragraph (c)(2)(ii)(G) of this section that apply to monitoring the constituent feedrate limits as specified under paragraph (c)(2)(ii)(G)(*1*)(*ii*) of this section continue to apply.

(ii) *Operating conditions*—(A) *Primary fuels.* (*1*) A minimum of 50 percent of fuel fired to the boiler shall be fossil fuel, fuels derived from fossil fuel, tall oil, or comparable fuel meeting the specifications provided by paragraph (a)(1) of this section. Such fuels are termed ''primary fuel'' for purposes of this section. (Tall oil is a fuel derived from vegetable and rosin fatty acids.) The primary fuel shall comprise at least 50% of the total fuel heat input to the boiler and at least 50% of the total fuel mass input to the boiler.

(*2*) The primary fuel firing rate shall be continuously monitored and the minimum primary fuel firing rate limit shall be achieved on an hourly rolling average basis;

(B) *Fuel heating value.* Primary fuels shall have a minimum as-fired heating value of 8,000 Btu/lb, and each material fired in a firing nozzle where emission-comparable fuel is fired must have a heating value of at least 8,000 Btu/lb, as-fired;

(C) *Feedrate limits for emission-comparable fuel constituents.* The total feedrate, considering all combustor feedstreams, of each emission-comparable fuel constituent listed under paragraph (a)(2)(ii)(B) of this section shall not exceed the limit provided by Table 2 to this section.

(*1*) The feedrate limits are expressed as gas flowrate-normalized feedrates in the units ''ug/dscm''.

(*2*) The feedrate limit for total combustor feedstreams expressed as mass/unit time (kg/hr) for each emission-comparable fuel constituent is determined by multiplying the gas flowrate-normalized feedrate limit provided by Table 2 to this section times the combustor gas flowrate.

(*3*) The maximum constituent feedrate (kg/hr) attributable to emission-comparable fuel is the total combustor constituent feedrate (kg/hr) minus the constituent feedrate (kg/hr) for all other combustor feedstreams.

(*4*) To account for emission-comparable fuel constituents in primary fuels, burners may use measured concentrations of the constituents, or:

(*i*) If natural gas is used as a primary fuel, burners may assume that natural gas does not contain emission-comparable fuel constituents and that natural gas has a heating value of 22,000 Btu/lb;

(*ii*) If fuel oil is used as a primary fuel, burners may use the default concentrations for emission-comparable fuel constituents provided in Table 3 to this section, and assume that fuel oil has a heating value of 19,200 Btu/lb; and

(*iii*) If coal is used as a primary fuel, burners may use the default concentrations for emission-comparable fuel constituents provided in Table 4 to this section, and assume that coal has a heating value of 11,100 Btu/lb.

(*5*) The feedrate of each emission-comparable fuel constituent shall be continuously monitored (by knowing the concentration of the constituent in each feedstream and by monitoring the feedrate of each feedstream), and the maximum feedrate limit for each constituent shall not be exceeded on an hourly rolling average basis.

(D) *CO CEMS.* When burning emission-comparable fuel, carbon monoxide emissions must not exceed 100 parts per million by volume, over an hourly rolling average (monitored with a continuous emissions monitoring system (CEMS)), dry basis and corrected to 7 percent oxygen. You must use an oxygen CEMS to continuously correct the carbon monoxide level to 7 percent oxygen. You must install, calibrate, maintain, and continuously operate the CEMS in compliance with the quality assurance procedures provided in the appendix to subpart EEE of part 63 of this chapter (Quality Assurance Procedures for Continuous Emissions Monitors Used for Hazardous Waste Combustors) and Performance Specification 4B (carbon monoxide and oxygen) in appendix B, part 60 of this chapter.

(E) *Dioxin/furan control*—(*1*) If the boiler is equipped with a dry particulate matter control device and the primary fuel is not coal, you must continuously monitor the combustion gas temperature at the inlet to the dry particulate matter control device, and the gas temperature must not exceed 400 °F on an hourly rolling average basis.

(*2*) *Calibration of thermocouples.* The calibration of thermocouples must be verified at a frequency and in a manner consistent with manufacturer specifications, but no less frequently than once per year.

(F) *Calculation of rolling averages*—(*1*) *Calculation of rolling averages upon intermittent operations.* You must ignore periods of time when one-minute values are not available for calculating the hourly rolling average. When one-minute values become available again, the first one-minute value is added to the previous 59 values to calculate the hourly rolling average.

(*2*) *Calculation of rolling averages when the emission-comparable fuel feed is cutoff.* You must continue monitoring carbon monoxide and combustion gas temperature at the inlet to the dry particulate matter emission control device when the emission-comparable fuel feed is cutoff, but the source continues operating on other fuels. You must not resume feeding emission-comparable fuel if the emission levels exceed the limits provided in paragraphs (c)(2)(ii)(D) and (E) of this section.

(G) *Automatic fuel feed cutoff system*—(*1*) *General.* You must operate the boiler with a functioning system that immediately and automatically cuts off the emission-comparable fuel feed, except as provided by paragraph (c)(2)(ii)(G)(*6*) of this section:

(*i*) When the hourly rolling average carbon monoxide level exceeds 100 ppmv or the combustion gas temperature at the inlet to the initial dry particulate matter control device (and the primary fuel is not coal) exceeds 400 °F on an hourly rolling average.

(*ii*) When the emission-comparable fuel feedrate limit for a constituent exceeds the limit provided by Table 2 to this section.

(*iii*) When the primary fuel firing rate is below 50 percent on a heat input and mass input basis;

(*iv*) When the steam production rate (or other indicator of boiler load) indicates that the boiler load is below 40 percent;

(*v*) When the span value of the combustion gas temperature detector is exceeded;

(*vi*) Upon malfunction of the carbon monoxide CEMS, the gas temperature detector, the feedrate monitor(s) for the primary fuel, the feedrate monitor(s) used to comply with the maximum feedrate limits for emission-comparable

fuel constituents, or the monitor for boiler load; or

(*iv*) When any component of the automatic fuel feed cutoff system fails.

(*2*) *Failure of the automatic fuel feed cutoff system.* If the automatic emission-comparable fuel feed cutoff system fails to automatically and immediately cut off the flow of emission-comparable fuel (except as provided by paragraph (c)(2)(ii)(G)(*6*) of this section) upon an occurrence of an event linked to the cutoff system as required under paragraph (c)(2)(ii)(G)(*1*) of this section, you have failed to comply with the emission-comparable fuel cutoff conditions of this section. If an equipment failure prevents immediate and automatic cutoff of the emission-comparable fuel feed, however, you must cease feeding emission-comparable fuel as quickly as possible.

(*3*) *Exceedance of a limit.* If, notwithstanding an automatic emission-comparable fuel feed cutoff, a limit linked to the cutoff system under paragraphs (c)(2)(ii)(G)(*1*)(*i*) through (*iv*) of this section is exceeded while emission-comparable fuel remains in the combustion chamber, you have failed to comply with a condition of the exclusion.

(*4*) *Exceedance reporting.* For each exceedance of a limit linked to the cutoff system under paragraphs (c)(2)(ii)(G)(*1*)(*i*) through (*iv*) of this section while emission-comparable fuel remains in the combustion chamber (*i.e.*, when the emission-comparable fuel residence time has not transpired since the emission-comparable fuel feed was cutoff), you must submit to the RCRA regulatory authority a written report within 5 calendar days of the exceedance documenting:

(i) The exceedance;

(ii) The measures you have taken to manage the material as a hazardous waste; and

(iii) The measures you have taken to notify the generator that you have failed to comply with a condition of the exclusion.

(*5*) *Testing.* The automatic emission-comparable fuel feed cutoff system and associated alarms must be tested at least weekly to verify operability, unless you document in the operating record that weekly inspections will unduly restrict or upset operations and that less frequent inspection will be adequate. At a minimum, you must conduct operability testing at least monthly. You must document and record in the operating record automatic emission-comparable fuel feed cutoff system operability test procedures and results.

(*6*) *Ramping down emission-comparable fuel feed.* You may ramp down the emission-comparable fuel feedrate over a period not to exceed one minute. If you elect to ramp down the emission-comparable fuel feed, you must document ramp down procedures in the operating record. The procedures must specify that the ramp down begins immediately upon initiation of automatic emission-comparable fuel feed cutoff and the procedures must prescribe a bona fide ramping down. If a limit linked to the cutoff system under paragraphs (c)(2)(ii)(G)(*1*)(*i*) through (*iv*) of this section is exceeded during the ramp down, you have failed to comply with that limit.

(H) *Boiler load.* (*1*) Boiler load shall not be less than 40 percent. Boiler load is the ratio at any time of the total heat input to the maximum design heat input.

(*2*) Steam production rate or other measure of boiler load shall be monitored continuously and the minimum 40 percent load shall be maintained on an hourly rolling average basis.

(I) *Fuel atomization.* The emission-comparable fuel shall be fired directly into the primary fuel flame zone of the combustion chamber with an air or steam atomization firing system, mechanical atomization system, or a rotary cup atomization system under the following conditions:

(*1*) *Particle size.* The emission-comparable fuel must pass through a 200 mesh (74 micron) screen, or equivalent;

(*2*) *Mechanical atomization systems.* Fuel pressure within a mechanical atomization system and fuel flow rate shall be maintained within the design range taking into account the viscosity and volatility of the fuel;

(*3*) *Rotary cup atomization systems.* Fuel flow rate through a rotary cup atomization system must be maintained within the design range taking into account the viscosity and volatility of the fuel.

(J) *Definition of continuous monitoring systems.* (*1*) Continuous monitoring systems (CMS) must sample the controlled parameter without interruption, and evaluate the detector response at least once each 15 seconds, and compute and record the average values at least every 60 seconds.

(2) For CMS other than the CO CEMS, you must install, operate, and calibrate the other CMS according to the manufacturer's written specifications or recommendations, at a minimum.

(iii) *Boiler operator training.* (A) Boiler operators are personnel that operate or maintain the boiler when emission-comparable fuel is burned, including continuous monitoring systems and the emission-comparable fuel automatic feed cutoff system.

(B) Boiler operators must successfully complete a program that teaches them to perform their duties in a way that ensures the boiler's compliance with the operating conditions under paragraph (c)(2)(ii) of this section. The boiler owner or operator must ensure that this program includes all the elements described in the document required under paragraph (c)(2)(iii)(F) of this section.

(C) This program must be directed by a person trained in boiler operation procedures, and must include instruction which teaches boiler operators procedures relevant to the positions in which they are employed.

(D) At a minimum, the training program must be designed to ensure that boiler operators understand the operating conditions under paragraph (c)(2)(ii) of this section and are able to respond effectively when the emission-comparable fuel automatic feed cutoff system engages an automatic cutoff of the feed of emission-comparable fuel.

(E) Boiler operators must take part in an annual review of the initial training required in paragraph (c)(2)(iii)(B) of this section.

(F) The boiler owner or operator must maintain the following documents and records at the facility:

(*1*) The job title for each boiler operator position, and the name of the employee filling each job;

(*2*) A written job description for each position listed under paragraph (c)(2)(iii)(F)(*1*) of this section. This description may be consistent in its degree of specificity with descriptions for other similar positions in the same company location or bargaining unit, but must include the requisite skill, education, or other qualifications, and duties of employees assigned to each position;

(*3*) A written description of the type and amount of both introductory and continuing training that will be given to each person filling a position listed under paragraph (c)(2)(iii)(F)(*1*) of this section; and

(*4*) Records that document that the training or job experience required under paragraphs (c)(2)(iii)(B), (C), (D), and (E) of this section has been given to, and completed by, boiler operators.

(*5*) Training records on current personnel must be kept until emission-comparable fuel is no longer burned in the boiler. Training records on former boiler operators must be kept for at least three years from the date the employee last worked as a boiler operator at the facility. Personnel training records may

accompany personnel transferred within the same company.

(3) *Off-site shipments.* (i) Emission-comparable fuel may not be managed by any entity other than its generator, transporter, and designated burner.

(ii) Emission-comparable fuel may not be exported to a foreign country.

(4) *EPA Identification Number.* A burner that receives emission-comparable fuel from an offsite generator must have or obtain an EPA identification number from the Administrator. A burner who has not received an EPA identification number may obtain one by applying to the Administrator using EPA form 8700–12. Upon receiving the request, the Administrator will assign an EPA identification number to the burner.

(5) *Notification, reporting, and recordkeeping.* Except as provided by paragraph (c)(5)(iv) of this section, burners of emission-comparable fuel are subject to the following conditions:

(i) *Initial Notification.* (A) *Off-site burners.* A burner that receives emission-comparable fuel from an offsite generator must submit an initial notification to the Regional or State RCRA and CAA Directors prior to receiving the first shipment:

(*1*) Providing the name, address, and EPA identification number of the burner;

(*2*) Certifying that the excluded fuel will be stored under the conditions of paragraphs (c)(1) or (e) of this section and burned in a boiler or hazardous waste combustor under the conditions of paragraph (c)(2) of this section, and that the burner will comply with the notification, reporting, and recordkeeping conditions of paragraph (c)(5) of this section;

(*3*) Identifying the specific units that will burn the excluded fuel;

(*4*) Providing an estimate of the maximum annual quantity of emission-comparable fuel that will be burned, and an estimate of the maximum as-fired concentrations of each constituent in Table 2 to this section for which the emission-comparable fuel exceeds the specifications for comparable fuel in Table 1 to this section;

(*5*) Providing documentation that ECF will be fired into the flame zone of the primary fuel; and

(*6*) Certifying that the state in which the burner is located is authorized to exclude wastes as excluded fuel under the provisions of this section.

(B) *On-site burners.* An on-site burner must include in the one-time generator notification required under paragraphs (b)(2)(i)(A) and (B) of this section the information identified under paragraphs (c)(5)(i)(A)(*3*) through (*5*) of this section.

(C) If there is a substantive change in the information provided in the initial notification, the burner must submit a revised notification.

(ii) *Reporting.* The burner must submit to the RCRA regulatory authority reports of exceedances of operating parameter limits that are linked to the emission-comparable fuel automatic feed cutoff system, as required under paragraph (c)(2)(ii)(G)(*4*) of this section.

(iii) *Recordkeeping.* (A) *Records of shipments.* If the burner receives a shipment of emission-comparable fuel from an offsite generator, the burner must retain for each shipment the following information on-site in the operating record:

(*1*) The name, address, and RCRA ID number of the generator shipping the excluded fuel;

(*2*) The quantity of excluded fuel delivered;

(*3*) For ECF that would have otherwise been a hazardous waste listed in §§ 261.31 through 261.33, the hazardous waste code for the listed waste; and

(*4*) The date of delivery;

(B) *Boiler operating data.* The burner must retain records of information required to comply with the operating conditions of paragraph (c)(2) of this section in an operating record.

(C) *Records retention.* The burner must retain records at the facility for three years.

(iv) *Burners that are hazardous waste combustors.* Hazardous waste combustors that burn emission-comparable fuel under the provisions of paragraph (c)(2)(i)(B) of this section are not subject to the provisions of paragraphs (c)(5)(i) through (iii) of this section, except:

(A) The provisions of paragraphs (c)(5)(i)(A)(*1*) and (*3*), and paragraphs (c)(5)(iii)(A) and (C) apply; and

(B) The initial notification required under paragraphs (c)(5)(i)(A)(*1*) and (*3*) must include a certification that the excluded fuel will be stored under the conditions of paragraphs (c)(1) or (e) of this section.

(d) *Failure to comply with the conditions of the exclusion.* (1) *General.* An excluded fuel loses its exclusion if any person managing the fuel fails to comply with the conditions of the exclusion under this section, and the material must be managed as hazardous waste from the point of generation. In such situations, EPA or an authorized state agency may take enforcement action under RCRA section 3008(a), except as provided in paragraph (d)(2) of this section.

(2) *Emission-comparable fuel burned in an off-site, unaffiliated burner.* If the generator that claims the exclusion for emission-comparable fuel that is burned in an off-site, unaffiliated burner documents in the operating record that reasonable efforts have been made under this paragraph to ensure that such burner complies with the conditions of exclusion, the burner rather than the generator will be liable for discarding a hazardous waste upon a finding that such burner has not complied with a condition of exclusion.

(i) In making these reasonable efforts, the generator must, at a minimum, affirmatively answer the following questions prior to shipping emission-comparable fuel to the burner:

(A) Has the burner submitted the notification to the RCRA and CAA Directors required under paragraph (c)(5)(i) of this section, and has the burner published the public notice of burning activities required under paragraph (b)(2)(ii) of this section?

(B) Does publicly available information indicate that the burner facility has not had any formal enforcement actions taken against the facility in the previous three years for violations of the RCRA hazardous waste regulations and has not been classified as a significant non-complier with RCRA Subtitle C? In answering this question, the emission-comparable fuel generator can rely on the publicly available information from EPA or the state. If the burner facility has had a formal enforcement action taken against it in the previous three years for violations of the RCRA hazardous waste regulations and has been classified as a significant non-complier with RCRA Subtitle C, does the emission-comparable fuel generator have credible evidence that the burner will manage the emission-comparable fuel properly? In answering this question, the emission-comparable fuel generator can obtain additional information from EPA, the state, or the facility itself that the facility has addressed the violations, taken remedial steps to address the violations and prevent future violations, or that the violations are not relevant to the management of emission-comparable fuel under the conditions of this section.

(C) Does the burner have the equipment and trained personnel to manage the emission-comparable fuel under the conditions of this section?

(ii) In making these reasonable efforts, the generator may use any credible evidence available, including information obtained from the burner and information obtained from a third party;

(iii) The generator must maintain for a minimum of three years

documentation and certification that reasonable efforts were made for each burner facility to which emission-comparable fuel is shipped.

(A) Documentation and certification must be made available upon request by a regulatory authority within 72 hours, or within a longer period of time as specified by the regulatory authority.

(B) The certification statement must:

(*1*) Be signed and dated by an authorized representative of the generator company; and

(*2*) Incorporate the following language: ''I hereby certify in good faith and to the best of my knowledge that, prior to arranging for transport of emission-comparable fuel to [insert name(s) of burner facility], reasonable efforts were made to ensure that the emission-comparable fuel would be stored and burned under the conditions prescribed by § 261.38, and that such efforts were based on current and accurate information.''

(iv) Reasonable efforts must be repeated at a minimum of every three years.

(v) An unaffiliated burner is a boiler or hazardous waste combustor located at a facility that is not owned by the same parent company that generated the emission-comparable fuel.

(e) *Alternative storage conditions for emissions-comparable fuel.* Emission-comparable fuel may be stored in a tank or container under the following conditions adopted from 40 CFR Part 264 in lieu of the conditions specified under paragraphs (c)(1)(iii) through (c)(1)(viii) of this section. When satisfying these conditions, you must substitute the term ''emission-comparable fuel'' for each occurrence of the term ''hazardous waste'' or ''waste.'' You must document in the operating record whether you are complying with the alternative storage conditions of this paragraph, or the storage conditions under paragraphs (c)(1)(iii) through (c)(1)(viii) of this section.

(1) *Security.* You must comply with the requirements under § 264.14 of this chapter to provide security for your emission-comparable fuel storage facility.

(2) *General inspection requirements.* You must comply with the general inspection requirements under § 264.15 of this chapter for your emission-comparable fuel storage facility.

(3) *Personnel training.* You must comply with the personnel training requirements under § 264.16 of this chapter for emission-comparable fuel storage facility personnel.

(4) *General requirements for ignitable, reactive, or incompatible materials.* You must comply with the requirements for ignitable, reactive, or incompatible materials managed by the emission-comparable fuel storage facility.

(5) *Preparedness and prevention.* You must comply with the preparedness and prevention requirements under §§ 264.31 through 264.37 of this chapter with respect to your emission-comparable fuel storage facility.

(6) *Contingency plan and emergency procedures.* You must comply with the contingency plan and emergency procedure requirements under §§ 264.51 through 264.56 of this chapter with respect to your emission-comparable fuel storage facility.

(7) *Air emission requirements for equipment leaks.* You must comply with the requirements under §§ 264.1051 through 264.1065 of this chapter to control leaks from equipment used to manage emission-comparable fuel;

(8) *Use and management of containers.* If you store emission-comparable fuel in a container, you must comply with the following requirements for use and management of those containers:

(i) *Condition of containers.* You must comply with the requirements to ensure containers are in good condition under § 264.171 of this chapter;

(ii) *Compatibility of emission-comparable fuel with containers.* You must comply with the requirements to ensure compatibility of emission-comparable fuel with containers under § 264.172 of this chapter;

(iii) *Management of containers.* You must manage containers as prescribed by § 264.173 of this chapter;

(iv) *Inspections.* You must inspect containers and the containment system as prescribed by § 264.174 of this chapter;

(v) *Containment.* You must comply with the containment provisions under § 264.175 of this chapter;

(vi) *Special requirements for ignitable or reactive emission-comparable fuel.* You must comply with the provisions for ignitable or reactive emission-comparable fuel under § 264.176 of this chapter; and

(vii) *Air emission standards.* You must comply with the air emission requirements under §§ 264.1081, 264.1086(b)(1), (c), (d), and (f) through (h), 264.1088, and 264.1089 of this chapter.

(viii) *Closed vent systems and control devices.* If you use a closed vent system or control device to comply with paragraph (e)(8)(vii) of this section, you must comply with the requirements under §§ 264.1033(b) through (o), and 264.1034 through 264.1036 of this chapter.

(9) *Tank systems.* If you store emission-comparable fuel in a tank, you must comply with the following requirements:

(i) *Containment and detection of releases.* You must comply with the requirements for containment and detection of releases under § 264.193(b), (c), (d), (e), and (f) of this chapter;

(ii) *General operating requirements.* You must comply with the general operating requirements under § 264.194 of this chapter;

(iii) *Inspections.* You must comply with the inspection requirements under § 264.195 of this chapter;

(iv) *Response to leaks or spills and disposition of leaking or unfit-for-use tank systems.* You must comply with the requirements regarding response to leaks or spills and disposition of leaking or unfit-for-use tank systems under § 264.196 of this chapter, except that § 264.196(e)(1) reads for emission-comparable fuel tank systems: ''Unless the owner/operator satisfies the requirements of paragraphs (e)(2) through (4) of this section, the tank system must be closed''.

(v) *Special requirements for ignitable or reactive materials.* You must comply with the requirements for ignitable and reactive materials under § 264.198 of this chapter;

(vi) *Special requirements for incompatible materials.* You must comply with the requirements for incompatible materials under § 264.199 of this chapter; and

(vii) *Air emissions.* (A) You must comply with the requirements to control air emissions under §§ 264.1081, 264.1083(c), 264.1084(b) through (l), 264.1087 through 264.1089, and 264.1090(b) through (d) of this chapter.

(B) *Closed vent systems and control devices.* If you use a closed vent system or control device to comply with paragraph (e)(9)(vii) of this section, you must comply with the requirements under §§ 264.1033(b) through (o), and 264.1034 through 264.1036 of this chapter.

(f) *Notification of closure of an emission-comparable fuel tank or a container storage unit.* If you store emission-comparable fuel in a tank or container, you must submit a notification to the RCRA regulatory authority when a container storage area or a tank system goes out of emission-comparable fuel service which states the date when the tank or container storage area goes out of service.

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**Table 1 to § 261.38--Detection and Detection Limit Values for Comparable Fuel Specification**

| Chemical name | CAS No. | Concentration Limit (mg/kg at 10,000 Btu/lb) | Minimum Required Detection Limit (mg/kg) |
|---|---|---|---|
| Total Nitrogen as N | NA | 4900 | ..... |
| Total Halogens as Cl | NA | 540 | ..... |
| Total Organic Halogens as Cl | NA | ([a]) | ..... |
| Polychlorinated biphenyls, total [Aroclors, total] | 1336-36-3 | ND | 1.4 |
| Cyanide, total | 57-12-5 | ND | 1 |
| Metals: | | | |
| Antimony, total | 7440-36-0 | 12 | ..... |
| Arsenic, total | 7440-38-2 | 0.23 | ..... |
| Barium, total | 7440-39-3 | 23 | ..... |
| Beryllium, total | 7440-41-7 | 1.2 | ..... |
| Cadmium, total | 7440-43-9 | 1.2 | ..... |
| Chromium, total | 7440-47-3 | 2.3 | ..... |
| Cobalt | 7440-48-4 | 4.6 | ..... |
| Lead, total | 7439-92-1 | 31 | ..... |
| Manganese | 7439-96-5 | 1.2 | ..... |
| Mercury, total | 7439-97-6 | 0.25 | ..... |
| Nickel, total | 7440-02-0 | 58 | ..... |
| Selenium, total | 7782-49-2 | 0.23 | ..... |
| Silver, total | 7440-22-4 | 2.3 | ..... |
| Thallium, total | 7440-28-0 | 23 | ..... |
| Hydrocarbons: | | | |
| Benzo[a]anthracene | 56-55-3 | 2400 | ..... |
| Benzene | 71-43-2 | 4100 | ..... |
| Benzo[b]fluoranthene | 205-99-2 | 2400 | ..... |
| Benzo[k]fluoranthene | 207-08-9 | 2400 | ..... |
| Benzo[a]pyrene | 50-32-8 | 2400 | ..... |
| Chrysene | 218-01-9 | 2400 | ..... |
| Dibenzo[a,h]anthracene | 52-70-3 | 2400 | ..... |
| 7,12-Dimethylbenz[a]anthracene | 57-97-6 | 2400 | ..... |
| Fluoranthene | 206-44-0 | 2400 | ..... |
| Indeno(1,2,3-cd)pyrene | 193-39-5 | 2400 | ..... |
| 3-Methylcholanthrene | 56-49-5 | 2400 | ..... |
| Naphthalene | 91-20-3 | 3200 | ..... |
| Toluene | 108-88-3 | 36000 | ..... |
| Oxygenates: | | | |
| Acetophenone | 98-86-1 | 2400 | ..... |
| Acrolein | 107-02-8 | 39 | ..... |
| Allyl alcohol | 107-18-6 | 30 | ..... |
| Bis(2-ethylhexyl)phthalate [Di-2-ethylhexyl phthalate] | 117-81-7 | 2400 | ..... |
| Butyl benzyl phthalate | 85-68-7 | 2400 | ..... |
| o-Cresol [2-Methyl phenol] | 95-48-7 | 2400 | ..... |
| m-Cresol [3-Methyl phenol] | 108-39-4 | 2400 | ..... |
| p-Cresol [4-Methyl phenol] | 106-44-5 | 2400 | ..... |
| Di-n-butyl phthalate | 84-74-2 | 2400 | ..... |

| | | | |
|---|---|---|---|
| Diethyl phthalate | 84-66-2 | 2400 | ..... |
| 2,4-Dimethylphenol | 105-67-9 | 2400 | ..... |
| Dimethyl phthalate | 131-11-3 | 2400 | ..... |
| Di-n-octyl phthalate | 117-84-0 | 2400 | ..... |
| Endothall | 145-73-3 | 100 | ..... |
| Ethyl methacrylate | 97-63-2 | 39 | ..... |
| 2-Ethoxyethanol [Ethylene glycol monoethyl ether] | 110-80-5 | 100 | ..... |
| Isobutyl alcohol | 78-83-1 | 39 | ..... |
| Isosafrole | 120-58-1 | 2400 | ..... |
| Methyl ethyl ketone [2-Butanone] | 78-93-3 | 39 | ..... |
| Methyl methacrylate | 80-62-6 | 39 | ..... |
| 1,4-Naphthoquinone | 130-15-4 | 2400 | ..... |
| Phenol | 108-95-2 | 2400 | ..... |
| Propargyl alcohol [2-Propyn-1-ol] | 107-19-7 | 30 | ..... |
| Safrole | 94-59-7 | 2400 | ..... |
| Sulfonated Organics: | | | |
| Carbon disulfide | 75-15-0 | ND | 39 |
| Disulfoton | 298-04-4 | ND | 2400 |
| Ethyl methanesulfonate | 62-50-0 | ND | 2400 |
| Methyl methanesulfonate | 66-27-3 | ND | 2400 |
| Phorate | 298-02-2 | ND | 2400 |
| 1,3-Propane sultone | 1120-71-4 | ND | 100 |
| Tetraethyldithiopyrophosphate [Sulfotepp] | 3689-24-5 | ND | 2400 |
| Thiophenol [Benzenethiol] | 108-98-5 | ND | 30 |
| O,O,O-Triethyl phosphorothioate | 126-68-1 | ND | 2400 |
| Nitrogenated Organics: | | | |
| Acetonitrile [Methyl cyanide] | 75-05-8 | ND | 39 |
| 2-Acetylaminofluorene [2-AAF] | 53-96-3 | ND | 2400 |
| Acrylonitrile | 107-13-1 | ND | 39 |
| 4-Aminobiphenyl | 92-67-1 | ND | 2400 |
| 4-Aminopyridine | 504-24-5 | ND | 100 |
| Aniline | 62-53-3 | ND | 2400 |
| Benzidine | 92-87-5 | ND | 2400 |
| Dibenz[a,j]acridine | 224-42-0 | ND | 2400 |
| O,O-Diethyl O-pyrazinyl phosphorothioate [Thionazin] | 297-97-2 | ND | 2400 |
| Dimethoate | 60-51-5 | ND | 2400 |
| p-(Dimethylamino) azobenzene [4-Dime thylaminoazobenzene] | 60-11-7 | ND | 2400 |
| 3,3[prime]-Dimethylbenzidine | 119-93-7 | ND | 2400 |
| α,α-Dimethylphenethylamine | 122-09-8 | ND | 2400 |
| 3,3[prime]-Dimethoxybenzidine | 119-90-4 | ND | 100 |
| 1,3-Dinitrobenzene [m-Dinitrobenzene] | 99-65-0 | ND | 2400 |
| 4,6-Dinitro-o-cresol | 534-52-1 | ND | 2400 |
| 2,4-Dinitrophenol | 51-28-5 | ND | 2400 |
| 2,4-Dinitrotoluene | 121-14-2 | ND | 2400 |
| 2,6-Dinitrotoluene | 606-20-2 | ND | 2400 |
| Dinoseb [2-sec-Butyl-4,6-dinitrophenol] | 88-85-7 | ND | 2400 |
| Diphenylamine | 122-39-4 | ND | 2400 |
| Ethyl carbamate [Urethane] | 51-79-6 | ND | 100 |
| Ethylenethiourea (2-Imidazolidinethione) | 96-45-7 | ND | 110 |

| | | | |
|---|---|---|---|
| Famphur | 52-85-7 | ND | 2400 |
| Methacrylonitrile | 126-98-7 | ND | 39 |
| Methapyrilene | 91-80-5 | ND | 2400 |
| Methomyl | 16752-77-5 | ND | 57 |
| 2-Methyllactonitrile, [Acetone cyanohydrin] | 75-86-5 | ND | 100 |
| Methyl parathion | 298-00-0 | ND | 2400 |
| MNNG (N-Metyl-N-nitroso-N[prime]-nitroguanidine) | 70-25-7 | ND | 110 |
| 1-Naphthylamine, [α-Naphthylamine] | 134-32-7 | ND | 2400 |
| 2-Naphthylamine, [β-Naphthylamine] | 91-59-8 | ND | 2400 |
| Nicotine | 54-11-5 | ND | 100 |
| 4-Nitroaniline, [p-Nitroaniline] | 100-01-6 | ND | 2400 |
| Nitrobenzene | 98-96-3 | ND | 2400 |
| p-Nitrophenol, [p-Nitrophenol] | 100-02-7 | ND | 2400 |
| 5-Nitro-o-toluidine | 99-55-8 | ND | 2400 |
| N-Nitrosodi-n-butylamine | 924-16-3 | ND | 2400 |
| N-Nitrosodiethylamine | 55-18-5 | ND | 2400 |
| N-Nitrosodiphenylamine, [Diphenylnitrosamine] | 86-30-6 | ND | 2400 |
| N-Nitroso-N-methylethylamine | 10595-95-6 | ND | 2400 |
| N-Nitrosomorpholine | 59-89-2 | ND | 2400 |
| N-Nitrosopiperidine | 100-75-4 | ND | 2400 |
| N-Nitrosopyrrolidine | 930-55-2 | ND | 2400 |
| 2-Nitropropane | 79-46-9 | ND | 2400 |
| Parathion | 56-38-2 | ND | 2400 |
| Phenacetin | 62-44-2 | ND | 2400 |
| 1,4-Phenylene diamine, [p-Phenylenediamine] | 106-50-3 | ND | 2400 |
| N-Phenylthiourea | 103-85-5 | ND | 57 |
| 2-Picoline [alpha-Picoline] | 109-06-8 | ND | 2400 |
| Propylthioracil, [6-Propyl-2-thiouracil] | 51-52-5 | ND | 100 |
| Pyridine | 110-86-1 | ND | 2400 |
| Strychnine | 57-24-9 | ND | 100 |
| Thioacetamide | 62-55-5 | ND | 57 |
| Thiofanox | 39196-18-4 | ND | 100 |
| Thiourea | 62-56-6 | ND | 57 |
| Toluene-2,4-diamine [2,4-Diaminotoluene] | 95-80-7 | ND | 57 |
| Toluene-2,6-diamine [2,6-Diaminotoluene] | 823-40-5 | ND | 57 |
| o-Toluidine | 95-53-4 | ND | 2400 |
| p-Toluidine | 106-49-0 | ND | 100 |
| 1,3,5-Trinitrobenzene, [sym-Trinitobenzene] | 99-35-4 | ND | 2400 |
| Halogenated Organics: | | | |
| Allyl chloride | 107-05-1 | ND | 39 |
| Aramite | 140-57-8 | ND | 2400 |
| Benzal chloride [Dichloromethyl benzene] | 98-87-3 | ND | 100 |
| Benzyl chloride | 100-44-77 | ND | 100 |
| bis(2-Chloroethyl)ether [Dichoroethyl ether] | 111-44-4 | ND | 2400 |
| Bromoform [Tribromomethane] | 75-25-2 | ND | 39 |
| Bromomethane [Methyl bromide] | 74-83-9 | ND | 39 |
| 4-Bromophenyl phenyl ether [p-Bromo diphenyl ether] | 101-55-3 | ND | 2400 |
| Carbon tetrachloride | 56-23-5 | ND | 39 |
| Chlordane | 57-74-9 | ND | 14 |

| | | | |
|---|---|---|---|
| p-Chloroaniline | 106-47-8 | ND | 2400 |
| Chlorobenzene | 108-90-7 | ND | 39 |
| Chlorobenzilate | 510-15-6 | ND | 2400 |
| p-Chloro-m-cresol | 59-50-7 | ND | 2400 |
| 2-Chloroethyl vinyl ether | 110-75-8 | ND | 39 |
| Chloroform | 67-66-3 | ND | 39 |
| Chloromethane [Methyl chloride] | 74-87-3 | ND | 39 |
| 2-Chloronaphthalene [beta-Chloronaphthalene] | 91-58-7 | ND | 2400 |
| 2-Chlorophenol [o-Chlorophenol] | 95-57-8 | ND | 2400 |
| Chloroprene [2-Chloro-1,3-butadiene] | 1126-99-8 | ND | 39 |
| 2,4-D [2,4-Dichlorophenoxyacetic acid] | 94-75-7 | ND | 7 |
| Diallate | 2303-16-4 | ND | 3400 |
| 1,2-Dibromo-3-chloropropane | 96-12-8 | ND | 39 |
| 1,2-Dichlorobenzene [o-Dichlorobenzene] | 95-50-1 | ND | 2400 |
| 1,3-Dichlorobenzene [m-Dichlorobenzene] | 541-73-1 | ND | 2400 |
| 1,4-Dichlorobenzene [p-Dichlorobenzene] | 106-46-7 | ND | 2400 |
| 3,3[prime]-Dichlorobenzidine | 91-94-1 | ND | 2400 |
| Dichlorodifluoromethane [CFC-12] | 75-71-8 | ND | 39 |
| 1,2-Dichloroethane [Ethylene dichloride] | 107-06-2 | ND | 39 |
| 1,1-Dichloroethylene [Vinylidene chloride] | 75-35-4 | ND | 39 |
| Dichloromethoxy ethane [Bis(2-chloroethoxy)methane] | 111-91-1 | ND | 2400 |
| 2,4-Dichlorophenol | 120-83-2 | ND | 2400 |
| 2,6-Dichlorophenol | 87-65-0 | ND | 2400 |
| 1,2-Dichloropropane [Propylene dichloride] | 78-87-5 | ND | 39 |
| cis-1,3-Dichloropropylene | 10061-01-5 | ND | 39 |
| trans-1,3-Dichloropropylene | 10061-02-6 | ND | 39 |
| 1,3-Dichloro-2-propanol | 96-23-1 | ND | 30 |
| Endosulfan I | 959-98-8 | ND | 1.4 |
| Endosulfan II | 33213-65-9 | ND | 1.4 |
| Endrin | 72-20-8 | ND | 1.4 |
| Endrin aldehyde | 7421-93-4 | ND | 1.4 |
| Endrin Ketone | 53494-70-5 | ND | 1.4 |
| Epichlorohydrin [1-Chloro-2,3-epoxy propane] | 106-89-8 | ND | 30 |
| Ethylidene dichloride [1,1-Dichloroethane] | 75-34-3 | ND | 39 |
| 2-Fluoroacetamide | 640-19-7 | ND | 100 |
| Heptachlor | 76-44-8 | ND | 1.4 |
| Heptachlor epoxide | 1024-57-3 | ND | 2.8 |
| Hexachlorobenzene | 118-74-1 | ND | 2400 |
| Hexachloro-1,3-butadiene [Hexachlorobutadiene]. | 87-68-3 | ND | 2400 |
| Hexachlorocyclopentadiene | 77-47-4 | ND | 2400 |
| Hexachloroethane | 67-72-1 | ND | 2400 |
| Hexachlorophene | 70-30-4 | ND | 59000 |
| Hexachloropropene [Hexachloropropylene] | 1888-71-7 | ND | 2400 |
| Isodrin | 465-73-6 | ND | 2400 |
| Kepone [Chlordecone] | 143-50-0 | ND | 4700 |
| Lindane [gamma-BHC] [gamma-Hexachlorocyclohexane] | 58-89-9 | ND | 1.4 |
| Methylene chloride [Dichloromethane] | 75-09-2 | ND | 39 |
| 4,4[prime]-Methylene-bis(2-chloroaniline) | 101-14-4 | ND | 100 |
| Methyl iodide [Iodomethane] | 74-88-4 | ND | 39 |

| | | | |
|---|---|---|---|
| Pentachlorobenzene | 608-93-5 | ND | 2400 |
| Pentachloroethane | 76-01-7 | ND | 39 |
| Pentachloronitrobenzene [PCNB] [Quintobenzene] [Quintozene]. | 82-68-8 | ND | 2400 |
| Pentachlorophenol | 87-88-5 | ND | 2400 |
| Pronamide | 23950-58-5 | ND | 2400 |
| Silvex [2,4,5-Trichlorophenoxypropionic acid].. | 93-72-1 | ND | 7 |
| 2,3,7,8-Tetrachlorodibenzo-p-dioxin [2,3,7,8-TCDD] | 1746-01-6 | ND | 30 |
| 1,2,4,5-Tetrachlorobenzene | 95-94-3 | ND | 2400 |
| 1,1,2,2-Tetrachloroethane | 79-35-4 | ND | 39 |
| Tetrachloroethylene [Perchloroethylene] | 127-18-4 | ND | 39 |
| 2,3,4,6-Tetrachlorophenol | 58-90-2 | ND | 2400 |
| 1,2,4-Trichlorobenzene | 120-82-1 | ND | 2400 |
| 1,1,1-Trichloroethane [Methyl chloroform] | 71-56-6 | ND | 39 |
| 1,1,2-Trichloroethane [Vinyl trichloride] | 79-00-5 | ND | 39 |
| Trichloroethylene | 79-01-6 | ND | 39 |
| Trichlorofluoromethane [Trichlormonofluoromethane] | 75-69-4 | ND | 39 |
| 2,4,5-Trichlorophenol | 95-95-4 | ND | 2400 |
| 2,4,6-Trichlorophenol | 88-06-2 | ND | 2400 |
| 1,2,3-Trichloropropane | 96-18-4 | ND | 39 |
| Vinyl Chloride | 75-01-4 | ND | 39 |

Notes:

NA--Not Applicable.

ND--Nondetect.

([a]) 25 or individual halogenated organics listed below.

## TABLE 2 TO §261.38.—MAXIMUM ALLOWABLE FEEDRATES FOR EMISSION-COMPARABLE FUEL CONSTITUENTS

| Chemical Name | CAS Number | Constituent Gas Flowrate-Normalized Feedrate Limit (ug/dscm)[1] |
|---|---|---|
| **Hydrocarbons** | | |
| Benzene | 71-43-2 | 5.33E+04 |
| Naphthalene | 91-20-3 | 3.20E+05 |
| Toluene | 108-88-3 | 1.20E+06 |
| Benzo[a]anthracene | 56-55-3 | 1.60E+03 |
| Benzo[b]fluoranthene | 205-99-2 | 2.00E+02 |
| Benzo[k]fluoranthene | 207-08-9 | 1.00E+03 |
| Benzo[a]pyrene | 50-32-8 | 5.00E+01 |
| Chrysene | 218-01-9 | 1.80E+03 |
| Dibenzo[a,h]anthracene | 52-70-30 | 4.00E+02 |
| 7,12-Dimethylbenz[a]anthracene | 57-97-6 | 2.00E+02 |
| Fluoranthene | 206-44-0 | 6.10E+03 |
| Indeno(1,2,3-cd)pyrene | 193-39-5 | 1.00E+03 |
| 3-Methylcholanthrene | 56-49-5 | 2.00E+02 |
| | | |
| **Oxygenates** | | |
| Acetophenone | 98-86-2 | 3.60E+05 |
| Acrolein | 107-02-8 | 3.60E+05 |
| Allyl alcohol | 107-18-6 | 3.60E+05 |
| Bis(2-ethylhexyl)phthalate [Di-2ethylhexyl phthalate] | 117-81-7 | 3.60E+05 |
| Butyl benzyl phthalate | 85-68-7 | 3.60E+05 |
| o-Cresol [2-Methyl phenol] | 95-48-7 | 3.60E+05 |
| m-Cresol [3-Methyl phenol] | 108-39-4 | 3.60E+05 |
| p-Cresol [4-Methyl phenol] | 106-44-5 | 3.60E+05 |
| Di-n-butyl phthalate | 84-74-2 | 3.60E+05 |
| Diethyl phthalate | 84-66-2 | 3.60E+05 |
| 2,4-Dimethylphenol | 105-67-9 | 3.60E+05 |
| Dimethyl phthalate | 131-11-3 | 3.60E+05 |
| Di-n-octyl phthalate | 117-84-0 | 3.60E+05 |
| Endothall | 145-73-3 | 3.60E+05 |
| Ethyl methacrylate | 97-63-2 | 3.60E+05 |
| 2-Ethoxyethanol [Ethylene glycol monoethyl ether] | 110-80-5 | 3.60E+05 |
| Isobutyl alcohol | 78-83-1 | 3.60E+05 |
| Isosafrole | 120-58-1 | 3.60E+05 |
| Methyl ethyl ketone [2-Butanone] | 78-93-3 | 3.60E+05 |
| Methyl methacrylate | 80-62-6 | 1.80E+05 |
| 1,4-Naphthoquinone | 130-15-4 | 3.60E+05 |
| Phenol | 108-95-2 | 3.60E+04 |
| Propargyl alcohol [2-Propyne-1-ol] | 107-19-7 | 3.60E+05 |
| Safrole | 94-59-7 | 3.60E+05 |

[1] To determine the maximum allowable mass feedrate per unit time to the combustor, "ug/min," of an emission-comparable fuel constituent, multiply the gas flowrate-normalized feedrate limit, "ug/dscm," times the gas flowrate of the combustor, "dscm/min."

# TABLE 3 TO §261.38—DEFAULT VALUES FOR THE CONCENTRATION OF EMISSION-COMPARABLE FUEL CONSTITUENTS IN FUEL OIL

| | Chemical Name | CAS Number | Default Concentration (mg/kg) |
|---|---|---|---|
| | **Hydrocarbons** | | |
| 1 | Benzene | 71-43-2 | 75 |
| 2 | Naphthalene | 91-20-3 | 3500 |
| 3 | Toluene | 108-88-3 | 380 |
| 4 | Benzo[a]anthracene | 56-55-3 | 2400 |
| 5 | Benzo[b]fluoranthene | 205-99-2 | 2400 |
| 6 | Benzo[k]fluoranthene | 207-08-9 | 2400 |
| 7 | Benzo[a]pyrene | 50-32-8 | 2400 |
| 8 | Chrysene | 218-01-9 | 2400 |
| 9 | Dibenzo[a,h]anthracene | 52-70-30 | 2400 |
| 10 | 7,12-Dimethylbenz[a]anthracene | 57-97-6 | 2400 |
| 11 | Fluoranthene | 206-44-0 | 2400 |
| 12 | Indeno(1,2,3-cd)pyrene | 193-39-5 | 2400 |
| 13 | 3-Methylcholanthrene | 56-49-5 | 2400 |
| | **Oxygenates** | | |
| 1 | Acetophenone | 98-86-2 | 2400 |
| 2 | Acrolein | 107-02-8 | 39 |
| 3 | Allyl alcohol | 107-18-6 | 30 |
| 4 | Bis(2-ethylhexyl)phthalate [Di-2ethylhexyl phthalate] | 117-81-7 | 2400 |
| 5 | Butyl benzyl phthalate | 85-68-7 | 2400 |
| 6 | o-Cresol [2-Methyl phenol] | 95-48-7 | 2400 |
| 7 | m-Cresol [3-Methyl phenol] | 108-39-4 | 2400 |
| 8 | p-Cresol [4-Methyl phenol] | 106-44-5 | 2400 |
| 9 | Di-n-butyl phthalate | 84-74-2 | 2400 |
| 10 | Diethyl phthalate | 84-66-2 | 2400 |
| 11 | 2,4-Dimethylphenol | 105-67-9 | 2400 |
| 12 | Dimethyl phthalate | 131-11-3 | 2400 |
| 13 | Di-n-octyl phthalate | 117-84-0 | 2400 |
| 14 | Endothall | 145-73-3 | 100 |
| 15 | Ethyl methacrylate | 97-63-2 | 39 |
| 16 | 2-Ethoxyethanol [Ethylene glycol monoethyl ether] | 110-80-5 | 100 |
| 17 | Isobutyl alcohol | 78-83-1 | 39 |
| 18 | Isosafrole | 120-58-1 | 2400 |
| 19 | Methyl ethyl ketone [2-Butanone] | 78-93-3 | 39 |
| 20 | Methyl methacrylate | 80-62-6 | 39 |
| 21 | 1,4-Naphthoquinone | 130-15-4 | 2400 |
| 22 | Phenol | 108-95-2 | 2400 |
| 23 | Propargyl alcohol [2-Propyne-1-ol] | 107-19-7 | 30 |
| 24 | Safrole | 94-59-7 | 2400 |

TABLE 4 TO §261.38.—DEFAULT VALUES FOR THE CONCENTRATION OF EMISSION-COMPARABLE FUEL CONSTITUENTS IN COAL

| Compound | Concentration in Coal (mg/kg) |
|---|---|
| Acetophenone | 150 |
| Acrolein | 2900 |
| Benzene | 217 |
| Bis(2-ethylhexyl)phthalate | 730 |
| MEK | 3900 |
| Methyl methacrylate | 200 |
| Phenol | 16 |
| Toluene | 120 |

Note: The default value for other emission-comparable fuel constituents in coal is 0 mg/kg.

[FR Doc. E8–29956 Filed 12–18–08; 8:45 am]
BILLING CODE 6560–50–C

Federal Register

Friday,
December 19, 2008

# Part V

# Department of Labor

## Employment and Training Administration

## 20 CFR Parts 655 and 656

## Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H–2B Workers), and Other Technical Changes; Final Rule

**DEPARTMENT OF LABOR**

**Employment and Training Administration**

**20 CFR Parts 655 and 656**

**RIN 1205–AB54**

## Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H–2B Workers), and Other Technical Changes

**AGENCY:** Employment and Training Administration, Department of Labor, in concurrence with the Wage and Hour Division, Employment Standards Administration, Department of Labor.

**ACTION:** Final rule.

**SUMMARY:** The Employment and Training Administration (ETA) of the Department of Labor (DOL or the Department) is amending its regulations to modernize the procedures for the issuance of labor certifications to employers sponsoring H–2B nonimmigrants for admission to perform temporary nonagricultural labor or services and the procedures for enforcing compliance with attestations made by those employers. Specifically, this Final Rule re-engineers the application filing and review process by centralizing processing and by enabling employers to conduct pre-filing recruitment of United States (U.S.) workers. In addition, the rule enhances the integrity of the H–2B program through the introduction of post-adjudication audits and procedures for penalizing employers who fail to comply with program requirements. This rule also makes technical changes to the regulations relating to both the H–1B program and the permanent labor certification program to reflect operational changes stemming from this regulation.

Although Congress has conferred the statutory authority to enforce H–2B program requirements on the Department of Homeland Security (DHS), recent discussions between DHS and the Department have yielded an agreement for the delegation of H–2B enforcement authority from DHS to the Department. This Final Rule contains the Wage and Hour Division (WHD) regulations establishing the H–2B enforcement procedures that the Department will institute pursuant to that agreement. Separately, this Final Rule institutes conditions and procedures for the debarment of employers, attorneys, and agents participating in the H–2B foreign labor certification process. As discussed further below, the Department intends to exercise its inherent authority under case law and general principles of program administration to determine what entities practice before it.

**DATES:** This Final Rule is effective January 18, 2009.

**FOR FURTHER INFORMATION CONTACT:** For information on the H–2B labor certification process governed by 20 CFR 655.1 to 655.35, contact William L. Carlson, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C–4312, Washington, DC 20210. Telephone: (202) 693–3010 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

For information on the H–2B enforcement process governed by 20 CFR 655.50 to 655.80, contact Michael Ginley, Office of Enforcement Policy, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–3502, Washington, DC 20210. Telephone (202) 693–0745 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

**SUPPLEMENTARY INFORMATION:**

### I. Background Leading to the NPRM

*A. Statutory Standard and Current Department of Labor Regulations*

Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (INA or the Act) defines an H–2B worker as a nonimmigrant admitted to the U.S. on a temporary basis to perform temporary nonagricultural labor or services. 8 U.S.C. 1101(a)(15)(H)(ii)(b).

Section 214(c)(1) of the INA requires DHS to consult with ''appropriate agencies of the Government'' before granting any H–2B visa petition submitted by an employer. 8 U.S.C. 1184(c)(1). The regulations for the U.S. Citizenship and Immigration Services (USCIS), the agency within DHS charged with the adjudication of nonimmigrant benefits such as H–2B status, currently require, at 8 CFR 214.2(h)(6), that the intending employer (other than in the Territory of Guam) first apply for a temporary labor certification from the Secretary of Labor (the Secretary) advising USCIS whether U.S. workers capable of performing the services or labor are available, and whether the employment of the foreign worker(s) will adversely affect the wages and working conditions of similarly employed U.S. workers.

The Department's role in the H–2B visa program stems from its obligation, outlined in DHS regulations, to certify, upon application by a U.S. employer intending to petition DHS to admit H–2B workers, that there are not enough able and qualified U.S. workers available for the position sought to be filled and that the employment of the foreign worker(s) will not adversely affect the wages and working conditions of similarly employed U.S. workers. 8 U.S.C. 1101(a)(15)(H)(ii)(b); 8 U.S.C. 1184(c)(1); see also 8 CFR 214.2(h)(6).

The Department's role in the H–2B process is currently advisory to DHS. 8 CFR 214.2(h)(6)(iii)(A). DHS regulations provide that an employer may not file a petition with DHS for an H–2B temporary worker unless it has received a labor certification from the Department (or the Governor of Guam, as appropriate), or received a notice from either that a certification cannot be issued. 8 CFR 214.2(h)(6)(iii)(C), (iv)(A), (vi)(A).

Currently, the Department's regulations at 20 CFR part 655, Subpart A, ''Labor Certification Process for Temporary Employment in Occupations other than Agriculture, Logging or Registered Nursing in the United States (H–2B Workers),'' govern the H–2B labor certification process. Applications for labor certification are processed by the Office of Foreign Labor Certification (OFLC) in ETA, the agency to which the Secretary of Labor has delegated her advisory responsibilities described in the DHS H–2B regulations, after they are processed by the State Workforce Agency (SWA) having jurisdiction over the area of intended employment.[1] The SWA reviews the employer's application and job offer (comparing the employer's offered wage against the prevailing wage for the position); supervises U.S. worker recruitment; and forwards completed applications to OFLC for further review and final determination.

Under current procedures, the employer must demonstrate that its need for the services or labor is temporary as defined by one of four regulatory standards: (1) A one-time occurrence; (2) a seasonal need; (3) a

[1] The SWAs are agencies of State Government that receive Federal Workforce Investment Act (WIA), Wagner-Peyser Act, and other funds to administer our nation's state-based employment services system and perform certain activities on behalf of the Federal Government.

peakload need; or (4) an intermittent need. 8 CFR 214.2(h)(6)(ii)(B). The employer or its authorized representative must currently submit to the SWA a detailed statement of temporary need and supporting documentation with the application for H–2B labor certification. Such documentation must provide a description of the employer's business activities and schedule of operations throughout the year, explain why the job opportunity and the number of workers requested reflects its temporary need, and demonstrate how the employer's need meets one of these four regulatory standards. Based on longstanding practice and DOL program guidance, the employer must also establish that the temporary position is full-time and that the period of need is generally one year or less, consistent with the standard under DHS regulations at 8 CFR 214.2h(6). This Final Rule clarifies that full-time employment, for purposes of temporary labor certification employment, means at least 30 hours per week, except that where a State or an established practice in an industry has developed a definition of full-time employment for any occupation that is less than 30 hours per week, that definition governs.

Additionally, the employer must recruit from the U.S. labor market to determine if a qualified U.S. worker is available for the position. In addition, in order to ensure an adequate test of the labor market for the position sought to be filled, the employer must comply with other program requirements. For example, it must offer and subsequently pay throughout the period of employment a wage that is equal to or higher than the prevailing wage for the occupation at the skill level and in the area of intended employment; provide terms and conditions of employment that are not less favorable than those offered to the foreign worker(s); and not otherwise inhibit the effective recruitment and consideration of U.S. workers for the job.

Historically, the Department's review and adjudication of permanent and temporary labor certification applications (including H–2B) took place through ETA's Regional Offices. However, in December 2004, the Department opened two new National Processing Centers (NPCs), one each located in Atlanta, Georgia, and Chicago, Illinois, to centralize processing of permanent and temporary foreign labor certification cases at the Federal level. The Department published a notice in the **Federal Register**, at 70 FR 41430, Jul. 19, 2005, clarifying that employers seeking H–2B labor certifications must file two originals of Form ETA 750, Part A, directly with the SWA serving the area of intended employment. Once the application is reviewed by the SWA and after the employer conducts its required recruitment, the SWA sends the complete application to the appropriate NPC. The NPC Certifying Officer (CO) issues a labor certification for temporary employment under the H–2B program, denies the certification, or issues a notice including the reasons why such certification cannot be made. Prior to June 1, 2008, the NPCs shared responsibility for processing of temporary labor certification applications; each NPC had jurisdiction over and processed applications from a different subset of states and territories. Effective June 1, 2008, the NPCs specialized, each assuming responsibility for different types of applications. Now, H–2B temporary labor certification applications approved by the SWAs are processed exclusively by the Chicago NPC. 73 FR 11944, Mar. 5, 2008.

Currently, the Department has no enforcement authority or process to ensure H–2B workers who are admitted to the U.S. are employed in compliance with H–2B labor certification requirements. Congress vested DHS with that enforcement authority in 2005. See 8 U.S.C. 1184, as amended by the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief of 2005, Public Law 109–13, 119 Stat. 231. As described more fully below, the Department in this Final Rule establishes the H–2B regulatory enforcement regime proposed in the NPRM, consistent with the agreement for a delegation of enforcement authority reached by the Department and DHS pursuant to 8 U.S.C. 1184(c)(14)(B). This enforcement regime also includes debarment procedures for ETA and the Employment Standards Administration, Wage and Hour Division (WHD), under the Department's inherent debarment authority, which is explained in greater detail below.

*B. Earlier Efforts To Reform the H–2B Regulatory Process*

On January 27, 2005, DHS and the Department issued companion NPRMs to significantly revise each agency's H–2B processing procedures. 70 FR 3984, Jan. 27, 2005; 70 FR 3993, Jan. 27, 2005. As proposed, those changes to both agencies' regulations would have eliminated in whole the Department's adjudicatory role, ending the current labor certification process for most H–2B occupations and requiring employers to submit labor-related attestations directly to USCIS as part of a revised supplement accompanying the H–2B petition.

The two agencies received numerous comments on the joint NPRMs in 2005. Most commenters opposed the proposals to move the program adjudication to USCIS and to eliminate the Department's role in reviewing the need of employers and the recruitment of U.S. workers except in post-adjudication audits. Commenter concerns focused in part on the loss of the Department's experience in adjudicating issues of temporary need and the potential adverse impact on U.S. workers. Based on the significant concerns posed in those comments, and after further deliberation within each agency, the Department and DHS have not pursued their 2005 proposals. Consequently, the NPRM published by the Department on January 27, 2005 (RIN 1205–AB36) was withdrawn in the Department of Labor's Fall 2007 Regulatory Agenda. See *http://www.reginfo.gov/public/do/eAgendaViewRule?ruleID=221117*.

As stated in the May 22, 2008, NPRM preceding this Final Rule, the Department continued, however, to closely review the H–2B program procedures in order to determine appropriate revisions to the H–2B labor certification process. This ongoing systematic review was accelerated in light of considerable workload increases for both the Department and the SWAs (an approximate 30 percent increase in applications in Fiscal Year (FY) 2007 over those received in FY 2006, and a similar increase during the first half of FY 2008) as well as limited appropriations funding program-related operations.

On April 4, 2007, ETA issued Training and Employment Guidance Letter (TEGL) No. 21–06, 72 FR 19961, Apr. 20, 2007, to replace its previous guidance for the processing of H–2B applications (General Administration Letter No. 1–95, 60 FR 7216, Feb. 7, 1995) and update procedures for SWAs and NPCs to use in the processing of temporary labor certification applications. The Department then held national briefing sessions in Chicago and Atlanta on May 1 and May 4, 2007, respectively, to inform employers and other stakeholders of the updated processing guidance contained in TEGL 21–06. Attendees at those briefing sessions raised important questions and concerns with regard to the effective implementation of TEGL 21–06 by the SWAs and ETA's National Processing Centers (NPCs). In response to the

substantive concerns that were raised, the Department further refined the process of reviewing applications in TEGL 27–06 (June 12, 2007), providing special procedures for dealing with forestry related occupations, and TEGL No. 21–06, Change 1 (June 25, 2007), and updating procedures by allowing the NPC Certifying Officer (CO) to request additional information from employers to facilitate the processing of H–2B applications. 72 FR 36501, Jul. 3, 2007; 72 FR 38621, Jul. 13, 2007. Several issues were not addressed by those refinements, particularly concerns relating to increasing workload and processing delays, which required regulatory changes. This Final Rule addresses a number of those unresolved issues.

*C. Current Process Involving Temporary Labor Certifications and the Need for a Redesigned System*

As described in the May 22, 2008, NPRM, the process for obtaining a temporary labor certification has been described to the Department as complicated, time-consuming, inefficient, and dependent upon the expenditure of considerable resources by employers. The current, duplicative process requires the employer to first file a temporary labor certification with the SWA, which reviews the application, compares the wage offer to the prevailing wage for the occupation, oversees the recruitment of U.S. workers, and then transfers the application to the applicable ETA NPC, which conducts a final review of the application. This process has been criticized for its length, overlap of effort, and resulting delays. Application processing delays, regardless of origin, can lead to adverse results with serious repercussions for a business, especially given the numerical limitation or ''cap'' on visas under this program, as a result of which any processing delay may prevent an employer from securing visas for H–2B workers during any given half year period for which numbers are available. This occurs because employer demand for the limited number of visas greatly exceeds their supply, and all visas are typically allocated in the early weeks of availability. See 8 U.S.C. 1184(g)(1)(B) (setting H–2B annual visa cap at 66,000) and 8 U.S.C. 1184(g)(10) (setting a cap of 33,000 as the number of H–2B visas that may be allocated during each 6-month period of a fiscal year).

The increasing workload of the Department and SWAs poses a growing challenge to the efficient and timely processing of applications. As stated in the NPRM, the H–2B foreign labor certification program continues to increase in popularity among employers. While the annual number of visas available is limited by statute, the number of labor certifications is not. The number of H–2B labor certification applications has increased 129 percent since FY 2000. In FY 2007, the Department experienced a nearly 30 percent increase in H–2B temporary labor certification application filings over the previous fiscal year. This increasing workload is exacerbated because the INA does not authorize the Department to charge a fee to employers for processing H–2B applications.[2] At the same time, appropriated funds have not kept pace with the increased workload at the State or Federal level. This has resulted in significant disparities in processing times among the SWAs. Some observers have noted these disparities among States unfairly advantage one set of employers (those in which the SWAs are able to timely process applications) over others (those in which SWAs experience delays due to backlogs resulting from inadequate staffing or funding, or other causes).[3]

In light of these recurring experiences, this Final Rule institutes several significant measures to reengineer the Department's administration of the program. These changes improve the process by which employers obtain labor certification and where our program experience has demonstrated additional measures would assist the Department in protecting the job opportunities and wages of U.S. workers. The Final Rule also provides greater accountability for employers through penalties, up to and including debarment, as an additional safeguard against abuse of the program.

*D. Overview of Redesigned H–2B Foreign Labor Certification Process*

As proposed in the NPRM and finalized in this rule, the redesigned application process will require employers to complete recruitment steps similar to those now required, but will require them to do so prior to filing the application for labor certification. Once recruitment is complete, this Final Rule maintains the requirement proposed in the NPRM that the completed application be submitted directly to DOL instead of being filed with a SWA. This Final Rule eliminates the SWA duplicative review of the H–2B application. In association with this Final Rule, the Department has redesigned the application form currently used for the H–2A and H–2B temporary labor certification programs and proposed a new ETA Form 9142. Additional information about the new application form appears in the Administrative Information section of this preamble. This rule does not eliminate or federalize SWA activities (*e.g.*, the job order and interstate clearance process) that may ultimately support an employer's H–2B application but are funded and governed independently under the Wagner-Peyser Act. This rule does federalize prevailing wage determinations, previously performed by the SWAs under this program.

To test the U.S. labor market appropriately, employers will be required to first obtain from the Chicago NPC a prevailing wage rate to be used in the recruitment of U.S. workers. To make this request, employers in the non-agricultural labor certification programs will use a new ETA Form 9141, which was designed and will be implemented in conjunction with this Final Rule. As with the Form 9142, additional information about the Form 9141 appears in the Administrative Information section of the preamble. The employer will then follow recruitment steps similar to those required under the current program. The NPRM proposed increasing the number of required advertisements to three. However, in response to comments, the Final Rule returns to the current requirement of two advertisements, although it retains the proposed requirement that one of those advertisements be placed on a Sunday.

Consistent with the NPRM, this Final Rule requires the employer to attest to and enumerate its recruitment efforts as part of the application but does not require the employer to submit

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[2] On June 17, 2008, the Department transmitted draft legislation to the Congress that would amend the INA to provide the Department with authority to charge and retain a fee to recoup the costs of administering the H–2B labor certification program.

[3] The growth in the number of applications is explained in part by the increasing desire of employers for a legal temporary workforce and by legislation that permitted greater numbers of H–2B workers into the U.S. by exempting from the 66,000 annual cap any H–2B worker who had been counted against the numerical cap in previous years. See Save Our Small and Seasonal Businesses Act of 2005, Public Law 109–13, Div. B, Title IV, 119 Stat. 318 (effective May 11, 2005) (exempting from numerical cap for FY 2005 and FY 2006 returning H–2B workers who had counted against the cap in one of the three fiscal years preceding the fiscal year in which the visa petition was filed), and Save Our Small and Seasonal Businesses Act of 2006, included in the Defense Authorization Act for FY 2007, Sec. 1074, Public Law 109–364 (making amendment retroactive to October 1, 2006, and extending the exemption through FY 2007). These returning worker provisions expired September 30, 2007. 8 U.S.C. 1184(g)(9) (2007); INA sec. 214(g)(9); see also Sec. 14006, Public Law 108–287, 118 Stat. 951, 1014 (August 6, 2004) (exempting some fish roe occupations from the cap).

supporting documentation with its application. To ensure the integrity of the process, the Final Rule requires the employer to retain documentation of its recruitment, as well as other documentation specified in the regulations, for 3 years from the date of certification. The employer will be required to provide this documentation in response to a request for additional information by the Certifying Officer (CO) before certification or by ETA pursuant to an audit or in the course of an investigation by the Wage and Hour Division (WHD) after a determination on the application has been issued. The Department has set the document retention requirement at 3 years rather than the proposed 5 years in response to comments received expressing concerns that five years would impose an unnecessary burden on small employers, especially those that are mobile or have a mobile component.

Employers or their authorized representatives (attorneys or agents) will be required to submit applications using a new form designed to demonstrate the employer's compliance with the obligations of the H–2B program. As described in the NPRM and the Final Rule, the application form will collect, in the form of attestations, information that is largely required already by the current H–2B labor certification process. These attestations are required from the employer to ensure adherence to program requirements and to establish accountability. As with recruitment, employers are required to retain records documenting their compliance with all program requirements. An application that is complete will be accepted by the NPC for processing and will undergo final review by the Department.

Based on the Department's experience, and in response to concerns voiced in public comments about the need for H–2B stakeholder guidance and ETA staff training, we have added a transition period to the Final Rule at new § 655.5. Although the Final Rule takes effect 30 days from publication, it phases in implementation based on employment start dates listed in the application. Employers with a date of need on or after October 1, 2009, will be governed by these new regulations. Employers with a date of need on or after the rule's effective date but prior to October 1, 2009, will follow the transitional process described in § 655.5. Additional information about the transition process appears below.

In order to further protect the integrity of the program, specific verification steps, such as verifying the employer's Federal Employer Identification Number (FEIN) to ensure the employer is a bona fide business entity, will occur during processing to ensure the accuracy of the information supplied by the employer. If an application does not appear to be complete or merit approval on its face but requires additional information in order to be adjudicated, the CO will issue a Request for Further Information (RFI), a process the program already employs. After Departmental review, an application will be certified or denied.

As proposed in the NPRM and adopted in the Final Rule, the introduction of new post-adjudication audits will serve, along with WHD investigations, as both a quality control measure and a means of ensuring program compliance. Audits will be conducted on adjudicated applications meeting certain criteria, as well as on randomly-selected applications. In the event of an audit or WHD investigation, employers will be required to provide information supporting the attestations made in the application. Failure to meet the required standards or to provide information in response to an audit or investigation may result in an adverse finding on the application in question, initiate Departmental supervised recruitment in future applications, and penalties.[4]

As stated in the NPRM, the Department expects the modernized processing of applications will yield a reduction in the overall average time needed to process H–2B labor certification applications. This process is expected to lead to greater certainty and predictability for employers by reducing processing times which have exceeded our historical 60-day combined State and Federal processing timeframe.

## II. Discussion of Comments on the Proposed Rule

In response to the proposed rule, the Department received 134 comments, of which 88 were unique and another 46 were duplicate form comments. Commenters represented a broad range of constituencies for the H–2B program, including individual employers, agents, industry coalitions and trade groups, advocacy and legal aid organizations, labor unions, a bar association, congressional oversight and authorizing committees, and individual members of the public.

The Department received comments both in support and opposition to the proposed regulation. Comments supported, for example, the anticipated efficiencies of the proposed streamlined process and the potential conversion to electronic filing. Broadly, other commenters opposed the rule because they felt it would undermine program integrity or weaken worker protections and U.S. worker access to job opportunities. Still others believed the rulemaking untimely, given the general weakening of the economy, or that the proposed rule failed to address what they believed to be key problems underlying the program. Several of those problems, such as the annual cap of 66,000 H–2B visas per year, are statutory and cannot be changed through regulation.

In addition, as described in greater detail below, the Department received comments raising a variety of concerns with specific proposals and provisions within the rule. After reviewing those comments thoughtfully and systematically, the Department has modified several provisions and retained others as originally proposed in the NPRM.

Provisions of the NPRM that received comments are discussed below; provisions that were not commented on or revised for technical reasons have been adopted as proposed. The Department has made some technical changes to the regulatory text for clarity and to improve readability, but those changes were not designed to alter the meaning or intent of the regulation.

### *A. Section 655.2—Territory of Guam*

In the Final Rule, the Department has revised the discussion on the authority of the Governor of Guam to clarify that the enforcement of the provisions of the H–2B visa program in Guam resides with the Governor, pursuant to DHS regulations.

### *B. Section 655.4—Definitions*

Of the definitions proposed in the NPRM, comments were received on the definitions for ''agent,'' ''attorney,'' ''employ,'' ''employer,'' ''full time,'' ''representative,'' and ''United States worker.''

The proposed rule defined an agent as ''a legal entity or person which is authorized to act on behalf of the employer for temporary agricultural labor certification purposes, and is not itself an employer as defined in this subpart. The term 'agent' specifically excludes associations or other organizations of employers.'' In response to comments, the Department has corrected the typographical error and replaced ''agricultural'' with ''nonagricultural.''

Some commenters supported the proposed definition of agent with regard to its barring of associations or organizations of employers. One bar

[4] Further sanctions may be imposed by DHS. See 8 U.S.C. 1184(c)(14).

association commented there had been many abuses by agents in the past, including the unauthorized practice of law, and recommended the Department adopt the definition under DHS regulations at 8 CFR 292.1. We have reviewed the guidelines under that section and concluded it is inappropriate for the labor certification process. The standard set by 8 CFR 292.1 is not tailored to the Department's needs. For example, it includes, among others, law students and ''reputable individuals.'' We have determined such persons may not be appropriate to practice before the Department, in particular for purposes of foreign labor certification activities. That definition was designed to fit the needs of another Federal agency and would eliminate many current individuals who act on behalf of employers in the labor certification process with the Department.

The Department acknowledges that allowing agents who are not attorneys does not fit into the categories recognized by DHS and creates a difference between the two agencies. The Department has permitted agents who do not meet these criteria to appear before it for decades. Agents who are not attorneys have represented claimants before the Department in a wide variety of activities since long before the development of H–2A program, and DOL's programs, where they intersect with those of DHS, permit a broader range of representation. To change such a long-standing practice in the context of this rulemaking would represent a major change in policy that the Department is not prepared to make at this time and was suggested in the NPRM seeking comments. Consequently, the Department has not adopted this recommendation. The Department will maintain its long-standing practice and policy with respect to who may represent employers.

For greater clarity, a definition for ''Administrator, Wage and Hour Division (WHD)'' has been added to the definition section of the regulation to distinguish this official from the ''Administrator, Office of Foreign Labor Certification (OFLC).'' Regulatory text has been added where needed to distinguish between these officials.

The proposed rule defined an attorney as:

> Any person who is a member in good standing of the bar of the highest court of any State, possession, territory, or commonwealth of the U.S., or the District of Columbia, and who is not under suspension or disbarment from practice before any court or before DHS or the U.S. Department of Justice's Executive Office for Immigration Review. Such a person is permitted to act as an attorney or representative for an employer under this part; however, an attorney who acts as a representative must do so only in accordance with the definition of ''representative'' in this section.

In the Final Rule, the Department has reworded the definition to provide more clarity regarding the bodies or courts that could suspend or disbar an attorney. The Department has also revised the final sentence in the definition to read: ''Such a person is permitted to act as an agent or attorney for an employer and/or foreign worker under this subpart.''

In the NPRM, the Department added a definition for ''employ'' and made revisions to the definition of ''employer.'' A trade association suggested that the Department eliminate the definition of ''employ'' but retain the definition of ''employer,'' stating that the definition of ''employ'' adds nothing to clarify status or legal obligations under the H–2B program and insinuates broad legal concepts that add unnecessary confusion. As suggested by commenters, the Department has deleted the definition of ''employ.'' We agree this definition did not provide any additional clarification regarding status or legal obligations related to the H–2B program and may generate some confusion with other statutes.

The Department received comments that the requirement for a Federal Employer Identification Number (FEIN) as incorporated in the definition of ''employer'' could be problematic for some employers. One commenter recommended the use of the DUNS number as a complement to the FEIN. The ''data universal numbering system'' (DUNS), which is operated by Dunn & Bradstreet, issues nine-digit numbers that serve as unique identifiers and are used, in cases, by the Federal Government or individual businesses to track business entities. The Department has decided to retain the definition as proposed, and notes that it is easy for employers to obtain FEINs, which have the advantage of being assigned by the Internal Revenue Service, although in paragraph (1)(iii) of the definition we have added the phrase ''for purposes of the filing of an application,'' to clarify the FEIN is information gathered specifically at the point of application for H–2B labor certification. In paragraph (1)(i) of the definition, the Department has replaced ''may'' with ''must'' to clarify U.S. workers must be referred to a U.S. location for employment.

Commenters supported the inclusion of a definition for ''full time.'' The Department agrees with one commenter's assertion that, consistent with program practice, the definition should not be construed to establish an actual obligation of the number of hours that must be guaranteed each week. The parameters set forth in the definition of ''full time'' refer to the number of hours that are generally perceived to constitute that type of employment, as distinguished from ''part time,'' and are not a requirement that an employer offer a certain number of hours or any other terms or conditions of employment.

The Department has also made changes to the definition of a job contractor for purposes of clarity. The changes make clear that the job contractor, rather than the contractor's client, must control the work of the individual employee.

One trade association commented that to the extent the intent of the rule is to define the respective liability of agents and representatives, it should articulate a clear set of standards for liability. The association found the definition of ''representative'' to be problematic and suggested deleting or revising it. The commenter questioned whether the intent of the regulation was to make the representative liable for any misrepresentations in an attestation made on behalf of an employer. Because of potential overlaps with the definition and role of agent, the commenter also requested the rule clarify if, and under what circumstances, an agent is liable for activities undertaken on behalf of an employer. The commenter recommended the Department delete the provision on the representative's role in the consideration of U.S. workers, questioning what rationale the Department had for dictating under what circumstances an attorney or other person can interview U.S. applicants for the job, and why the Department is ''singling out'' attorneys within the definition.

The Department disagrees with the commenter's interpretation of the liability of an agent or attorney for the acts of the employer. The duties of an agent or attorney may vary widely and not all duties that an agent or attorney undertakes may lead to liability. The Department recognizes, however, that some of an agent's or attorney's duties in representing an employer may put the agent or attorney in the role of the employer and be a basis for assigning liability for the employer's acts or omissions. For example, in undertaking to represent an employer in the H–2A program, an agent or attorney not only performs administrative tasks but also

submits attestations regarding the employer's obligations under the program. Attorneys and agents undertake a significant duty in making such representations. They are, therefore, responsible for reasonable due diligence in ensuring that employers understand their responsibilities under the program and are prepared to execute those obligations. Agents and attorneys do not themselves make the factual attestations and are not required to have personal knowledge that the attestations they submit are accurate. They are, however, required to inform the employers they represent of the employers' obligations under the program, including the employers' liability for making false attestations, and the prohibition on submitting applications containing attestations they know or should know are false. Failure to perform these responsibilities may render the agent or attorney personally liable for false attestations. The Department has decided to retain the definition as proposed.

One commenter believed that the definition of ''United States worker'' presented in the NPRM was too narrow and that there are other persons in the United States legally entitled to work in addition to those in the categories listed. The Department disagrees and has retained the proposed definition, as it is inclusive and consistent with other provisions of immigration law and regulations that define U.S. workers and persons authorized to work in the U.S.

The Department also added definitions for the terms ''Administrative Law Judge,'' ''Chief Administrative Law Judge,'' ''Department of Homeland Security,'' and ''United States Citizenship and Immigration Services,'' mirroring the definitions in the Department's H–2A Final Rule. These terms and definitions were inadvertently omitted from the proposed rule.

The Department has added a definition of the term ''*strike*'' to the Final Rule. The definition clarifies that the Department will evaluate whether job opportunities are vacant because of a strike, lockout, or work stoppage on an individualized, position-by-position basis.

The Department also has added a definition of ''successor in interest'' to make clear that the Department will consider the facts of each case to determine whether the successor and its agents were personally involved in the violations that led to debarment in determining whether the successor constitutes a ''successor in interest'' for purposes of the rule.

*C. Section 655.5—Transition*

The Department recognizes that implementing the provisions of the Final Rule may be somewhat difficult for employers who have already filed their applications with the SWA to begin recruiting U.S. workers. Even though the NPRM put current and future users of H–2B workers on notice regarding the Department's intention to publish a Final Rule, the rule represents a departure from the current administration of the program. H–2B employers, including those who expressed concern regarding the time frame for a Final Rule, will require some period of time to prepare and adjust their requests for nonimmigrant workers to perform temporary or seasonal nonagricultural services or labor, particularly in tandem with changes to DHS processing of cases, and understand how to complete the Department's new forms for requesting a prevailing wage and applying for temporary employment certification.

In response to comments, the Department is accordingly adopting a transition period, outlined in new § 655.5 (previously reserved). Employers filing applications for H–2B workers on or after the effective date of these regulations where the date of need for the services or labor to be performed is before October 1, 2009, will be required to obtain a prevailing wage determination from the SWA serving the area of intended employment, rather than the NPC, but must meet all of the other pre-filing recruitment requirements outlined in this regulation before an *Application for Temporary Employment Certification* can be filed with the NPC. However, employers filing applications on or after the effective date of these regulations where the date of need for H–2B workers is on or after October 1, 2009, must obtain a prevailing wage determination from the NPC and comply with all of the obligations and assurances detailed in this subpart. The SWAs will no longer accept for processing applications filed by employers for H–2B workers on or after the effective date of these regulations. Rather, the SWAs will assist the Department's transition efforts by issuing prevailing wage determinations where the employer's need for H–2B workers is prior to October 1, 2009. This will allow the rest of the pre-filing recruitment requirements, obligations and assurances to become effective immediately. During this transition period, the Department expects that SWAs will continue to allow employers to file prevailing wage requests on forms they currently use in other visa programs in order to minimize any confusion and expedite the prevailing wage review process.

In order to complete the processing of applications filed with the SWAs prior to the effective date of these regulations, the transition procedures require the SWAs to continue to process all active applications under the former regulations and transmit all completed applications to the NPC for review and issuance of a final determination. In circumstances where the SWA has already transmitted the completed application to the NPC, the NPC will complete its review in accord with the former regulations and issue a final determination. OFLC intends to conduct several national stakeholder briefings to familiarize program users with these requirements.

*D. Section 655.6—Temporary Need*

Congress mandated the H–2B program be used to fill only the temporary needs of employers where no unemployed U.S. workers capable of performing the work can be found. 8 U.S.C. 1101(a)(15)(H)(ii)(b). Therefore, as explained in the NPRM, the Department will continue to determine whether the employer has demonstrated that it has a need for foreign labor that cannot be met by U.S. workers and that the need is temporary in nature.

The controlling factor continues to be the employer's temporary need and not the nature of the job duties. *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982); *cf. Global Horizons, Inc.* v. *DOL*, 2007–TLC–1 (Nov. 30, 2006) (upholding the Department's position that a failure to prove a specific temporary need precludes acceptance of temporary H–2A application).

DHS regulations at 8 CFR 214.2(h)(6)(ii)(B) provide that a petitioner's need be one of the following: (1) A one-time occurrence, in which an employer demonstrates it has not had a need in the past for the labor or service and will not need it in the future, but needs it at the present time; (2) a seasonal need, in which the employer establishes that the service or labor is recurring and is traditionally tied to a season of the year; (3) a peakload need, in which the employer needs to supplement its permanent staff on a temporary basis due to a short-term demand; or (4) an intermittent need, in which the employer demonstrates it occasionally or intermittently needs temporary workers to perform services or labor for short periods.

As proposed in the NPRM, for purposes of a one-time occurrence, under this Final Rule the Department will consider a position to be temporary

as long as the employer's need for the duties to be performed is temporary or finite, regardless of whether the underlying job is temporary or permanent in nature, and as long as that temporary need—as demonstrated by the employer's attestations, temporary need narrative, and other relevant information—is less than 3 consecutive years. This interpretation is consistent with the rule proposed by USCIS on August 20, 2008, 73 FR 49109, which is being finalized in conjunction with this regulation.

Consistent with the final USCIS regulations, the Department proposed—and the Final Rule permits—a one-time occurrence to include one-time temporary events that have created the need for temporary workers for up to 3 years. The Final Rule requires those employers to request annual labor certifications based on new tests of the U.S. labor market. As stated in the NPRM, we believe this is the best method by which to ensure U.S. worker access to these job opportunities, but recognize that an employer's need for workers to fill positions could, in some cases, last more than one year.

The Department received a number of comments in response to the proposed expansion of the one-time occurrence definition. A job contractor commented that it did not believe the Department needed to specifically authorize the possibility of a 3-year, one-time need, since it could be inferred as already having the authority to certify such situations as long as the employer's situation as described in the application was compelling. However, the commenter believed that establishing a maximum 3-year stay may be limiting under certain circumstances such as rebuilding after natural disasters. It also creates confusion and complexity for the employer applicants who may not understand the distinction between a 3-year labor need broadly speaking and a one-time occurrence. Under the NPRM and this Final Rule, the extension of the temporary need definition from 1 year or less to potentially up to 3 years does not apply to all categories of need. The Department believes employers should understand that an H–2B visa will only be granted for longer than 1 year in the case of a one-time occurrence.

Neither the Department nor DHS is changing the long-established definition of one-time occurrence which encompasses both unique non-recurring situations but also any ''temporary event of a short duration [that] has created the need for a temporary worker.'' For example, an employer could utilize the H–2B program to secure a worker to replace a permanent employee who was injured. Further, if that permanent employee, upon returning to work, subsequently suffered another injury, the same employer could utilize the H–2B program again to replace the injured employee on the basis of a one-time occurrence. A one-time occurrence might also arise when a specific project creates a need for additional workers over and above an employer's normal workforce. For example, if a shipbuilder got a contract to build a ship that was over and above its normal workload, that might be a one-time occurrence. However, the Department would not consider it a one-time occurrence if the same employer filed serial requests for H–2B workers for each ship it built.

The NPRM required that employers request recertification annually where their one-time occurrence extends beyond 1 year. The Department agrees with public comments that, where the need is one-time only, the added burden and expense of an additional labor market test does not make sense where the total period of need is less than 18 months. Therefore, an employer with a one-time need that has been approved for more than 1 year but less than 18 months will receive a labor certification covering the entire period of need, and will not be required to conduct another labor market test for the portion of time beyond 12 months. An employer requesting certification based on a one-time occurrence it expects to last 18 months or longer, however, will be required to conduct one or more additional labor market tests.

A number of individual small business commenters were concerned that the proposed changes went beyond the original intent of the program and would leave the seasonal and peakload businesses for which it was intended without adequate numbers of visas. They raised longstanding concerns with what many believe is an arbitrarily low visa cap and the strong competition among industries for the limited visas. These commenters posited that expanding the term to 3 years would open up the program to a wider number of industries, further increasing competition for visas and effectively crowding out those employers for which these commenters believe the visa was intended. One small employer thought it would allow high tech businesses to participate in the H–2B program to use up all the visas and leave other employers with real peakload needs wanting. This employer also thought it would create a security threat by letting visas be sold on the black market. SWAs commenting also questioned the change in definition as being what they described as a significant program change. While most employers of highly skilled workers currently avail themselves of the H–1B visa program, they are not precluded from seeking, as an alternative, H–2B nonimmigrant status, if they otherwise meet the requirements of the H–2B program. None of the changes proposed by the Department would make the H–2B visa program any more or less available to highly skilled workers or provide employers who might wish to use such persons as H–2B workers with any greater advantage than other H–2B employers. In addition, with respect to visas issued by the State Department based on an approved DHS petition, the Department is unaware of any contemplated change in this or the DHS rulemaking that would create an automatic 3-year H–2B visa. Depending on reciprocity schedules, under current State Department regulations, an initial H–2B visa is generally issued for a year or less, or for the validity period of the approved H–2B petition, but can be extended for additional periods of time to correspond to any period of time DHS might extend such H–2B petition. Nothing in this rule would change that.

Several Members of Congress submitted separate comments on behalf of congressional committees. One U.S. Senator opposed the expansion of the definition of a one-time occurrence as contrary to the 1987 legal opinion of the Department of Justice, Office of the Legal Counsel. The comment stated that the Department of Justice considered various views of the proposed construction of ''temporarily'' in the context of the H–2A visa program and declined to define temporary as up to 3 years. According to the comment, the Justice opinion concluded that the statutory text, Congressional intent, and sound policy compelled a definition of temporary to be 1 year or less for all H–2 classifications. The comment also pointed to the Department's and DHS's proposed rules on the H–2A program that retained the one year or less definition of temporary (absent extraordinary circumstances) as evidence that the current construction should be retained. The commenter was concerned that the regulation would lead to abuse of the H–2B program by encouraging some employers who want to take advantage of the program to characterize long-term or permanent jobs as temporary. The commenter believed that these longer-term jobs should be filled by U.S. workers and, if none are available, only then through the employment-based immigration visa process.

Several labor unions also commented on this provision, largely in opposition.

One believed the proposal to be at odds with years of precedent and immigration and workforce policy, as well as current law. The commenter asserted that expanding the definition conflicts with DHS regulations, runs counter to the purpose of the H–2B program, and undermines the Congressional mandate to protect U.S. workers. Another labor organization contended that if an employer's need is longer than a short duration it is not a temporary need, and a period longer than a year is not of short duration. This commenter opposed the inclusion of this provision and urged the Department to withdraw this proposed change. Another union proposed temporary employment be limited to six months and ''certainly no longer than [1] year.'' Another labor organization opposing the proposed provision did not believe that the requirement that employers retest the labor market each year represented a meaningful safeguard for domestic workers, particularly if the Department were to adopt an attestation-based system where recruitment of U.S. workers is not actively supervised by the SWAs. It recommended the H–2B program be made consistent with the H–2A program concerning the definition of temporary.

Several worker advocacy organizations also opposed this provision, indicating their belief it was not in keeping with the objectives of the program and would open most construction jobs in the country to be potentially part of the program. An individual employer commented that seasonal should mean 8 months or less so as to not compete with local permanent jobs.

A law firm commented that the proposed changes went beyond what it believed Congress intended and claimed anecdotally it would directly and proportionally adversely affect the industries for which it felt the program was designed. It believed that the problems with the program are more associated with the delays and uncertainties related to the inadequate number of visas as well as inadequate budget and staffing at all levels of the application process. The commenter recommended these problems would be best addressed by Congress and by increased fees at each step. It also believed that this expansion of the definition would encourage additional industries, most notably the information technology industry, to participate and to put undue pressure on an already pressured program.

Conversely, several employer and trade associations supported the expanded provision. One employer association welcomed the change as long in coming. Another supported it as a means to provide greater flexibility across industries and regions. Still another recommended that the 3-year provision be expanded beyond ''one-time need'' to the other three categories of temporary need.

A legal association supported the proposal to expand temporary need but suggested the Department rethink the requirement that employers retest the market each year. According to the comment, requiring employers to get a new prevailing wage and perform additional recruitment and filing each year would increase workload for the Department, increase costs to employers, and fails to recognize the advantages of the employer having the availability of trained, experienced workers. It recommended that a reasonable alternative would be for employers to check the prevailing wage determination annually to ensure that the workers are being paid the appropriate wage but not to have to undertake further recruitment efforts.

Many SWAs commented on the proposed rule. On the issue of temporariness, one SWA stated its support for retesting the labor market each year. An employer association supported retesting the labor market each year only in situations where there was a significant time period beyond the ordinary 10-month period left on the labor certification. It believed that this requirement would be too onerous on employers if applied to jobs lasting only 18 months, for example.

Finally, a worker advocacy group recommended the addition of a process either through the Department or the SWAs under which workers could challenge the determination that the jobs are temporary.

The Department defers to the Department of Homeland Security and will use their definition of temporary need as published in their Final Rule on H–2B. Currently, that definition, including the four categories of need, appears at 8 CFR 214.2(h)(6)(ii), and requires the employer show extraordinary circumstances in order to establish a need for longer than 1 year. DHS's Final Rule amends 8 CFR 214.2(h)(6)(ii)(B) to eliminate the requirement for extraordinary circumstances and clarify that a temporary need is one that ends in the near, definable future, which in the case of a one-time occurrence could last longer than 1 year and up to 3 years. Accordingly, we have deleted the definitions we had in our regulatory text in the NPRM and instead provided a reference to the DHS regulations.

*E. Section 655.10—Determination of Prevailing Wage for Labor Certification Purposes*

1. Federalizing Prevailing Wage Determinations

The Department proposed a new reengineered system to federalize the issuance of prevailing wages, under which employers would obtain the prevailing wage for the job opportunity directly from the NPC. As proposed, the new federalized process would allow employers to file prevailing wage requests with the appropriate NPC—designated as the Chicago NPC for prevailing wage requests—no more than 90 days before the start of recruitment. The proposed rule also clarified the validity period for wage determinations. Based on annual updates to the Occupational Employment Survey (OES) database, and depending on the time of year that the prevailing wage determination (PWD) was obtained from the Department, relative to the date of the most recent update, the wage determination provided could be valid from several months up to 1 year. The NPRM sought comments from employers who had utilized the program in the past on the efficacy of this proposed action.

The Department received numerous comments on this new process. After consideration of all comments, we have decided to implement the PWD process as proposed in the NPRM. However, to reflect the transition from the current system to the new, the Final Rule now clarifies that employers with a date of need on or after October 1, 2009, must seek a PWD from the Chicago NPC prior to beginning recruitment, while employers with prior dates of need will continue to seek PWDs from the SWAs. However, consistent with the Department's intent to immediately implement the Final Rule, and as set forth in § 655.5 of this Final Rule, SWAs will be required to follow the procedures instituted under § 655.10 for any prevailing wage determination requests submitted on or after the date this Final Rule takes effect.

Overwhelmingly, commenters were concerned about the capability of the NPC to provide timely and accurate prevailing wage determinations. Commenters supporting the new centralized process included trade associations, employer-based organizations, businesses, and individual professionals with significant experience in the foreign labor certification field. Of those, some requested reassurance that the Department would allocate sufficient resources and training to the PWD

activity at the NPCs to prevent processing delays. They urged the Department to institute mechanisms to ensure consistency between NPCs and across job titles, descriptions, and requirements; and to offer comprehensive training to employers, attorneys, and agents prior to implementation.

Many commenters, including labor unions, advocacy organizations, academic institutions, and SWAs expressed concern that the NPC staff would not possess the same level of expertise, particularly locally-oriented expertise, required to provide accurate, context-appropriate prevailing wage determinations as the SWA staff. They believed this could lead to reduced scrutiny, inaccuracy, backlogs, and delays, and adversely affect U.S. worker wages and job opportunities. The SWAs that commented on this issue were concerned that transferring the determination to the NPCs would also degrade customer service, and some questioned whether OES really keeps pace with changes in local standards. One state has had success with its own system and recommended the Department replicate that system on a national scale.

One advocacy organization expressed the view that centralization would be particularly harmful to amusement park industry workers, which currently use a weekly rate rather than an hourly rate. One employer was concerned that NPC-issued PWDs would be inaccurate and biased in favor of higher wages, raising program costs. Several commenters opposed PWD federalization in its entirety and proposed full funding of SWAs for these activities. In the alternative, they recommended that, if the Department were to move forward, it hire staff with strong PWD backgrounds and create a separate PWD unit within the NPC.

To guard against potential delays, some commenters requested that a timeframe for the process be established, or recommended adjustments to the process as proposed. A small business coalition recommended the Department permit employers to recruit without first getting the PWD from the NPC, so long as the employer accompanied its H–2B application with a printout of a current and appropriate wage from O*NET, which is the Internet wage survey the Department updates on an annual basis. A large trade association made a similar recommendation, with a proviso that if the employer has not used the correct wage from the database, it would be required to restart the application process after obtaining a PWD from the NPC. The Department also received a suggestion that employers be allowed to get the OES rate themselves unless they want a safe harbor which would be provided by getting the wage rate from the NPC or SWA. Another commenter was concerned that employer surveys do not provide the same safe harbor as SWA determinations and another commenter was concerned that eliminating the SWA from the process meant that the safe harbor would also be eliminated.

This Final Rule establishes rules under which employers may provide their own information. Apart from those instances, the Department believes there is greater value and potential for greater consistency and efficiency in having the NPC provide the wage. The Department believes that continued oversight at the Federal level is essential to ensuring that the job opportunities are advertised and paid at the required wage and therefore does not adversely affect U.S. worker wages.

A number of commenters urged that within this new process, the Department provide a vehicle for communication between program users and NPC staff to resolve disagreements on the job opportunity or wage level and educate program users on the Department's methodology. One trade association recommended the Department disclose its methodology for a PWD upon request from an employer with sufficient time to avoid delaying the application. Other organizations conditioned their support of the new process specifically on the creation of a mechanism for communicating or interacting with the public. Some commenters observed that the appeal process for wage determinations can be quite lengthy, and not a viable option in the context of H–2B or H–1B, where timing is critical; those commenters were particularly concerned that without such communication the timeframe for resolving any prevailing wage determination issues would be lengthened.

The Department recognizes its responsibility to provide an efficient process for prevailing wage determinations. Now that the backlog in the permanent labor program has been eliminated, resources are being redirected to other OFLC priorities, including offsetting some costs associated with the re-engineering of the temporary labor certification programs. As the new program design is implemented, we will allocate available appropriated resources to key activities, including the PWD function. As part of this process, the Department will focus on identifying areas where improvements could be made, including developing and providing needed training. The Department will also look to its stakeholder community for input and suggestions for improvements.

The Department will provide stakeholder briefings on H–2B Final Rule, is updating its Prevailing Wage Guidance for agricultural and nonagricultural programs, and will provide additional training and educational material as appropriate.

The Department will, to the extent feasible and within available resources, seek to hire qualified staff, will train staff already on board, and if appropriate, will consider establishing a separate PWD unit at the Chicago NPC. In addition, the Department will strive to provide timely, appropriate guidance to program users and SWAs to ensure a successful transition and implementation. We remain confident that federalizing the prevailing wage application component will instill a high level of efficiency and consistency in the process which has been a past problem. This increased efficiency and consistency will help ensure more accurate wage determinations, which result in improved protections for U.S. workers.

As stated in the NPRM, the Department strongly believes that shifting wage determination activities to NPC staff will reduce the risk of job misclassification because of centralized staff experience, thereby not only strengthening program integrity, but also ensuring consistency in classification across States, resulting in improved protections for U.S. workers.

As discussed in the NPRM, the Department has received numerous reports that in cases where job descriptions are complex and contain more than one different and definable job opportunity, some SWAs have made inconsistent classifications that resulted in inconsistent PWDs. Furthermore, where H–2B workers are required to work in several different geographic areas that may be in the jurisdiction of several SWAs (examples include the New York, New Jersey, Connecticut ''Tri-state Region'' or the Washington, DC-Maryland-Virginia metropolitan area), questions have arisen about where to file a prevailing wage request and how that wage should be determined. Utilizing a federalized system will alleviate such confusion. Moreover, the Department's current prevailing wage guidance requires SWAs refer—with certain exceptions—to federally provided OES data to determine the appropriate prevailing wage for jobs. Therefore, the NPC can provide the data

and there is no requirement for any local input or expertise.

The Department understands the desire for a fixed timeframe within which an employer will receive a prevailing wage determination. The timeframe depends on a number of factors, including the volume and timing of requests received, the method by which the requests are received (whether paper or electronic), the complexity of the request, and the resources available. Nevertheless, the Department has committed as part of the Final Rule to processing employer requests for prevailing wage determinations within 30 days of receipt.

However, the Department acknowledges that this process of obtaining a prevailing wage may endure a period of processing time fluctuation as a result of the transition. We therefore recommend that, as an initial matter, employers filing H–2B applications should file a Prevailing Wage Determination Request, Form 9141, with the NPC at least 60 days in advance of their initial recruitment efforts. The Department will make every effort to process these requests within the 60 days. The Department will analyze its experience with application patterns and workload, as the NPCs take on the prevailing wage determinations in the other programs handled by OFLC. During that time, the Department will review not only the level of requests it receives, but the information contained in the requests and whether the information received is typically sufficient to be able to generate accurate prevailing wages, or whether employers are providing deficient information. The Department's intent is to substantially reduce the response time for prevailing wage determinations and to design procedures, based upon the results of its analyses to provide employers with greater certainty in their expectation of response time from the NPC.

One commenter thought the prevailing wages would be based on a national average as a result of the centralization in the NPC. That commenter misunderstood the proposal; the wages will continue to be based on applicable data for the area of intended employment. The Department did not propose any change to the methodology used to determine the wage rates under the H–2B program and continues to support the use of OES data as the basis for the prevailing wage determinations. The OES program produces occupational estimates by geographic area and by industry. Estimates based on geographic areas are available at the national, State, and metropolitan area levels. Industry estimates are available for over 450 industry classifications at the national level. The industry classifications correspond to the sector, 3, 4, and 5-digit North American Industry Classification System industrial groups. The OES program also provides data at the substate level in addition to the State level. Data is compiled for each metropolitan statistical area and for additional areas that completely cover the balance of each state. It also offers the ability to establish four wage-level benchmarks commonly associated with the concepts of experience, skill, responsibility and difficulty variations within each occupation.

In the Final Rule, the Department has revised § 655.10(d) to clarify that where the duration of a job opportunity is less than one year or less, the prevailing wage determination will be valid for the duration of the job opportunity.

2. Automating the PWD Process

Initially the PWD process will be a manual process. It is the Department's goal to allow the PWD activity eventually to be conducted electronically between the NPC and the employer. The Department sought comment from potential program users on all aspects of its PWD proposal, but in particular regarding the required use of an online prevailing wage system and corresponding form for interaction with the NPC.

The Department received several comments in support of an electronic process. One commenter suggested the centralization of prevailing wage determinations be delayed until the electronic process was available. Another commenter suggested the electronic process should not be mandatory for all employers, since not all employers have access to the Internet. One commenter expressed concern that employers would use an electronic system to ''shop'' for occupations with the lowest wages to use in describing their job opportunities. The Department disagrees with the suggestion we delay implementation of the prevailing wage function until an electronic version is available. If and when the Department implements an electronic application system, it customarily makes special provisions for those who cannot access the electronic system, and advises the public accordingly. The Department appreciates the input on an electronic system and will take the comments into consideration should a new system be proposed.

3. Extending the PWD Model to PERM, H–1B/H–1B1, E–3, and H–1C Programs

The Department received comments on its proposal to extend the federalized wage determination process to other permanent and temporary worker programs. Some believed that the Department should not include other programs in an H–2B rulemaking. One commenter suggested that the process should not be extended until the new system has proven to be workable. Another commenter was concerned that extending the process to these other programs would result in the total elimination of the States when enforcement capacity is best kept at the State level. One commenter who supported the federalization mentioned that the assignment of occupational codes from the Standard Occupational Classification (SOC) system is also key and should be reviewed. The SOC system is used by many Federal agencies to classify workers into occupational categories.

a. H–1B and PERM Programs

As proposed in the NPRM, for consistency and greater efficiency across non-agricultural programs, this Final Rule extends the new prevailing wage request processing model to the permanent labor certification program, as well as to the H–1B, H–1B1, H–1C and E–3 specialty occupation nonimmigrant programs. As stated in the NPRM, the new process will not alter the substantive requirements of foreign labor certification programs, and we anticipate that, at least in the foreseeable future, the methodology for determining appropriate wage rates will remain much the same as it stands today. Our intent is to modernize, centralize, and make the mechanics and analysis behind wage determination more consistent. Much as the SWAs do now, the NPCs will evaluate the particulars of the employer's job offer, such as the job duties and requirements for the position and the geographic area in which the job is located, to arrive at the correct PWD based on OES data, CBA rates, employer-provided surveys, or other appropriate information. The Department's current prevailing wage guidance for non-agricultural foreign labor certification programs has been in effect since 2005 and is posted in the form of a memorandum on the OFLC Web site. In the near term, the Department will update and formalize its guidance for making prevailing wage determinations to maintain some existing procedures and revise others such as to conform to these regulations. As program experience administering

the PWD process grows, the Department may revise its guidance to explain and assist employers in navigating the process.

To implement and standardize the new process, ETA has developed a new standard Prevailing Wage Determination Request (PWDR) form for employers to use in requesting the applicable wage regardless of program or job classification. As stated in the NPRM, the Department is considering means by which eventually such requests could be submitted, and a prevailing wage provided, electronically.

For purposes of the permanent labor certification (PERM) program, this rule amends the regulations at 20 CFR part 656 to reflect the transfer of prevailing wage determination functions from the SWAs to the NPCs and makes final the technical changes described in the proposed rule.

For purposes of the H–1B program, this rule amends the regulations at 20 CFR part 655 to reflect the transfer of PWD functions from the SWAs to the NPCs and makes final the technical changes described in the proposed rule. Department regulations covering the H–1B program also govern the H–1B1 and E–3 programs, which both require the filing and approval of a ''Labor Condition Application,'' or LCA, rather than a ''labor certification application.'' The Final Rule also amends § 655.1112 governing the H–1C program, to provide for the federalization of prevailing wage determinations.

As described in the NPRM and included in the Final Rule, under the new process, for purposes of H–2B job classifications, NPC staff will follow the requirements outlined under new §§ 655.10 and 655.11 when reviewing each position and determining the appropriate wage rate. These new regulatory sections are consistent with existing provisions at 20 CFR 656.40 and the Department's May 2005 Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs, but would supersede current regulations and guidance for the H–2B program to the extent there are any perceived inconsistencies.

These new regulatory sections supersede current regulations and guidelines for all prevailing wage requests in the H–1B, H–1B1, E–3 and PERM programs made on or after January 1, 2010, and for H–1C prevailing wage requests made on or after the effective date of this Final Rule. The Department appreciates that employers will require some time to become accustomed to the new method of securing a prevailing wage determination. The SWAs will also need a time of transition to complete pending prevailing wage determination requests, just as the NPC will require a corresponding time to fully implement the new form and process. The Department believes keeping PWD activities with the SWAs for PERM, H–1B and related programs until January 2010 will facilitate the transition of Federal staff and program users to complete federalization of prevailing wage determinations. Therefore, the Chicago NPC will begin to provide prevailing wage determinations in programs other than H–2B and H–1C on January 1, 2010. Given the limited size of the H–1C program, and the possibility it may sunset in 2009, the Department believes it can begin processing prevailing wage determination requests shortly after this Final Rule takes effect. Prevailing wage requests under the H–1C program made prior to the effective date of this Final Rule will be governed by the Department's current procedures and its 2005 guidance. Any prevailing wage requests for other non-H–2B programs governed by this regulation made prior to January 1, 2010, must be submitted to the SWA having jurisdiction over the area of intended employment and will be valid for the period listed on the determination issued by the SWA. Prevailing wage determinations issued prior to January 1, 2010, by a SWA will be valid after October 1, 2010, if so determined by the SWA issuing them, and fully enforceable as determined by the applicable regulation (H–1B, H–1B1, E–3, H–1C or PERM).

b. H–1C Program

In the same way that the Department is in this Final Rule establishing national processing for the obtaining of prevailing wages through its National Processing Center for both H–1B (and by extension H–1B1 and E–3) and PERM, it will also amend its H–1C regulations to incorporate the same changes. This program, whose prevailing wage processing amendments were inadvertently removed from the NPRM, previously lapsed, but was reauthorized in December 2006, and is scheduled to sunset again in December 2009.[5] The Department has determined that it is administratively prudent to move the prevailing wage determination function to the Chicago NPC in the H–1C program as in the other programs. This affects a very small number of employers (only 14 hospitals are eligible to participate) and is consistent with the reasoning for federalizing prevailing wage determinations that applies to the other programs. As stated in the preamble to the NPRM, the conversion to a federalized prevailing wage system has no effect on the substantive requirements of foreign labor certification programs or on the methodology by which the NPC will determine the prevailing wage for workers to be admitted under any of the applicable visas. This applies equally to H–1C. In fact, the majority of prevailing wage determinations in the H–1C program are based on the wages contained in collective bargaining agreements, making the need to obtain a wage determination by the NPC frequently unnecessary. Facilities may begin submitting H–1C prevailing wage requests to the Chicago NPC on the date this Final Rule takes effect.

4. Section 655.10(b)(3)—Paying the Highest Prevailing Wage Across MSAs

As proposed in the NPRM, this Final Rule requires that, where a job opportunity involves multiple worksites in areas of intended employment and cross multiple Metropolitan Statistical Areas (MSAs) in multiple counties or States with different prevailing wage rates, an employer must pay the highest applicable wage rate of the applicable MSAs throughout the term of employment. The U.S. worker responding to recruitment and the foreign H–2B worker are entitled to know and rely on the wage to be paid for the entire period of temporary employment.

The Department received comments on this requirement, both in support and in opposition. One trade association supported the proposal, concluding it would strengthen protections for U.S. workers while not adding burden to its members, whom it said already paid the highest prevailing wage rate in every MSA. A number of other employer associations opposed the proposal, stating it was arbitrary, unfair, would artificially increase costs for H–2B labor, and would undermine the basic decision-making of many employers, who locate in areas with low labor costs in order to save money.

The Department has decided to retain the requirement that employers advertise and pay the highest of the applicable prevailing wages when the job opportunity involves multiple worksites across multiple MSAs with varying prevailing wage rates for that occupation and at those worksites. This provision is retained because it provides greater consistency and predictability

[5] The Nursing Relief for Disadvantaged Areas Reauthorization Act of 2005, Public Law 109–423, took effect December 20, 2006. The Act reauthorized the H–1C nonimmigrant nurses program, a program originally created by the Nursing Relief for Disadvantaged Areas Act of 1999.

for both employers and the workers and ensures that U.S. workers who are interested in the job opportunity would not be deterred due to varying wage rates. It also ensures greater protection for workers against possible wage manipulation by unscrupulous employers.

5. General Process or Data Integrity Concerns

Some commenters raised concerns about the integrity of the data currently being used for prevailing wage determinations and recommended changes to the OES survey itself. Others commented on different aspects of the methodology and procedures. One commenter suggested that the Department set the minimum wage rate for H–2B workers at or above the wage (presumably the adverse effect wage rate) for H–2A workers in that State. Another commenter suggested the Department require employers in the construction industry to use, first, the Davis-Bacon Act (DBA) survey wage rate; second, if no DBA wage existed, the collective bargaining agreement rate; and as a last resort, the OES rate, if neither of the other rates was available. Another commenter suggested that the provision regarding when an employer may utilize a wage determination under the Davis-Bacon Act also cover when an employer can choose not to utilize that wage rate. One commenter believed that the proposal did not correct what they claimed was a problem with the Department's Bureau of Labor Statistics (BLS) wage rates being 2 years out of date and also expressed concerns that piece rate policies have led to depressed wages and suggested that the Department should require advance written disclosure of piece rates on the job orders.

The Department appreciates these suggestions and concerns. However, the Department did not propose changes to the sources of data to be used for prevailing wage determinations and, therefore, these comments are beyond the scope of the current rulemaking. The Department notes that the proposed procedures that were retained in the Final Rule already cover the use of wages specified in a collective bargaining agreement. Similarly, these procedures provide that an employer may use the Davis-Bacon wage and that such use is at the employer's option unless the employer is a Federal construction contractor. There is a similar provision that applies to Service Contract Act wage rates.

Some commenters suggested that employers should not be allowed to submit their own wage surveys. The Department, however, believes that employers should continue to have the flexibility to submit pertinent wage information and therefore, the Final Rule continues the Department's policy of permitting employers to provide an independent wage survey under certain guidelines. It also continues to provide for an appeal process in the event of a dispute over the applicable prevailing wage.

*F. Section 655.15—Employer Conducted Pre-Filing Recruitment*

Under the Final Rule, employers will continue to be required to test the labor market for qualified U.S. workers at prevailing wages no more than 120 days before the date the work must begin (''date of need''). This will ensure the jobs are made available to U.S. workers most likely to qualify for the positions in question. As described in the NPRM and finalized under this rule, U.S. worker recruitment will continue to consist of prescribed steps designed to reflect what the Department has determined, based on program experience, are most appropriate to test the labor market. These steps are similar to those required under the current H–2B program. However, application processing and consistency will be improved by having employers conduct the recruitment before forwarding the recruitment report and application to the Department for review. Additionally, we will continue the Department's current requirement that recruitment take place no more than 120 days before the date of need to ensure jobs are advertised to U.S. workers with adequate notice.

This Final Rule retains the requirement in the proposal that employer recruitment efforts be documented and retained for production to the Department or other Federal agencies. As stated in the NPRM, the recruitment documentation requirements will be satisfied by copies of the pages containing the advertisement from the newspapers in which the job opportunity appeared and, if appropriate, correspondence signed by the employer demonstrating that labor or trade organizations were contacted. Documentation of a SWA job order will be satisfied by copies of the job order downloaded from the Internet showing the beginning and the ending date of the posting or a copy of the job order provided by the SWA with the dates of posting listed, or other proof of publication from the SWA containing the text of the job order. However, in response to public comments, the Final Rule requires record retention for 3 years, which is 2 years less than the Department originally proposed.

As proposed, the Final Rule permits employers to place their own newspaper advertisements. The Department has revised the proposed requirement of three advertisements and will in this Final Rule revert to the current requirement of two advertisements. The Department, however, has maintained in this Final Rule the proposed requirement that one of the two advertisements must be placed in a Sunday edition of a newspaper closest to the area of intended employment. The Department has also added a clarification that the newspaper chosen needs to have a reasonable distribution.

The Department received several comments that supported the shift to a pre-filing recruitment model. One of these commenters recommended that the job order process should also be centralized or that timelines for posting job orders should be established and SWAs should have staff dedicated to working with H–2B job orders. The centralization of the job order process was not envisioned by this regulation, and would require separate rulemaking. Moreover, posting job orders and referring individuals to those jobs is a core function of the SWAs and one that remains at the local level in this rule. Additionally, the Department believes the SWAs must have the flexibility to assign their limited resources based on needs and priorities and declines to establish a timeline for SWAs to post job orders.

The Department received a number of comments about the proposed timeframe for pre-filing recruitment; some opposing recruitment so far in advance of the date of need and others suggesting the timeframe be lengthened. The commenters who were opposed to the proposal generally believed that U.S. workers would not be able or willing to commit to temporary jobs so far ahead of the actual start date or would indicate they would accept the jobs but then fail to report on the actual start date. These commenters believed this would result in delays, additional costs to employers and the Department, and the late arrival of H–2B workers because new applications would have to be filed. One commenter opposed the early pre-filing recruitment and believed the result would be a false indication that no U.S. workers were available. Another commenter opined that employer compliance would be reduced due to the pre-filing recruitment. One SWA recommended that the period for recruitment be shortened because 120 days in advance is not suitable when serious job seekers are looking for

temporary employment and stating their view that those U.S. workers who apply are rarely offered employment because the employer knows foreign workers are available. The commenter was further concerned that the U.S. workers who are hired that far in advance of the date of need are not reliable and will not report for work. In contrast, two commenters suggested a longer recruitment period—one recommended 180 days in advance of the date of need—to provide employers with greater flexibility. The Department declines to extend the period of recruitment to 180 days prior to the date of need because we do not believe recruitment that far in advance would be effective given the concerns expressed by some of the commenters and our own extensive program experience.

One commenter was concerned that the proposed pre-filing recruitment period, when combined with a prevailing wage determination request submission 90 days prior to the recruitment start date, advanced the timeframe for beginning the application to more than 6 months prior to the date of need. This commenter stated this was not characteristic of a user-friendly program. The Department understands that there are trade-offs when designing a new system. In this case, in order to provide the employer more flexibility and eliminate an extra layer of government bureaucracy, the process must begin earlier.

One commenter was concerned about the validity of the pre-filing recruitment when, after completing the recruitment and submitting the application, the employer's needs change and it requires a modification to a term or condition on the application. This commenter questioned whether the recruitment would be considered a valid test of the labor market since, unlike the current process, the underlying application and job order will not have been approved prior to the recruitment effort. The commenter recommended that the Department provide in the regulation that as long as the recruitment was conducted based on the job description and offered wage as determined by the CO and the job order was accepted by the SWA, the recruitment would be considered valid irrespective of any required modifications. It is unclear what kind of modifications would be warranted and, therefore, the Department cannot respond directly to this comment. For example, if a timely-filed application requires a technical modification, but the modification cures the defect and allows the application to resume processing, then the recruitment will continue to be valid for as long as the petition is pending at the NPC and valid for purposes of a final determination. However, if an employer's needs change in a way that requires a substantive correction in one or more key terms and conditions of employment—for example, wages or occupation—the NPC will require that the position be readvertised. Changes in terms of employment contained in the underlying job offer will trigger a requirement for a new labor market test.

The Department's requirement that the employer submit an acceptable job order to the appropriate SWA for posting mandates that the employer complete and submit information regarding all of the job duties and terms and conditions of the job offer: The job duties, the minimum qualifications required for the position (if any), any special requirements, and the rate of pay. This information is normally submitted to the SWA for acceptance prior to the employer's recruitment; as long as the employer's advertisements do not depart from the descriptions contained in the accepted job order, they will be deemed acceptable by the Department. At the same time, the SWA will be the arbiter of the job's acceptability for the job order, and as the job order must be accepted prior to the commencing of recruitment in this Final Rule, all recruitment must reflect the job as accepted by the SWA as well.

The Department has decided to eliminate the document retention requirement in its entirety with respect to applications not certified; therefore, any employer whose application has been denied can discard the records relevant to the denied application immediately upon receiving the denial notice or whenever the decision becomes final if the employer appeals the decision. If the denial is overturned, the application becomes subject to the document retention requirements for approved cases. The Department determined that a document retention requirement in such cases serves no governmental purpose and is unnecessarily burdensome on employers. The Department would, in virtually all such cases, already have copies of the employer's supporting documentation rendering such a retention requirement unnecessary.

1. Section 655.15(g)—Unions as a Source of Labor

As proposed, the rule would have required that if the job opportunity were in an industry, region and occupation in which union recruitment is customary, the appropriate union organization must be contacted. A number of commenters were concerned that the proposed provision placed too great a reliance on the employer's ability to determine what the Department will later decide is ''appropriate for the occupation and customary to the industry and area of intended employment.'' One of these commenters suggested that even if contacting a union may be appropriate in some industries, it would be entirely inappropriate in the construction industry and, at a minimum, the construction industry should be expressly excluded from this requirement under a Final Rule. Another commenter suggested that the requirement was unnecessary, as the required newspaper advertising would reach the same pool of applicants. Another commenter believed the requirement was not authorized by statute and the Department has no basis to impose it. Additionally, the commenter expressed concern that the requirement also has the potential to subject non-unionized employers to ''salting'' campaigns, during which union organizers retain employment in union shops for the sole purpose of organizing the workforce. According to this commenter, the requirement could unfairly and unnecessarily inject the Department into an area in which it should not be involved.

One specialty bar association opined that the requirement to use unions as a recruitment source would be unworkable in practice, stating that in their experience, unions will not refer workers to non-union shops. The commenter recommended the regulation instead use the approach of the permanent labor certification program, which requires union contact for unionized employers only.

The Department has considered these comments and agrees with the many concerns raised about the proposed requirement, in particular concerns about vagueness and ambiguity, and the dilemma employers would face in trying to interpret and implement the requirement. Accordingly, we have revised the provision to require an employer to contact a labor organization only in cases where the employer is already a party to a collective bargaining agreement that covers the occupation at the worksite that is the subject of the H–2B application. The employer's obligation is only to contact the local affiliate of labor organization that is party to the existing collective bargaining agreement that covers the occupation at the worksite that is the subject of the H–2B application.

2. Section 655.15(i)—Referral of U.S. Workers and SWA Employment Verification

To strengthen the integrity of the Secretary's determination of the availability of U.S. workers, and to help bolster employers' confidence in their local SWAs and the H–2B program, the Department proposed that SWAs verify the employment eligibility of U.S. workers they refer for nonagricultural employment services with the SWA. The Department received a significant number of comments on the practicality of this provision.

Comments on this subject were received from national associations, numerous SWAs, several labor advocacy organizations, and members of Congress. Commenters generally opposed the proposal for a variety of legal, programmatic, resource-related, and policy-based reasons.

Most of the commenters were SWAs that noted the burden this new provision would create. Many saw it as an unfunded Federal mandate in violation of the Unfunded Mandates Reform Act. More than one referred to the Department's recent inclusion of the requirement as a condition for receiving further labor certification grant funding.

As stated in the preamble to the NPRM, the Department is not insensitive to the resource constraints facing state agencies in their administration of the H–2B program. However, as we stated in the NPRM, we do not believe that the requirement will result in a significant increase in workload or administrative burden not covered by Department-provided resources.

In addition, notwithstanding funding limitations, there is a strong, longstanding need for a consistent verification requirement at the State government level. The Department is not leaving States to their own devices. Precisely to ensure that available Federal funding supports verification activities, the Department has added the verification requirement as an allowable cost under the foreign labor certification grant agreement. The Department also funds State employment services under the Wagner-Peyser Act, and for many years States have made Wagner-Peyser grant funding a part of their annual financial plan. To the extent that State functions related to foreign labor certification depend extensively on activities that are already part and parcel of the employment service system, State labor agencies can continue to rely on Wagner-Peyser to support that portion of activity. Ultimately, while cognizant of the challenges posed by funding limitations, we expect States to comply as they do with other regulatory requirements and other terms and conditions of their foreign labor certification grant.

SWAs also expressed concern about possible discrimination suits. The requirement to verify employment eligibility does not violate constitutional prohibitions against disparate impact. The eligibility requirement is similar to verification requirements to gain access to other similar public benefits.

One SWA said it would be impossible to implement verification of work eligibility because they have a virtual one-stop system that is self-service for both employers and job seekers and the SWA would be unable to certify that applicants referred to those job orders are employment-eligible. While we do not disagree that an in-person verification requirement may impact the decisions of a limited number of otherwise eligible workers, such impact does not outweigh the significant value of verification. Moreover, SWAs can respond to any possible inconvenience to workers by designating or creating additional in-person locations where eligibility can be verified. This is not a problem unique to SWAs—workers may be required to travel great distances to reach a prospective employer, who then (absent a SWA certification) would be required to verify work eligibility. In the end, although employment eligibility verification does require some amount of extra time and effort, the Department has determined that simple convenience must cede to the overarching goal of a legal workforce and has drafted its regulations accordingly.

Several SWAs also pointed out that under the new regulations it will be impossible to identify H–2B job orders, especially now that the SWA will no longer receive a copy of the application or determine prevailing wages and be only responsible for placing the job order. The Final Rule now requires the job order carry a notation identifying it as a job order to be placed in connection with a future application for H–2B workers.

Several other commenters supported the contention made by the SWAs that this requirement will drain SWA resources. A few commenters seem to have interpreted this requirement as mandating the use of the ''E-Verify'' electronic system. However, although both the NPRM and the Final Rule require the use of the DHS process, which requires the completion of I–9 forms and process, the use of the electronic E-verify system is optional.

The Department's expectation is that SWAs will not expend public resources to refer undocumented workers to H–2B job opportunities. The employment verification provisions included in this regulation are part of a concerted effort—one that includes regulation, written guidance, and ongoing outreach and education—to address longstanding weaknesses and to strengthen the integrity of the program.

3. Section 655.15(h)—Layoff Provisions

Under the NPRM, an employer seeking to employ H–2B workers would have been required to attest that it is not displacing any similarly employed permanent U.S. worker in the occupation in the area of intended employment within the period beginning 120 days before the date of need and throughout the entire employment of the H–2B worker(s). The Department received a number of comments from various groups on this provision. We have addressed those below, in conjunction with comments on the layoff provisions at § 655.22(k).

*G. Section 655.17—Advertising Requirements*

As proposed in the NPRM, the Final Rule requires employers to advertise for available U.S. workers. The advertisement must: (1) Identify the employer with sufficient clarity to notify the potential pool of U.S. workers (by legal and trade name, for example); (2) provide a specific job location or geographic area of employment with enough specificity to apprise applicants of travel or commuting requirements, if any, and where applicants will likely have to reside to perform the services or labor; (3) provide a description of the job with sufficient particularity to apprise U.S. workers of the duties or services to be performed and whether any overtime will be available; (4) list minimum education and experience requirements for the position, if any, or state that no experience is required; (5) list the benefits, if any, and the wage for the position, which must equal or exceed the applicable prevailing wage as provided by the NPC; (6) contain the word ''temporary'' to clearly identify the temporary nature of the position; (7) list the total number of job openings that are available, which must be no less than the number of openings the employer lists on the application (ETA Form 9141); and (8) provide clear contact information to enable U.S. workers to apply for the job opportunity. The advertisement cannot contain a job description or duties which are in addition to or exceed the duties listed on the Prevailing Wage Determination Request or on the application, and must not contain terms and conditions of

employment which are less favorable than those that would be offered to an H–2B worker.

The Department received multiple comments on the newspaper advertising requirements. Several commenters believed that the requirements, especially the requirement for three ads that was proposed in the NPRM (rather than the two required under the current program), would increase employer costs and time devoted to the application process but not yield additional U.S. workers. The requirement for advertising in a Sunday edition of a newspaper was seen as particularly objectionable due to the higher costs for Sunday ads and the belief that many nonprofessional workers do not read Sunday newspaper editions. Some commenters suggested employers should have the flexibility to use other recruitment methods, such as Web sites that have proved successful in locating seasonal workers. Others were concerned that without SWA guidance, employers would have to guess as to the correctness of their ads, risking that if the CO subsequently determined there were errors in the advertisements, it would be too late to get the workers needed. One commenter was concerned that no process was provided for requiring an employer to revise its ad if the content was determined to be unduly restrictive.

As previously discussed, this Final Rule requires two newspaper advertisements which must include one Sunday edition. Sunday editions have traditionally provided the most comprehensive job advertisements and many U.S. workers potentially seeking employment would normally choose the Sunday paper to review. Employers can, however, always conduct more recruitment than is required, such as posting the opportunity on job search Web sites.

One commenter inquired about the process for employers to follow in selecting an alternate publication in lieu of one of the newspaper ads. Other commenters were concerned about the choice of the specific newspaper in which to advertise and believed that the NPC would not be able to determine the most appropriate newspaper in all cases. One commenter suggested that the SWA should be involved in the process and provide guidance regarding newspaper choices. Another commenter asked whether there would be specific guidance regarding advertisements for live-in jobs, such as those for housekeepers, child monitors, and similar positions. The Department believes that staff at the NPC will be able to handle such issues. The Department declines in the Final Rule to specify the requirements to a high level of detail, as appropriate publication may vary, for example by industry or industry practice, and as the Department normally issues such guidance in the form of Standard Operating Procedures or other policy guidance.

*H. Section 655.20—Direct Filing With the NPC and Elimination of SWA Role*

Consistent with the proposed rule, the Final Rule eliminates the role of the SWAs in accepting and reviewing H–2B labor certification applications. Once the Final Rule is effective, employers will file H–2B applications directly with the NPC, consistent with the transition provisions of the regulation and with the Department's specialization of its two processing centers effective June 1, 2008. Employers with dates of need prior to October 1, 2009, will submit prevailing wage determination requests SWA, which will process them under the PWD procedures established under § 655.10 of this Final Rule. In the long term, under these regulations, each employer will continue to be required to place a job order with the appropriate SWA as part of pre-filing recruitment, and SWAs will continue to place H–2B-associated job orders in their respective Employment Service systems. This proposal received comments from a broad range of constituencies, including employers, employer associations, advocacy organizations, labor unions, State agencies, and elected officials. Most of the commenters opposed this provision.

Many commenters remarked that the elimination of the SWA portion of the process only shifted activities previously performed by the SWAs to the NPCs without actually improving the process. These commenters believed that eliminating the duplicate SWA review and increasing the Federal role in reviewing applications would result in increased delays, particularly when the Department has acknowledged that its funding has not kept pace with increased workloads in the H–2B program. Others also mentioned possible processing delays and were especially concerned that those industries with later dates of need could be locked out of the program.

Other commenters were concerned the new process would result in the loss of local labor market and prevailing practice expertise in the review process, including checks and balances now in the system, and would increase the potential for fraud. These commenters asserted that the knowledge and expertise of local staff in reviewing and processing applications was essential to the integrity of the H–2B certification process. Some commenters also criticized the NPCs for what they view as ''ignoring their own regulations'' and ''misconstruing the certification process.'' Several commenters also believed elimination of the duplicate SWA review would result in decreased assistance for employers. One SWA stated that employers would be left without a source for guidance which would drive up the demand for agents, thereby increasing the costs to employers. An employer expressed the opinion that the new process would replace longstanding relationships with SWA employees and reliable determinations with unpredictable determinations and potentially overly stringent penalties.

The Department remains committed to modernizing the application process and continues to believe that the submission of applications directly to the NPC is the most effective way of accomplishing this goal. Processing of H–2B applications by NPC staff will allow for greater consistency for employers, regardless of their industry or location, in both the time required and quality of the application review. The Department believes that by specializing in H–2B application processing, NPC staff will have greater program expertise than SWA staff who are often required to implement a number of diverse programs during the course of their workday, and will generate additional efficiencies in application processing. Therefore, this federalized review of applications will lead to more efficient processing, greater consistency of review, and more effective administration. It will also enable the Department to better identify and implement program improvements.

Eliminating the SWAs' participation in the application review process will provide more efficient review of applications, as well as greater consistency of review. The Department disagrees that NPC staff have insufficient knowledge to undertake this role given that they already perform it. In fact, NPC reviewers who currently review H–2B applications have, in some cases, more experience with such applications than many SWA staff.

Moreover, the SWAs have not been removed from the process—they will continue their traditional role in the recruitment process and working with employers on the specifics of the job order. SWAs will be responsible for clearing and posting job orders, both intrastate and interstate, thus reducing the risk for employers to make mistakes with respect to job descriptions,

minimum requirements, and other application particulars. SWAs will, as part of these duties, review the job offer, its terms and conditions, any special requirements, and the justifications as part of the SWAs' duties to clear and post such orders.

*I. Section 655.20—Form Submission and Electronic Filing*

The Final Rule requires employers to submit applications on paper, through an information collection (form) modified significantly from the current form to reflect an attestation-based filing process. As stated in the NPRM, the Department will consider in the future an electronic submission system similar to that employed in other programs administered by OFLC, should resources be made available.

The Department received a number of comments from SWAs, a specialty bar association, a large trade association, a small-business coalition, and several industry groups largely supportive of the potential conversion to electronic applications. One commenter encouraged prompt migration to electronic filing, as the commenter felt this would make program data easier to gather, more accurate, and more shareable across federal agencies. A few comments expressed concern that electronic filing would be mandatory for everyone, and recommended that, in the event the Department converted to electronic submission, it maintain paper filing as an option. Two commenters were concerned making electronic submission mandatory could cause undue hardship to employers that do not have Internet access, are not computer literate, or do not have access to a computer. One bar association recommended the Department not require electronic filing until the system was error-free, that any electronic filing system not include system-generated denials as the PERM system does, and that any defects receive an RFI. The Department takes seriously these recommendations. We will determine appropriate timing for the development and implementation of an electronic system based on program need and available resources. We have learned—as have programs users—from our experience with the electronic filing process used in the permanent program, and will apply those lessons to any system we institute for the H–2B program.

*J. Section 655.21—Supporting Evidence of Temporary Need*

As proposed, this Final Rule provides the employer a variety of options for documenting the basis of its temporary need, to be retained by the employer and submitted in the event of a Request for Further Information (RFI), a post-adjudication audit, a WHD investigation, or another agency investigation. As explained in the NPRM, for most employers participating in the H–2B program, demonstrating a seasonal or peakload temporary need can best be evidenced by summarized monthly payroll records for a minimum of one previous calendar year that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers employed, the total hours worked. Such records, however, are not the only means by which employers can choose to document their temporary need. The proposed regulation accordingly leaves it to the employer to retain other types of documentation, including but not limited to work contracts, invoices, client letters of intent, and other evidence that demonstrates that the job opportunity that is the subject of the application exists and is temporary in nature. Contracts and other documents used to demonstrate temporary need would be required to plainly show the finite nature of that need by clearly indicating an end date to the activity requested.

The Department's new H–2B temporary labor certification application form is designed to require both a short narrative on the nature of the temporary need and responses to questions to determine the time of need and the basis for the need. The narrative will enable the employer to demonstrate in its own words the scope and basis of the need in a way that will enable the Department to confirm the need meets the regulatory standard, with additional questions on the form providing context and clarification. If further clarification is required, the RFI process will be employed. The form also contains an attestation to be signed under penalty of perjury to confirm the employer's temporary H–2B need.

As explained in the NPRM and consistent with current program practice, employers should be wary of using documents demonstrating a ''season'' in general terms (hotel occupancy rates, weather charts, newspaper accounts); in the Department's experience, such generalized statements fail to link a season to a specific position sought to be filled by the employer, which is required under the program. The Department also recognizes that conventional evidence such as payroll information may not be sufficient to demonstrate a one-time or intermittent need, or seasonal or peakload need in cases in which the employer's need has changed significantly from the previous year. In such cases, the employer should retain other kinds of documentation with the application that demonstrates the temporary need.

*K. Section 655.22—Obligations of H–2B Employers and Attestation-Based Application*

The Department proposed, and this Final Rule institutes, the shift to an attestation-based filing system. The new application form contains a series of attestations to confirm employers' adherence to its obligations under the H–2B program. The information and attestations on the form will provide the necessary assurances for the Department to initially verify program compliance. As described in the NPRM, the Department anticipates the shift to an attestation-based application will have a number of benefits, including a reduction in processing times while maintaining program integrity.

The Department received numerous comments, many of them negative, on the move to an attestation-based application. Some commenters believed that an attestation-based application would reduce the role of the SWA and thus eliminate local expertise; decrease employer compliance; increase erroneous approvals; and increase the likelihood that the Department will simply ''rubber stamp'' the certifications and weaken U.S. worker protections. The Department disagrees with these assumptions and conclusions. The Department believes that an attestation-based application, backed by audits, is within the Secretary's statutory discretion to implement and is an effective means to ensure that all statutory and regulatory criteria are met and all program requirements are satisfied. Similar approaches have been used successfully by the Department in other contexts, such as in the current permanent labor certification process.

One commenter suggested the Department require that the employer always be the applicant, even if an agent is used, because neither an agent nor the employer would be able to attest to all of the required obligations. This commenter also feared that an employer could shield itself from responsibility by using an agent for such prohibited acts as requiring recruitment fees to be paid by the foreign worker. The Department disagrees with this commenter. In the H–2B program, the agent simply represents the employer in the labor certification process. The employer is ultimately responsible for its obligations under the program and it

is the employer who signs the application form, and attests to the veracity of the information provided and that it will meet all of its obligations.

One commenter appeared to confuse the H–2B and H–2A programs. This commenter referred to the 50 percent rule, an H–2A program feature, and requested that the Department include a grace period for a foreign worker to find another employer if dismissed under the 50 percent rule. In the current H–2A temporary agricultural program, employers must hire a qualified U.S. worker who applies for a position certified under a temporary labor certification, if that worker applies during the first half of the certified period of employment. The H–2B program has no such provision and the Department declines to impose one, especially as this was not proposed in the NPRM.

The Department received a number of comments on the specific obligations of H–2B employers outlined in the proposed rule. One commenter pointed out a semantic error in proposed § 655.22(a), which stated the employer must attest that ''no U.S. workers'' are available. The commenter correctly pointed out that an employer cannot possibly have such broad knowledge and that the statute does not require such knowledge. The Department has deleted that provision. There were other comments about word choice and semantics and, where appropriate, the Department has changed the wording to make the attestations easier to understand.

The Department has also added language to the provision, in § 655.22(a), that requires that H–2B job opportunities offer terms and working conditions that are ''normal to U.S. workers similarly employed'' to clarify that normal is synonymous with not unusual. This is within the range of generally accepted meanings of the term. See, e.g., Black's Law Dictionary 1086 (8th ed. 2004) (''The term describes not just forces that are constantly and habitually operating but also forces that operate periodically or with some degree of frequency. In this sense, its common antonyms are *unusual* and *extraordinary*.''); Webster's Unabridged Dictionary 1321 (2d ed. 2001) (supplying ''not abnormal'' as one of several definitions). Thus, ''normal'' does not require that a majority of employers in the area use the same terms or working conditions. If there are no other workers in the area of intended employment who are performing the same work activity, the Department will look to workers outside the area of intended employment to assess the normality of an employer's proposed productivity standard.

Unless otherwise noted, no substantive change is intended. Below, we respond to comments on specific obligations and describe substantive changes made to those subsections. In cases where the Final Rule deletes or adds provisions, the numbering has changed accordingly from that published in the NPRM.

1. Section 655.22(a)—U.S. Worker Unavailability

The Department proposed that employers seeking to hire H–2B workers attest there were no U.S. workers in the area of intended employment capable of performing the temporary services or labor in the job opportunity. Comments on this provision reflected strong concern that employers cannot attest to the actual unavailability of U.S. workers, but simply that the employer has tested the labor market appropriately and in good faith to demonstrate that capable U.S. workers did not respond to its recruitment efforts or ultimately were not available (either due to lawful rejection by the employer, failure on the worker's part to follow through or remain on the job, etc.) to perform the labor or services. The Department agrees and has deleted this provision from the Final Rule.

2. Section 655.22(f)—Worker Abandonment and Employer Notification to the Department and DHS

The Department's NPRM would have required employers to notify the Department and DHS within 48 hours if an H–2B worker separated from employment prior to the end date of employment in the labor certification. This notification requirement would have also applied if the H–2B worker absconded from or abandoned employment prior to the end date of employment. This requirement was included to ensure that if the basis for the worker's status ended before the end date on the application, both DHS and the Department could take appropriate action to monitor the program.

The Department received a number of comments in opposition to this requirement, primarily from employers and employer and trade associations. Several employer associations shared the concern that, in their view, the requirement represented a new and unfair liability for employers, opening them up to potential legal action from H–2B employees if the employee left to pursue other legal employment before the end of the contract period. One association found it problematic, given the perception that this worker population is more transient than the workforce at large. It also was concerned about the administrative burden on employers to comply with the requirement. It asserted that employers were unlikely to know the real circumstances of the worker's departure, if it was a legal extension or change of status or something else. Consistent with a number of other comments either seeking or recommending clarification to the notice requirement, this association stated that such status determinations are complex legal issues and employers should not be required to make them. It also believed that the reporting requirement was unlikely to accomplish anything without imposing additional significant burdens on employers and that it was unlikely that DHS would pursue individuals who are the subject of these reports. A small business association agreed about the unreasonableness of the potential burden on employers and was concerned that the requirement would ask small businesses to become unpaid Immigration Service agents responsible for enforcing immigration laws.

A trade association found the required 48 hours for notification to be an extremely limited period of time for notification, and a burden on employers. It recommended that, if the requirement were continued, it should be extended to 30 days. Further, this trade association recommended that DHS create a simple reporting method to allow employers to provide the information directly through the Internet or by telephone. The requirement was described as too vague and not providing enough specifics as to when the employer would be required to do such notification.

An individual employer found insufficient safeguards in the proposal, as there was no indication of actions that the bureaucracy at the Department or DHS would take based on the information. The employer wanted the two departments to be more specific as to how the information was to be used.

An employer agent believed the requirement was inappropriate in these regulations, as it was tangential to the Department's role regarding the availability of U.S. workers or preventing adverse affect on U.S. workers, and believed that it created additional confusion and potential liability for employers. Similarly, an employer association thought the requirement inappropriate and did not clearly outline the process by which employers would make such notifications. Additionally, the employer association asked for

additional guidance as to what information would be required for employers to document separation or job abandonment and was concerned that violations of this provision could lead to debarment from future participation in the program.

The Department reviewed the comments received on this specific reporting requirement and the concerns raised by the employers and associations on its implementation. The Department acknowledges that many of these concerns have merit, and has therefore sought to provide clarifications and limitations in the Final Rule to address these concerns. The Department did not, however, discern sufficient justification from these comments to eliminate the requirement in its entirety. The notification is necessary in all circumstances because the early separation of a worker impacts not only the rights and responsibilities of the employer and worker but also implicates DOL's and DHS's enforcement responsibilities. Although any abscondment is a loss to the employer, the Government requires notification to be able to better track workers who are in the country on a temporary basis with limited work authorization.

The Department acknowledges the need for clarification in the provision to ensure that the 48-hour requirement begins to run only when the abandonment is actually discovered. The Department has therefore added language to the provision clarifying that the employer must notify DOL no later than 2 work days after such abandonment or termination is discovered by the employer. The Department has added further clarification to ensure that employers must meet the identical standards for notification to DOL as to DHS, so that an abscondment occurs when the worker has not reported for work for a period of 5 consecutive work days without the consent of the employer to that non-reporting. This is intended to clarify for the employer that the same standard of reporting applies across both agencies, making it easier on the employer to make the report. There is no requirement that the notification be made by certified mail, however. A file copy of a letter sent by normal U.S. mail, with notation of the posting date, will suffice. However, in addition, the Department revised the notification requirement to reflect a time period of no later than 2 work days after the employer discovers the employee has absconded, which, consistent with DHS, has been defined as 5 consecutive work days of not reporting for work. To make the standard further consistent across agencies, for purposes of this provision the Department will defer to DHS on the definition of the term ''working day.''

3. Section 655.22(g)—Deductions and Prohibition on Transfer of Costs

The NPRM prohibited deductions by the employer or any third party, including a recruiter, for any expenses including recruitment fees and any other deductions not expressly permitted by law. Both worker advocacy organizations and an employer of H–2B workers commented that the provision was confusing and ambiguous. Worker advocates objected that it was unclear whether employees could be required to pay recruiting costs directly, while an employer objected to the payment of recruiting costs that were not clearly defined in the proposal. We agree that the rule as proposed was confusing. The confusion resulted in part from the fact that employer cost shifting is addressed elsewhere in the regulations, in § 655.22(j). Further, cost shifting by third parties presents an identical problem under the H–2A program but was dealt with in a different manner in the NPRM. Accordingly we are revising the language concerning cost shifting by third parties to mirror § 655.105(p) of the H–2A Final Rule to read as follows: ''The employer has contractually forbidden any foreign labor contractor or recruiter whom the employer engages in international recruitment of H–2A workers to seek or receive payments from prospective employees, except as provided for in DHS regulations at 8 CFR 214.2(h)(5)(xi)(A).''

The Final Rule makes clear that recruiters may not pass on expenses to H–2B workers. Examples of exploitation of foreign workers, who in some instances have been required to give recruiters thousands of dollars to secure a job, have been widely reported. The Department is concerned that workers who heavily indebt themselves to secure a place in the H–2B program may be subject to exploitation in ways that would adversely affect the wages and working conditions of U.S. workers by creating conditions akin to indentured servitude, driving down wages and working conditions for all workers, foreign and domestic. We believe that requiring employers to incur the costs of recruitment is reasonable, even when taking place in a foreign country. Employers may easily band together for purposes of recruitment to defray costs. The fact that a recruiter is essential to the securing of such worker does not dissuade the Department from requiring the employer to bear the expense; rather, it underscores the classification of that payment as a cost allocable to the employer.

The Department recognizes that its power to enforce regulations across international borders is constrained. However, it can and should do as much as possible in the U.S. to protect workers from unscrupulous recruiters. Consequently, the Department is requiring that the employer make, as a condition of applying for labor certification, the commitment that the employer is contractually forbidding any foreign labor contractor or recruiter whom the employer engages in international recruitment of H–2B workers to seek or receive payments from prospective employees.

The Department has also revised this section in the Final Rule to omit restrictions on deductions that are already covered in § 655.22(j), and we are incorporating the following language which is identical to the language in 20 CFR 655.104(p) of the H–2A Final Rule: ''The employer must make all deductions from the worker's paychecks that are required by law. The job offer must specify all deductions not required by law that the employer will make from the worker's paycheck. All deductions must be reasonable. However, an employer subject to the FLSA may not make deductions that would violate the FLSA.''

4. Section 655.22(h) [(g) in Final Rule]—Basis for Offered Wage

This provision requires that the offered wage not be based on commission, bonuses, or other incentives unless the employer guarantees that the wage paid will equal or exceed the prevailing wage. The second sentence of the proposed provision further stated that ''the offered wage shall be held to exclude any deductions for reimbursement of the employer or any third party by the employee for expenses in connection with obtaining or maintaining the H–2B employment including but not limited to international recruitment, legal fees not otherwise prohibited by this section, visa fees, items such as tools of the trade, and other items not expressly permitted by law.'' This sentence received several comments. A worker's rights advocacy group claimed the Department will not achieve its objective of protecting foreign workers from paying fees that should be paid by the employer. This commenter provided an example of a practice by one employer who required workers to pay for tests to determine their welding and fitting skills in preparation for employment in the United States. This

commenter further recommended that this section should clarify that costs paid directly by workers are de facto deductions for the purpose of calculating compliance with the offered wage, even if employers do not directly deduct them and also that DOL should clarify its position on which costs are considered to benefit employers and thus require reimbursement and include specific examples of such costs. This commenter also believed that similar language in the FLSA was confusing. The Department appreciates the detailed analysis provided by this commenter, but we believe the statutory requirements, which are based on decades of administration of the Federal wage and hour laws, are clear and that it is not necessary to make the recommended changes.

5. Section 655.22(i) [(h) in Final Rule]—Position Is Temporary and Full-Time

The Department proposed that an employer seeking to employ H–2B workers be required to attest that the job opportunity is for a full-time, temporary position. One commenter suggested the proposed regulation could harm U.S. workers by guaranteeing full-time work for the period to foreign workers, while there is no such guarantee provided to U.S. workers in any seasonal position. The commenter also stated that while employers can state their intention to hire temporary workers full-time, if the weather does not cooperate, the employer may have no choice but to reduce hours in a particular week and that under this provision, the employer would not be able to do this, causing significant harm to the business and the U.S. workers whose hours would need to be reduced even further in order to ensure that foreign workers were paid a full-time wage. The commenter recommended a revised attestation stating: ''The job opportunity is a bona fide, temporary position and hours worked will be comparable to the full time hours worked by associates in the same position at the employment site.'' As stated in the preamble to the NPRM, the H–2B program has always required that the positions being offered be temporary and full-time in nature, and the Department recognizes that some industries, occupations and States have differing definitions of what constitutes full-time employment. For example, certain landscaping positions are often classified as full-time for a 35-hour work week. To provide additional clarity, the Department, in § 655.4 has provided a definition of full-time employment that reflects our experience in the administration of this program. We will continue to make determinations of whether work is full-time for foreign labor certification purposes based on the facts, program experience, customary practice in the industry, and any investigation of the attestation. The Department has therefore decided to retain the proposed language.

6. Section 655.22(k) [(i) in Final Rule]—Layoff Provisions

Under the NPRM, an employer seeking to employ H–2B workers would have been required to attest that it is not displacing any similarly employed U.S. worker(s) in the occupation in the area of intended employment within the period beginning 120 days before the date of need and throughout the entire employment of the H–2B worker. The Department received a number of comments from various groups on this provision.

A number of commenters favored the requirement, noting that it assisted efforts to ensure that employers cannot lay off U.S. workers after seeking to hire H–2B workers to perform the same services. Other commenters, however, had concerns regarding the implementation of the prohibition and the potential liability.

Several commenters were concerned that the requirement to contact former employees who had been laid off would be onerous, given the difficulties in reaching what is purportedly a transient population, making such contact unduly burdensome. The Department finds this argument unpersuasive. The commenter did not support the summary statements that all temporary or seasonal help is transient and rootless in the communities in which the work is performed. Even assuming that such workers do not have lasting ties to the employer, employers generally maintain continuing contact with former employees for many purposes—including, but not limited to, the provision of payroll tax information the following year and the transfer or disposition of benefits (including unemployment benefits). Moreover, by limiting the requirement for such contact to the 120 days or less before the employer's date of need for the H–2B workers, the employer's last contact information would likely be current, making such contact, generally speaking, relatively simple.

One commenter asserted that the layoff provision conflicts with the definition of seasonality, noting that by definition a seasonal employee will always be laid off within the period set forth in an annual cycle. An employer association also objected to the provision on the ground that requiring the consideration of U.S. workers would force employers who laid off U.S. workers at the end of one season to hire them again at the commencement of the next season because the timing would put the next season within the 120-day window.

In response to these comments, the Department has limited the applicability of the layoff provision to 120 days on either side of the date of need. This broad period of time, covering two thirds of the year, will protect U.S. workers near the time of recruiting for and hiring H–2B workers, which is when U.S. workers are most vulnerable, but avoids the complications of overlapping seasons noted by some commenters.

The Department notes that much of the concern of those commenters regarding the re-hiring of U.S. workers stems from a belief that such workers will not show up or be interested in being re-hired. But, by limiting the applicability of the provision to within 120 days of the date of need (as well as the actual occupation and the area of intended employment of the sought-after H–2B certification), this provision affords laid off workers a reasonable opportunity to apply for vacancies for which they qualify, striking an appropriate balance between worker protection and employer needs.

Some commenters noted the need for a strengthening of the layoff provision, calling for additional safeguards against massive layoffs of U.S. workers by strengthening requirements for how employers will demonstrate they have made efforts to contact former employees. The Department declines to do so at this time. Employers will be allowed to document their contact of former employees using any objective means at their disposal in a manner guaranteed to ensure a good faith contact effort has been made. The Department does not have evidence at this time that employers will engage in fraudulent behavior with respect to this requirement. The Department will monitor this attestation, and all other employer attestations, through post-certification audits and will note the need for program modifications through that process.

7. Section 655.22(l) [(j) in Final Rule]—Prohibition Against Payments

As in the proposal, the Final Rule requires that an employer attest that it has not and will not shift the costs of preparing or filing the H–2B temporary labor certification application to the temporary worker, including the costs of domestic recruitment or attorneys' and agent fees. The domestic recruitment, legal, and other costs associated with

obtaining the labor certification are business expenses necessary for or, in the case of legal fees, desired by, the employer to complete the labor certification application and labor market test. The employer's responsibility to pay these costs exists separate and apart from any benefit that may accrue to the foreign worker. Prohibiting the employer from passing these costs on to foreign workers allows the Department to protect the integrity of the process and protect the wages of the foreign worker from deterioration by unwarranted deduction. The Department will continue to permit employers, consistent with the Fair Labor Standards Act (FLSA), to make deductions from a worker's pay for the reasonable cost of furnishing housing and transportation, as well as worker expenses such as passport and visa fees (see fuller discussion below concerning transportation costs under the FLSA).

This section, pertaining to the receipt of payments by the employer from the employee or a third party, received many comments. Some of the commenters opposed the provision in its entirety, arguing it will make the program prohibitively expensive for employers. Other commenters were concerned the requirement would eliminate the current practice of having the employee pay for part of the recruiting and visa costs as an incentive for the workers not to leave the employer. Others supported this provision in its entirety, while still others agreed with the intent of the provision but found the language ambiguous. One specialty bar association not only supported the prohibition on cost-shifting for recruitment, but asked the Department to strengthen the prohibition language. However, this commenter was adamantly opposed to the prohibition against foreign workers paying the attorney's fees. The Department disagrees with the comments opposing this provision. We believe that these expenses are the costs of doing business and should be borne by the employer. The Department took all comments into consideration and modified the provision to clarify and strengthen the prohibition. The Final Rule applies the prohibition to attorneys and agents, not simply to employers. As rewritten, the provision eliminates reference to payments from ''any other party;'' it applies only to payments from the employees.

This section in the NPRM also would have prohibited the employer from receiving payments ''of any kind for any activity related to the labor certification'' process. The Department received a comment arguing that the phrase ''received payment * * * as an incentive or inducement to file'' is ambiguous. The Department took this comment into consideration and removed reference to incentive or inducement.

In addition, and based upon the comments received, the Department has revised the provision on cost-shifting for greater clarity. As mentioned above, the Department has eliminated the qualifying language regarding the incentive and inducement to filing, again to simplify for all employers engaging in recruitment activities what is prohibited. By simplifying the provision to prohibit employers who submit applications from seeking or receiving payment for any activity related to the recruitment of H–2B workers, the Department hopes to achieve consistent and enforceable compliance.

With regard to the application of the FLSA to H–2B workers' inbound subsistence and transportation costs, we note that a number of district courts have issued decisions on this question. See *De Leon-Granados* v. *Eller & Sons Trees Inc.,* 2008 WL 4531813 (N.D. Ga., Oct. 7, 2008); *Rosales* v. *Hispanic Employee Leasing Program,* 2008 WL 363479 (W.D. Mich. Feb. 11, 2008); *Rivera* v. *Brickman Group,* 2008 WL 81570 (E.D. Pa. Jan. 7, 2008); *Castellanos-Contreras* v. *Decatur Hotels, LLC,* 488 F. Supp. 2d 565 (E.D. La. 2007); *Recinos-Recinos* v. *Express Forestry Inc.,* 2006 WL 197030 (E.D. La. Jan. 24, 2006). These district courts have referenced the appellate court's decision in *Arriaga* v. *Florida Pacific Farms, L.L.C.,* 305 F.3d 1228 (11th Cir. 2002), which held that growers violated the minimum wage provisions of the FLSA by failing to reimburse farmworkers during their first workweek for travel expenses (and visa and immigration fees) paid by the workers employed by the growers under the H–2A program. Under the FLSA, pre-employment expenses incurred by workers that are properly business expenses of the employer and primarily for the benefit of the employer are considered ''kick-backs'' of wages to the employer and are treated as deductions from the employees' wages during the first workweek. 29 CFR 531.35. Such deductions must be reimbursed by the employer during the first workweek to the extent that they effectively result in workers' weekly wages being below the minimum wage. 29 CFR 531.36. Although the employer in the *Arriaga* case did not itself make direct deductions from the workers' wages, the Court held that the costs incurred by the workers amounted to ''de facto deductions'' that the workers absorbed, thereby driving the workers' wages below the statutory minimum. The Eleventh Circuit reasoned that the transportation and visa costs incurred by the workers were primarily for the benefit of the employer and necessary and incidental to the employment of the workers and stated that ''[t]ransportation charges are an inevitable and inescapable consequence of having H–2A foreign workers employed in the United States; these are costs which arise out of the employment of H–2A workers.'' Finally, the court held that the growers' practices violated the FLSA minimum wage provisions, even though the H–2A regulations provide that the transportation costs need not be repaid until the workers complete 50 percent of the contract work period. The Eleventh Circuit noted that the H–2A regulations require employers to comply with applicable federal laws, and in accepting the contract orders in this case, the ETA Regional Administrator informed the growers in writing that their obligation to pay the full FLSA minimum wage is not overridden by the H–2A regulations.

The Department believes that the better reading of the FLSA and the Department's own regulations is that relocation costs under the H–2A program are not primarily for the benefit of the employer, that relocation costs paid for by H–2A workers do not constitute kickbacks within the meaning of 29 CFR 531.35, and that reimbursement of workers for such costs in the first paycheck is not required by the FLSA.

The FLSA requires employers to pay their employees set minimum hourly wages. 29 U.S.C. 206(a). The FLSA allows employers to count as wages (and thus count toward the satisfaction of the minimum wage obligation) the reasonable cost of ''furnishing [an] employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees.'' 29 U.S.C. 203(m). The FLSA regulations provide that ''[t]he cost of furnishing 'facilities' found by the Administrator to be primarily for the benefit or convenience of the employer will not be recognized as reasonable [costs within the meaning of the statute] and may not therefore be included in computing wages.'' 29 CFR 531.3(d)(1). The FLSA regulations further provide examples of various items that the Department has deemed generally to be qualifying facilities within the meaning of 29 U.S.C. 203(m) (see also 29 CFR 531.32(a)), as well as examples of

various items that the Department has deemed generally not to be qualifying facilities (see 29 CFR 531.3(d)(2), 29 CFR 531.32(c)).

Separate from the question whether items or expenses furnished or paid for by the employer can be counted as wages paid to the employee, the FLSA regulations contain provisions governing the treatment under the FLSA of costs and expenses incurred by employees. The regulations specify that wages, whether paid in cash or in facilities, cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally, or ''free and clear.'' 29 CFR 531.35. Thus, ''[t]he wage requirements of the Act will not be met where the employee 'kicks-back' directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee. This is true whether the 'kick-back' is made in cash or in other than cash. For example, if the employer requires that the employee must provide tools of the trade that will be used in or are specifically required for the performance of the employer's particular work, there would be a violation of the Act in any workweek when the cost of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid him under the Act.'' *Id.* The regulations treat employer deductions from an employee's wages for costs incurred by the employer as though the deductions were a payment from the employee to the employer for the items furnished or services rendered by the employer, and applies the standards set forth in the ''kick-back'' provisions at 29 CFR 531.35 to those payments. Thus, ''[d]eductions for articles such as tools, miners' lamps, dynamite caps, and other items which do not constitute 'board, lodging, or other facilities' '' are illegal ''to the extent that they reduce the wages of the employee in any such workweek below the minimum required by the Act.'' 29 CFR 531.36(b).

In sum, where an employer has paid for a particular item or service, under certain circumstances it may, pursuant to 29 U.S.C. 203(m), count that payment as wages paid to the employee. On the other hand, when an employee has paid for such an item or service, an analysis under 29 CFR 531.35 is required to determine whether the payment constitutes a ''kick-back'' of wages to the employer that should be treated as a deduction from the employee's wages.

The *Arriaga* court seems to have assumed that all expenses necessarily fall into one of these two categories—that either they qualify as wages under 29 U.S.C. 203(m) or they constitute a ''kick-back'' under 29 CFR 531.35. See *Arriaga*, 305 F.3d at 1241–42 (stating that if a payment ''may not be counted as wages'' under 29 U.S.C. 203(m), then ''the employer therefore would be required to reimburse the expense up to the point the FLSA minimum wage provisions have been met'' under 29 CFR 531.35 and 29 CFR 531.36). That is incorrect. For example, if an employer were to give an employee a valuable item that was not ''customarily furnished'' to his or her employees, the employer would not be able to count the value of that item as wages under 29 U.S.C. 203(m) unless the employer ''customarily furnished'' the item to his or her employees. Nevertheless, since the employee paid nothing for that item, it clearly would not constitute a ''kick-back'' of wages to the employer that would have to be deducted from the employee's wages for purposes of determining whether the employer met its minimum wage obligations under 29 U.S.C. 206(a). Similarly, if a grocery employee bought a loaf of bread off the shelf at the grocery store where he or she worked as part of an arms-length commercial transaction, the payment made by the employee to the employer would not constitute a ''kick-back'' of wages to the employer, nor would the loaf of bread sold by the employer to the employee be able to be counted toward the employee's wages under 29 U.S.C. 203(m). Both parties would presumably benefit equally from such a transaction—it would neither be primarily for the benefit of the employer, nor would it be primarily for the benefit of the employee.

Expenses paid by an employer that are primarily for the employer's benefit cannot be counted toward wages under 29 U.S.C. 203(m). See 29 CFR 531.3(d). Similarly, expenses paid by an employee cannot constitute a ''kick-back'' unless they are for the employer's benefit. See 29 CFR 531.35. An analysis conducted under 29 U.S.C. 203(m) determining that a particular kind of expense is primarily for the benefit of the employer will thus generally carry through to establish that the same kind of expense is primarily for the benefit of the employer under 29 CFR 531.35. Each expense, however, must be analyzed separately in its proper context.

The question at issue here is whether payments made by H–2B employees for the cost of relocating to the United States, whether paid to a third party transportation provider or paid directly to the employer, constitutes a ''kick-back'' of wages within the meaning of 29 CFR 531.35. If the payment does constitute a ''kick-back,'' then the payment must, as the *Arriaga* court decided, be counted as a deduction from the employee's first week of wages under the FLSA for purposes of determining whether the employer's minimum wage obligations have been met.

The Department does not believe that an H–2B worker's payment of his or her own relocation expenses constitutes a ''kick-back'' to the H–2B employer within the meaning of 29 CFR 531.35. It is a necessary condition to be considered a ''kick-back'' that an employee-paid expense be primarily for the benefit of the employer. The Department need not decide for present purposes whether an employee-paid expense's status as primarily for the benefit of the employer is a sufficient condition for it to qualify as a ''kick-back,'' because the Department does not consider an H–2B employee's payment of his or her own relocation expenses to be primarily for the benefit of the H–2B employer.

Both as a general matter and in the specific context of guest worker programs, employee relocation costs are not typically considered to be ''primarily for the benefit'' of the employer. Rather, in the Department's view, an H–2B worker's inbound transportation costs either primarily benefit the employee, or equally benefit the employee and the employer. In either case, the FLSA and its implementing regulations do not require H–2B employers to pay the relocation costs of H–2B employees. *Arriaga* and the district courts that followed its reasoning in the H–2B context misconstrued the Department's regulations and are wrongly decided.

As an initial matter, any weighing of the relative balance of benefits derived by H–2B employers and employees from inbound transportation costs must take into account the fact that H–2B workers derive very substantial benefits from their relocation. Foreign workers seeking employment under the H–2B nonimmigrant visa program often travel great distances, far from family, friends, and home, to accept the offer of employment. Their travel not only allows them to earn money—typically far more money than they could have in their home country over a similar period of time—but also allows them to live and engage in non-work activities in the U.S. These twin benefits are so valuable to foreign workers that these workers have proven willing in many instances to pay recruiters thousands of dollars (a practice that the Department is now taking measures to curtail) just to gain access to the job opportunities, at times

going to great lengths to raise the necessary funds. The fact that H–2B workers travel such great distances and make such substantial sacrifices to obtain work in the United States indicates that the travel greatly benefits those employees.

Most significantly, however, the Department's regulations explicitly state that ''transportation furnished employees between their homes and work where the travel time does not constitute hours worked compensable under the Act and the transportation is not an incident of and necessary to the employment'' are qualifying ''facilities'' under 29 U.S.C. 203(m). 29 CFR 531.32(a). As qualifying facilities, such expenses cannot by definition be primarily for the benefit of the employer. 29 CFR 531.32(c). The wording of the regulation does not distinguish between commuting and relocation costs, and in the context of the H–2B program, inbound relocation costs fit well within the definition as they are between the employee's home country and the place of work.

The *Arriaga* court ruled that H–2A relocation expenses are primarily for the benefit of the employer in part because it believed that under 29 CFR 531.32, ''a consistent line'' is drawn ''between those costs arising from the employment itself and those that would arise in the ordinary course of life.'' 305 F.3d at 1242. The court held that relocation costs do not arise in the ordinary course of life, but rather arise from employment. *Id.* Commuting costs and relocation costs cannot be distinguished on those grounds, however. Both kinds of expenses are incurred by employees for the purpose of getting to a work site to work. Moreover, an employee would not rationally incur either kind of expense but for the existence of the job. Both the employer and the employee derive benefits from the employment relationship, and, absent unusual circumstances, an employee's relocation costs to start a new job cannot be said to be primarily for the benefit of the employer.

That is not to say that travel and relocation costs are never properly considered to be primarily for the benefit of an employer. The regulations state that travel costs will be considered to be primarily for the benefit of the employer when they are ''an incident of and necessary to the employment.'' 29 CFR 531.32(c). This might include, for example, a business trip, or an employer-imposed requirement that an employee relocate in order to retain his or her job. Relocation costs to start a new job will rarely satisfy this test, however.

In a literal sense it may be necessary to travel to a new job opportunity in order to perform the work, but that fact, without more, does not render the travel an ''incident'' of the employment. Inbound relocation costs are not, absent unusual circumstances, any more an ''incident of * * * employment'' than is commuting to a job each day. Indeed, inbound relocation costs are quite similar to commuting costs in many respects, which generally are not considered compensable. Cf. DOL Opinion Letter WH–538 (Aug. 5, 1994) (stating that travel time from home to work is ''ordinary home-to-work travel and is not compensable'' under the FLSA); *Vega ex rel. Trevino* v. *Gasper,* 36 F.3d 417 (5th Cir. 1994) (finding travel to and from work and home not compensable activity under Portal-to-Portal Act). In fact, there is no reason to believe that the drafters of 29 U.S.C. 203(m) and 206(a) ever intended for those provisions to indirectly require employers to pay for their employees' relocation and commuting expenses. To qualify as an ''incident of * * * employment'' under the Department's regulations, transportation costs must have a more direct and palpable connection to the job in question than merely serving to bring the employee to the work site.

Taking the *Arriaga* court's logic to its ultimate conclusion would potentially subject employers across the U.S. to a requirement to pay relocation expenses for all newly hired employees—or at least to pay relocation expenses for all newly hired foreign employees, since international relocation is perhaps less ''ordinary'' than intranational relocation. That simply cannot be correct. The language of 29 U.S.C. 203(m) and 206(a) and their implementing regulations provide a very thin reed on which to hang such a seismic shift in hiring practices, particularly so many years after those provisions have gone into effect. Nor does the fact that H–2B workers are temporary guest workers change the equation. Even assuming that H–2B workers derive somewhat less benefit from their jobs because they are only temporary, that fact alone would not render the worker's relocation expenses an ''incident'' of the temporary job. If it did, ski resorts, camp grounds, shore businesses, and hotels would all be legally required to pay relocation costs for their employees at the beginning of each season—again, a result that is very difficult to square with the language and purpose of 29 U.S.C. 203(m) and 29 CFR 531.35.

A stronger argument could be made, perhaps, that employers derive a greater-than-usual benefit from relocation costs when they hire foreign guest workers such as H–2B workers, because employers generally are not allowed to hire guest workers unless they have first attempted but failed to recruit U.S. workers. Thus, such employers have specifically stated a need to hire non-local workers. Given the substantially greater benefit that foreign guest workers generally derive from work opportunities in the United States than they do from employment opportunities in their home countries, however, the Department believes that this at most brings the balance of benefits between the employer and the worker into equipoise. Moreover, the employer's need for non-local workers does nothing to transform the relocation costs into an ''incident'' of the job opportunity in a way that would render the employee's payment of the relocation expenses a ''kick-back'' to the employer. If it did, courts would soon be called upon every time an employer hired an out-of-state worker to assess just how great the employer's need for the out-of-state employee was in light of local labor market conditions. Conversely, the courts would also have to inquire into the employee's circumstances, and whether the employee had reasonably comparable job prospects in the area from which the employee relocated. Again, the Department does not believe such a result is consistent with the text or the intent of the FLSA or the Department's implementing regulations.

It is true, of course, that H–2B employers derive some benefit from an H–2B worker's inbound travel. To be compensable under the FLSA, however, the question is not whether an employer receives some benefit from an item or paid-for cost, but rather whether they receive the primary benefit. Significantly, despite the fact that employers nearly always derive some benefit from the hiring of state-side workers as well, such workers' relocation costs generally have not been considered to be ''primarily for the benefit of the employer.'' That is so because the worker benefits from the travel either more than or just as much as the employer.

In sum, the Department believes that the costs of relocation to the site of the job opportunity generally is not an ''incident'' of an H–2B worker's employment within the meaning of 29 CFR 531.32, and is not primarily for the benefit of the H–2B employer. The Department states this as a definitive interpretation of its own regulations and expects that courts will defer to that interpretation.

8. Section 655.22(m) [(k) in Final Rule]—Bona Fide Inquiry

As proposed in the NPRM, the Final Rule at § 655.22(k) requires an employer that is a job contractor to attest that if it places its employees at the job sites of other employers, it has made a written bona fide inquiry into whether the other employer has displaced or intends to displace a similarly employed U.S. worker within the area of intended employment within the 120 days of the date of need. To comply with this attestation, the Department is requiring the employer to inquire in writing to and receive a written response from the employer where the relevant H–2B worker will be placed. This can be done by exchange of correspondence or attested to by the secondary employer in the contract for labor services with the employer petitioning to bring in H–2B workers. This proposed attestation at § 655.22(k) also requires the employer to attest that all worksites where the H–2B employee will work are listed on the *Application for Temporary Employment Certification.*

The Department received several comments on this secondary placement attestation provision. While some were in favor of the requirement, some employer associations expressed concern that making such an inquiry of their clients was unfair and unduly burdensome. The Department acknowledges that this attestation imposes an additional level of inquiry between job contractors and their clients where the contractor will be providing H–2B workers at a client site. The INA's mandate of the unavailability of persons capable of performing the job duties for which the H–2B workers are sought is at the heart of this requirement.

It is the H–2B worker's job activity, rather than the identity of the H–2B worker's employer, which is required to be measured against the availability of U.S. workers; the H–2B worker can be admitted only upon assurances of the unavailability of unemployed persons able to take the H–2B job opportunity. As a result, an H–2B worker performing duties at company X, for which company Y has hired him and pays him, may have an adverse effect not only on employees at the petitioning job contractor company employing him but also the company benefiting from his or her services. The limitations imposed by the Department—area of intended employment, occupation, and timing—provide parameters to reassure employers while at the same time enabling them to ensure full compliance with the mandates of the H–2B program.

One commenter agreed with this provision but did not believe a labor contractor should be held liable for the statements provided by those entities. The Department believes this commenter misinterpreted this section. The job contractor should make a bona fide inquiry and document the inquiry and response. If it later turns out that the employer who received the H–2B worker from the job contractor displaced a U.S. worker during the stated timeframe, proof of the employer's negative response to the job contractor's bona fide inquiry will relieve the job contractor of liability for that violation.

Another commenter requested that we strike this provision in its entirety because it does not allow for change in circumstances that would warrant displacing U.S. workers. The Department sees no reason why the U.S. worker would have to be displaced over the foreign worker and therefore, declines to eliminate this provision.

Finally, an industry association commented that H–2B workers employed by carnivals and circuses are constantly being placed on job sites of other employers as they travel the circuit and that this requirement is too difficult to comply with. It is difficult for the Department to discern, from the manner in which this comment was written, whether the H–2B workers are being paid by one petitioning employer throughout the itinerary or whether these H–2B workers are placed on the payroll of the fixed-site employer at each location. The Department has not made any changes to this section, as no compliance challenge was clearly communicated.

9. Section 655.22(o) [(m) in Final Rule]—Notice to Worker of Required Departure

Under the Final Rule, employers have a responsibility to inform foreign workers of their duty to leave the United States at the end of the authorized period of stay, and to pay for the return transportation of the H–2B worker if that worker is dismissed early. As stated in the NPRM, DHS will establish a new land-border exit pilot program for certain H–2B and other foreign workers to help ensure that departure follows the end of work authorization, regardless of whether it flows from a premature end or from the end of the authorized labor certification.

The Department received one comment on the duty to inform the worker of the obligation to depart from the country. This commenter opined that it is not the responsibility of employers to become unpaid immigration officers. The Department is not suggesting that it is placing any burden on employers to act as immigration officers. The Department has retained the requirement, while clarifying it to be consistent with DHS's regulations on this issue.

10. Section 655.22(p) [(n) in Final Rule]—Representation of Need

The Final Rule requires the employer to attest that it truly and accurately stated the number of workers needed, the dates of need, and the reasons underlying the temporary need in its labor certification request. The Department received two comments on this provision. One requested that we change the words ''truly and accurately'' to ''reasonable and good faith'' based on estimates from information available at the time of filing the certification. The Department has considered this change but declines to amend the regulatory language. The concern of the commenter of the need for flexibility is found in the provision in both the NPRM and this Final Rule regarding amendments (§ 655.34(c)(2)) of the start date of the certification. Any need for additional flexibility on the part of the Department must be balanced against the Department's need to ensure integrity in an attestation-based program; giving freedom to change its dates of need allows unscrupulous employers to submit applications not based on an actual need, thus circumventing the entire process in an attempt to obtain limited visas.

The second commenter expressed concern with the date of need requirement and requested the Department change several sections on which this attestation is predicated. One of the major concerns of this commenter was the potential need to amend start dates after certification if an employer must wait for visa numbers to become available. The Department has, however, retained the underlying provision for this attestation. While the Department permits amendment of the start date of the certification by the employer both prior to certification (§ 655.34(c)(2)) and after certification to certify a late adjudication (§ 655.34(c)(4)), the reconciliation of the start date becomes an issue for DHS adjudication. The Department notes that a regulatory provision allowing movement of the date of need after certification would be inconsistent with the DHS proposed rule, which would not permit the filing of a petition whose start date was inconsistent with the start date of the labor certification.

This commenter also proposed, in the alternative, that employers be allowed

to submit their I–129 labor certification applications to DHS with a note that they have submitted their request for an amendment to the Department and that the Department be required to adjudicate the request for amendment within five days. The Department considered the comment and has decided not to establish a deadline for the processing of amendment requests. We defer to DHS to determine what is appropriate for its adjudication of I–129 petitions which falls exclusively under its jurisdiction.

*L. Retention of Supporting Documentation*

The Final Rule contains a modified requirement that employers retain specified documentation outlined in the proposed regulations to demonstrate compliance with program requirements. The proposed retention period was for 5 years. This documentation must be provided in the event of an RFI, post-adjudication audit, WHD investigation or other similar activity. The Department received a few comments in response to this proposed requirement. One small business coalition expressed its support, while another organization expressed concern that a 5-year document retention requirement was too long, especially for small employers, or employers like circuses and carnivals that are mobile or have a mobile component. Another commenter requested the Department prepare and provide a list to H–2B employers in one place, in plain language—perhaps as part of broad stakeholder compliance assistance—the documentation that should be retained. In response to concerns about the length of time for records retention, the Department has reduced the requirement from 5 years to 3 years. The documentation required will support specific attestations by the employer under the program. We will provide additional guidance in the course of individual and broad-based technical assistance and educational outreach to the employer community, including on the OFLC Web site. We will consider the issuance of additional written guidance, as appropriate.

*M. Section 655.23(c)—Request for Further Information*

The Department proposed to issue a Request for Further Information (RFI) within 14 days of receiving the application, if needed, for the purpose of adjudicating the application for labor certification. All of those who commented on this provision requested that the timeframes be changed, but most also recommended an additional provision that would obligate the Department to process and respond to the information received through the RFI within a certain period of time. The Department agrees and shortened both the issuance and response time to 7 days. The Department also has added a provision that obligates the CO to issue a Final Determination within 7 business days of receiving the employer's response, or by 60 days before the date of need, whichever is greater.

*N. Section 655.24—Post-Adjudication Audits*

The Department proposed to use various selection criteria for identifying applications for audit review after the application has been adjudicated in an effort to maintain and enhance program integrity. The audits are meant to permit the Department to ensure compliance with the terms and conditions by an employer and to fulfill the Secretary's statutory mandate to certify applications only where unemployed U.S. workers capable of performing such services cannot be found. Failure by an employer to respond to the audit could lead to debarment from the program as could a finding by the Department that the employer has not been complying with the terms and conditions attested to in the application. The Department received many comments on this provision. They were equally divided between those that opposed post-adjudication audits and those that believed audits are an effective tool to enhance integrity. Those who opposed the post-adjudication audits did not make any alternative suggestions on how the Department could determine compliance with the program. Therefore, with no other alternatives available, the Department believes its initial analysis is correct and, therefore, has not made any substantive changes to this section, save for including the option for the CO to refer any findings that an employer violated the terms and conditions of the program with respect to eligible U.S. workers to the Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices, as suggested by one commenter.

*O. Section 655.30—Supervised Recruitment*

The Department proposed to require certain employers to engage in supervised pre-filing recruitment to ensure compliance with recruitment requirements. One comment was received on this provision. The commenter believes that the NPC will be unable to handle such a responsibility as effectively and as efficiently as did the local SWAs and that it will affect the integrity of the program. The Department respectfully disagrees with this commenter and has retained the provision as proposed. We believe that centralizing the process will provide uniformity and expertise that will enhance program integrity. Further, in the permanent labor certification program, supervised recruitment is conducted under Federal guidance and not SWA supervision.

*P. Section 655.31—Debarment*

The Department's NPRM proposed a mechanism allowing the Department to debar an employer/attorney/agent from the H–2B program for a period of up to 3 calendar years. Debarment from the program is a necessary and reasonable mechanism to enforce H–2B labor certification requirements and ensure compliance with the program's statutory requirements. Further, debarment and other enforcement mechanisms, *e.g.*, audits, are necessary and reasonable program compliance checks to balance the transition to an attestation-based filing system. The proposed rule would permit the Department to debar an employer, attorney, and/or agent for a period of up to 3 calendar years for misrepresenting a material fact or for making a fraudulent statement on an H–2B application, for a material or substantial failure to comply with the terms of the attestations, for failure to cooperate with the audit process or ordered supervised recruitment, or if the employer/attorney/agent has been found by a court of law, WHD, DHS, or the DOS to have committed fraud or willful misrepresentation involving any OFLC employment-based immigration program.

Upon further consideration, based in part upon the Department's recent efforts to modernize its H–2A labor certification regulations, the Department has decided to modify the debarment provision so that it more closely parallels the debarment provision for the H–2A regulation at 20 CFR 655.118, given the similarity of the H–2A and H–2B labor certification programs. While many of the grounds for debarment are substantially similar in the Final Rule as in the NPRM, the Final Rule contains additional safeguards for both workers and employers, which are explained in greater detail below.

1. Debarment Authority

An advocacy organization questioned the Department's authority to debar attorneys, agents, or employers from the H–2B program and asserted that a determination of a violation should only be made after notice of violation and an

opportunity for a hearing. The debarment of entities from participating in a government program is an inherent part of an agency's responsibility to maintain the integrity of that program. As the Second Circuit found in *Janik Paving & Construction, Inc.* v. *Brock,* 828 F.2d 84 (2d Cir. 1987), the Department possesses an inherent authority to refuse to provide a benefit or lift a restriction for an employer that has acted contrary to the welfare of U.S. workers. In assessing the Department's authority to debar violators, the court found that ''[t]he Secretary may * * * make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions * * * as [s]he may find necessary and proper in the public interest to prevent injustice of undue hardship or to avoid serious impairment of the conduct of Government business.'' *Id.* at 89.

In addition, although the Administrative Procedure Act provides that parties are entitled to appear before the agency with legal counsel, see 5 U.S.C. 555(b), this provision ''leaves intact the agencies' control over both lawyers and non-lawyers who practice before them,'' Attorney General's Manual on the APA (1947) at 65. The Department's debarment of attorneys and agents under the H–2B program is also consistent with the Department's longstanding practice of regulating attorneys and representatives who appear before the agency. See, *e.g., In re judicial inquiry re Miroslaw Kusmirek,* 2000–INA–116 (Sept. 18, 2002) (sanctioning a representative for providing forged documents to the Department of Labor).

In order to encourage compliance, the regulatory scheme for the H–2B program relies on attestations, audits, investigations and the remedial measure of debarment. Use of debarment as a mechanism to encourage compliance has been endorsed in the INA for a number of foreign labor certification and attestation programs. Ensuring the integrity of a statutory program enacted to protect U.S. workers is an important part of the Department's mission.

As part of the Department's inherent debarment authority, the Department may determine the particular procedures that may apply to the process. Accordingly, it is within the Department's authority to require the OFLC Administrator to issue a Notice of Intent to Debar no later than 2 years after the occurrence of the violation; offer the employer an opportunity to submit evidence in rebuttal; and if the rebuttal evidence is not timely filed or if the Administrator determines that the employer, attorney, or agent more likely than not meets one or more of the bases for debarment, issue a *Notice of Debarment* which may be subject to administrative appeal through the Department's Board of Alien Labor Certification Appeals (BALCA). Like the NPRM, the Final Rule provides that the *Notice of Debarment* shall be in writing, state the reason for the debarment finding and duration of debarment, and identify the appeal rights. Additionally, the Final Rule provides that the debarment will take effect on the start date identified in the *Notice of Debarment* unless the administrative appeal is properly filed within 30 days of the date of the Notice, thereby, staying the debarment pending the outcome of the appeal.

2. Grounds for Debarment

While a union and a state agency expressed their support for the debarment provisions, a law firm asserted that the debarment was an unduly strict sanction for minor violations of new procedures, the details of which are still not clear. We disagree with the commenter's characterization of violations warranting debarment as ''minor.'' The Department will not debar for ''minor'' violations. Rather most of the violations that will be the basis of potential debarment actions require a pattern or practice of acts that: (1) Are significantly injurious to the wages or benefits offered under the H–2B program or working conditions of a significant number of the employer's U.S. or H–2B workers; (2) reflect a significant failure to offer employment to each qualified domestic worker who applied for the job opportunity for which certification was being sought, except for lawful job-related reasons; (3) reflect a significant failure to comply with the employer's obligations to recruit U.S. workers; (4) reflect a significant failure to comply with the RFI or audit process; (5) reflect the employment of an H–2B worker outside the area of intended employment, or in an activity/activities not listed in the job order (other than an activity minor and incidental to the activity/activities listed in the job order), or after the period of employment specified in the job order and any approved extension; or (6) reflect a significant failure to comply with supervised recruitment. However, the Department recognizes that there are some acts which the Department would have no other available remedy to enforce would warrant debarment even without a pattern or practice. These acts are set forth separately under § 655.31(d)(2) through (5). These acts are: Fraud; the failure to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection or law enforcement function; the failure to comply with one or more sanctions or remedies imposed by the ESA, or with one or more decisions of the Secretary or court; and a single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected.

As to the details of the violation not being clear, we believe that the regulations are quite clear in setting forth the various grounds under which an employer, attorney or agent may be debarred. The Department understands the seriousness of debarment as a penalty and, in considering the comments received in response to the NPRM, believes that the resulting debarment provision upholds the integrity of the H–2B labor certification program and puts employers on notice of what violations are sufficiently serious that could result in potential debarment.

Additionally, the law firm requested a provision for training prior to being subject to sanctions such as debarment. While we do not think that it is necessary to address such training directly in the regulation, OFLC will issue further guidance, as appropriate, to orient stakeholders and staff to these new provisions.

3. Debarment of Attorneys and Agents

An international recruiting company requested that the Department apply a different standard for the debarment of attorneys and agents from the debarment of employers. In particular, the commenter asserted that the evidence to debar the agent or attorney would need to be legally significant since they do not share in the task of employment and stated that many agents accept information from the employer at face value and accept information as true. While attorneys and agents are not strictly liable for all actions of the employers they represent they do have responsibilities attendant to their participation in the program. Employers, agents, and attorneys each must remain aware of their particular responsibilities under the labor certification process and of the consequences of submitting false or misleading information to a Federal agency. Accordingly, the regulation provides that the Administrator may debar agents and attorneys not only for participating in, but also having knowledge of, or having reason to know of, the employer's substantial violation.

An advocacy organization objected to the omission of appeal rights for

attorneys and agents with respect to a *Notice of Debarment.* The commenter stressed that since attorneys and agents may themselves be subject to a *Notice of Debarment,* they ought to have recourse to correct a conceivably incurred or unfair decision. The commenter also noted that there may be certain instances where the interests of an employer and attorney or agent may diverge with respect to pursuing an appeal and the latter would be harmed due to the lack of appeal rights. The commenter also noted that the Department's permanent labor certification regulations provide not only the employer but any debarred person or entity the right to appeal the debarment decision. We agree with commenter's concern and have included references to attorneys' and agents' rebuttal and appeal rights, in additional to that of employers.

4. Use of Labor Contractors

An advocacy organization expressed a concern that employers would manipulate their legal identities resulting in abuses that would not be cured by debarment. In particular, the commenter set forth a scenario in which a company would retain a labor contractor or temporary agency to serve as the ''employer'' for a group of foreign workers at the company's work site. The commenter was concerned that the company would take advantage of a labor contractor's false claim that no domestic workers could be found, yet only the labor contractor would be debarred as the ''employer,'' thus allowing the company to hire another labor contractor to repeat the same abuses.

The commenter seems to presume all labor contractors would commit violations of the program, which is a generalization that unfairly portrays law abiding labor contractors in a negative light. Nonetheless, this is a situation that would be of concern to the Department and, if appropriate, we would pursue administrative means to ascertain the veracity of applications and information submitted to the Department.

5. Review of Debarment Determinations

The Department did not receive comments about the procedures for the review of the Administrator, OFLC's debarment determinations. However, to ensure consistency across programs, the Department has included in the Final Rule procedures, identical to those set forth in the Department's H–2A Final Rule, for hearings before an administrative law judge and review of the administrative law judge's decision by the Administrative Review Board. Under the Final Rule, a debarred party may request a hearing which would be governed by the procedures in 29 CFR part 18, and administrative law judge decisions would not be required to be issued within a set period of time. We believe that this process provides a period of time that is both sufficient for thorough consideration of the grounds for debarment and expedient enough so as to allow the Department to debar bad actors before they can cause any additional harm while also minimizing the period of uncertainty for employers in the case of a successful appeal.

*Q. Section 655.32—Labor Certification Determinations*

The proposed language delineated the criteria by which the Administrator of OFLC will certify or deny applications. The commenters, though citing this particular section of the NPRM, actually commented on the attestation-based process in general. Their comments were incorporated into that discussion above.

*R. Section 655.33—Appeals to the BALCA*

The Department's and DHS's NPRMs proposed a new model for the adjudication of H–2B applications. Under current procedures, the Department does not provide for any administrative review of decisions either denying H–2B labor certification applications or rendering a non-determination. Currently, the Department's decisions are advisory to DHS and employers whose applications are denied or issued a non-determination by the Department may submit countervailing evidence to DHS and have access to administrative review under DHS procedures. Under the DHS NPRM, the countervailing evidence process is eliminated and employers seeking to file H–2B visa petitions will be required to present an approved labor certification from DOL. Since DOL decisions denying H–2B labor certification will no longer be subject to additional review outside of the Department, we concluded that it would be appropriate to provide an employer whose labor certification application is denied an opportunity to seek review in the Department. The Department's NPRM included such a procedure providing for administrative review before the BALCA.

The Department received a number of comments on this portion of the NPRM, the majority of which expressed dissatisfaction with the proposal. We have carefully reviewed these comments and made several changes in response. Several commenters expressed satisfaction with the current appeal process and requested that it not be changed. To the extent these comments related to concerns about the length of that process, that question is discussed below. To the extent the commenters expressed a preference for the retention of the current practice in which countervailing evidence can be submitted to DHS when an H–2B labor certification application is denied, similar comments were submitted to DHS in response to its NPRM and DHS made no change in its Final Rule. We defer to and adopt DHS's response on this issue. Likewise, the concern expressed by one commenter that the time spent utilizing the Department's appeals procedures will delay employers getting into the queue at DHS for the limited number of available H–2B visas, is a matter that is addressed by DHS in their Final Rule.

With regard to matters directly related to the Department's proposal, a number of commenters objected to the provision that precluded the submission of new evidence to the BALCA. We believe these commenters do not recognize the totality of the proposal. The NPRM provides that before a CO can deny an H–2B application, the CO must issue an RFI that apprises the employer of the grounds for the proposed denial and provides an opportunity to submit additional information. The Department does not see any reason to provide another opportunity to submit necessary information. In addition, providing such an opportunity would inevitably delay issuance of final decisions from the BALCA. Concerns about delays at the BALCA were expressed by a number of commenters even in the absence of any authorization for the submission of new evidence.

Several commenters expressed concern that the appeal process before the BALCA would take too long. One noted specifically that no time limit was contained for the BALCA to issue its docketing statement and a briefing schedule. It was also pointed out that the NPRM provided merely that the BALCA ''should'' notify the employer of its decision within 20 days of the filing of the CO's brief. In response to comments reflecting concerns about the timeliness of the appeal process, the Final Rule reflects significantly shorter time frames, with the BALCA decision due no later than 15 business days after the request for review is filed.

One commenter suggested the possibility of allowing worker representatives to participate in the administrative appeal process. We have rejected that suggestion. Generally, the

Department's labor certification procedures do not involve participation by third parties and we do not believe that their involvement would enhance the process given the nature of the labor certification determination.

*S. Section 655.34(c)—Amendments*

The Department received several comments on the provision requiring the amendment of labor certifications if the start dates change and/or the number of workers change. All commenters opposed this change. One commenter admitted that employers set their start date based on the availability of visa numbers. Other commenters claimed that this provision makes it impracticable to adjust to market fluctuations during the season. The Department appreciates the candid comments about the difficulties this new requirement will create. However, the Department's experience is that many times dates of need or number of workers needed are changed to such a degree that the recruitment previously done is stale by the time USCIS receives the application. Changes to start dates, especially as the practice has become more common, also raise a concern that U.S. workers who might indeed be available for work on the new start date were not given the chance to apply originally. Therefore, this requirement represents a reasonable and logical solution. The only changes made to the section were for clarification purposes.

*T. Section 655.35—Required Departure*

In consultation with DHS, the Department proposed to include, as part of the employer's obligations, the requirement that employers provide notice to the H–2B workers of their required departure at the end of their authorized stay or separation from employment, whichever occurs first. This section was designed in anticipation of DHS establishing a registration of departure program. The provision requires employers to inform their H–2B workers of their obligation to register their departure at the port of exit. The Department received one comment suggesting that we eliminate this provision because it is unworkable due to the requirement for specific entry and exit points, which is inevitably a guarantee for violations occurring. This commenter also suggested we work with DHS instead. The Department respectfully declines to eliminate this language. The entry-exit ports and requirements continue to be matters of immigration under DHS's jurisdiction; this language simply makes it an employer's obligation to inform foreign workers of the workers' responsibility. The Department did consult with DHS on this language to establish this employer obligation and lay the appropriate groundwork as DHS continues to build their next-generation entry-exit system.

*U. Delegation of Enforcement Authority*

As previously discussed, the INA provides the Department no direct authority to enforce any conditions concerning the employment of H–2B workers, including the prevailing wage attestation. DHS possesses that authority pursuant to secs. 103 and 214(a) and (c) of the INA. 8 U.S.C. 1103 and 8 U.S.C. 1184(c)(14)(A). DHS may also delegate its authority to the Department under secs. 103(a)(6) and 214(c)(14)(B) of the INA. 8 U.S.C. 1103(a)(6) and 8 U.S.C. 1184(c)(14)(B). DHS has chosen to delegate its enforcement authority to DOL, which provides the basis for the new enforcement provisions of this subpart. The delegation will not take effect until this rule becomes effective.

*V. Section 655.50(c)—Availability of Records in the Enforcement Process*

Language has been added to § 655.50(c) to describe the employer's responsibility to make records available when those records are maintained in a central office.

*W. Section 655.60—Compliance With Application Attestations*

The NPRM proposed a WHD enforcement program addressing H–2B employers' compliance with attestations made as a condition of securing authorization to employ H–2B workers. The proposed enforcement program also covered statements made to DHS as part of the petition for an H–2B worker on the DHS Form I–129, Petition for a Nonimmigrant Worker. Compliance with attestations and the DHS petition are designed to protect U.S. workers and would be reviewed in WHD enforcement actions. This Final Rule adopts this proposal.

A trade union and U.S. Senator commented that the proposal did not include a mechanism for accepting complaints of potential violations. The Department intends to accept complaints, as it does under other statutes it administers such as the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.,* which does not have a specific regulatory mechanism for the acceptance of complaints. Thus, the Department has not added a specific regulatory procedure here.

Another trade union commented that the Department should adopt the definition of ''employ'' found in the FLSA, which defines the term to include ''suffer or permit to work.'' In fact, the proposed regulations included such a definition. However, the terms ''employer'' and ''employee'' were defined in terms of the common law test of employment which does not include ''suffer or permit to work.'' Since the two concepts are different and the use of the ''suffer or permit'' test is precluded by the U.S. Supreme Court opinion in *Nationwide Mutual Ins.* v. *Darden,* 503 U.S. 318, 322–323 (1992), the reference to ''suffer or permit to work'' has been removed.

*X. Section 655.65—Remedies for Violations of H–2B Attestations*

1. Section 655.65(a) and (b)—Assessment of Civil Money Penalties

Under the proposed rule, the WHD would assess civil monetary penalties in an amount not to exceed $10,000 per violation for a substantial failure to meet conditions of the H–2B labor condition application or of the DHS Form I–129, Petition for a Nonimmigrant Worker for an H–2B worker; or for a willful misrepresentation of a material fact on the DOL application or DHS petition; or a failure to cooperate with a Department of Labor audit or investigation. No comment addressed this provision and it is adopted in the Final Rule, with one change—in accordance with the statutory provisions, the Final Rule clearly reflects that the WHD Administrator may access civil money penalties when appropriate.

2. Section 655.65(i)—Reinstatement of Illegally Displaced U.S. Workers

Under the NPRM the WHD would seek reinstatement of similarly employed U.S. workers who were illegally laid off by the employer in the area of intended employment. Such unlawful terminations are prohibited if they occur less than 120 days before the date of requested need for the H–2B workers or during the entire period of employment of the H–2B workers. No comments addressed this proposal and it is adopted in the Final Rule.

3. Section 655.65(i)—Other Appropriate Remedies

WHD may seek remedies under other laws that may be applicable to the work situation including, but not limited to, remedies available under the FLSA (29 U.S.C. 201 *et seq.*), the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1801 *et seq.*), and the McNamara-O'Hara Service Contract Act (41 U.S.C. 351 *et seq.*). WHD also may seek other administrative remedies for violations as it determines to be appropriate.

The Department sought public comments on whether back wages can be assessed under the H–2B program when an employer fails to pay the prevailing wage rate. The most extensive comments received were from a U.S. Senator asserting that the lack of back pay as a remedy is a ''weakness of the Department's enforcement proposal'' and that back pay is ''an essential make-whole remedy for both H–2B program participants and American workers * * * [and] would provide a key incentive for otherwise vulnerable workers to come forward and protect their rights.'' The Senator also stated that ''[t]here is ample authority establishing that similarly broad grants of remedial authority are sufficient to authorize an award of back [pay], even when this remedy is not specifically enumerated.''

The Department has carefully considered whether Congress has provided authority to assess back wages under the H–2B provisions. The Department concludes that the H–2B statutory provisions provide the Secretary with the authority to seek back wages for failure to pay the required wage even though the statute does not specifically list this remedy. The INA broadly authorizes DHS to, ''in addition to any other remedy authorized by law, impose such administrative remedies (including civil monetary penalties * * *) as the Secretary of Homeland Security determines to be appropriate[.]'' 8 U.S.C. 1184(c)(14)(i). As noted above, that authority has been delegated to the Department of Labor. Awarding back pay is unquestionably the most appropriate remedy for failure to pay the required wage. It is also consistent with the statutory grant of authority and will further the purposes of the H–2B program because it will reduce employers' incentives to bypass U.S. workers in order to hire and exploit H–2B foreign workers, and guard against depressing U.S. workers' wage rates.

A number of courts have concluded that, under similarly broad grants of remedial authority, the Secretary may establish back pay as an appropriate sanction even in the absence of explicit statutory authority. See, *e.g.*, *Commonwealth of Kentucky Dept. of Human Resources* v. *Donovan*, 704 F.2d 288, 294–96 (6th Cir. 1983) (ruling that the Secretary of Labor had authority to award back pay under Comprehensive Employment and Training Act (CETA) both prior to the 1978 statutory and regulatory amendments and pursuant to the 1978 amendments); *City of Philadelphia* v. *U.S. Dept. of Labor*, 723 F.2d 330, 332 (3d Cir. 1983); *United States* v. *Duquesne Light Co.*, 423 F. Supp. 507, 509 (W.D. Pa. 1976) (in government contracting case, back pay appropriate under E.O. 11246).

The preamble to the NPRM, 73 FR 29946, noted that the H–1B provisions of the INA, unlike the H–2B provisions, contain a separate provision requiring that the Secretary assess back wages in cases where an employer has failed to pay the LCA-specified wages. 8 U.S.C. 1182(n)(2)(D) (''If the Secretary finds, after notice and opportunity for a hearing, that an employer has not paid wages at the wage level specified under the [LCA] * * * the Secretary shall order the employer to provide for payment of such amounts of back pay as may be required to comply with the [H–1B] requirements * * * whether or not [other penalties have] been imposed.''). The H–1B back pay provision is, however, different from either programs' general, broad grant of remedial authority by being mandatory and by imposing no standard for the severity of wage violations (*e.g.*, willfulness or ''substantial violation'') for the collection of back wages. Therefore, the failure to include the mandate in H–2B simply means that the Secretary is not required to seek back pay in cases where the employer has failed to pay the LCA-specified wages; it does not bear on the Secretary's discretion to seek back pay in such cases. The Department concludes that the statutory language of the H–2B program provides the Secretary with the discretionary authority to seek back pay, provided there is a finding of a ''substantial violation'' or willfulness, in cases where the employer has failed to pay the LCA-specified wages. See 8 U.S.C. 1184(c)(14)(A)(i). The Department has modified the Final Rule accordingly.

*Y. Comments Beyond the Scope*

In addition to those discussed above, the Department received numerous comments that were beyond the scope of or not directly relevant to the proposed regulation. We did not respond to these comments, but find it appropriate to note them. They included: Calls for the Department to work with Congress to extend the Save Our Small and Seasonal Business Act returning workers provision; calls for the Congress to raise the H–2B 66,000 annual visa cap, or to allocate visa numbers more equitably across States; calls for the government to ''recapture'' H–2B visa numbers that expire the same year they are issued so they can be used for different workers; calls for the Congress to increase funding for all Federal agencies administering the H–2B visa program, and the SWAs, either through appropriations, or applications or fraud preventions fees; requests that DHS establish a special fraud investigative unit for certain visa related crimes and offenses; concerns about the requirement that workers use DHS's designated entry-exit system, and about the burdens and policies behind such a system; a request that foreign workers be given a two-month grace period between employers when the worker needs an extension but the workers' visas terminate before the beginning of their next employment; a request that employers have the authority to activate or deactivate the H–2B visa like a credit card to allow immediate action and loss of status if the worker fails to comply with the terms of the H–2B contract; calls for the government to require that H–2B workers (over whom the Department has no jurisdiction save for the areas covered in this Final Rule) purchase travel insurance or prohibit H–2B workers from identifying themselves as ''self-employed'' on their federal tax forms, or to eliminate the requirement that H–2B workers pay Social Security or Medicare; opinions that the United States has sufficient foreign workers to meet the needs of U.S. employers, especially at a time when the economy is slowing down and many U.S. workers are unemployed; calls for U.S. employers to provide higher wages and better working conditions; and a call for H–2B workers to be permitted representation by Federally-funded legal services corporations, and that resources for such counsel be increased.

## III. Administrative Information

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

Under Executive Order (E.O.) 12866, the Department must determine whether a regulatory action is ''significant'' and therefore, subject to the requirements of the E.O. and subject to review by the Office of Management and Budget (OMB). Section 3(f) of the E.O. defines a ''significant regulatory action'' as an action that is likely to result in a rule that: (1) Has an annual effect on the economy of $100 million or more or adversely and materially affects a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as ''economically significant''); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues

arising out of legal mandates, the President's priorities, or the principles set forth in the E.O.

The Department determined that this regulation is a ''significant regulatory action'' under sec. 3(f)(4). This Final Rule implements a significant policy related to the President's policies on immigration. However, the Department determined that this rule is not an ''economically significant'' rule under E.O. 12866 because it will not have an annual effect on the economy of $100 million or more.

Analysis Considerations

The direct incremental costs employers will incur because of this Final Rule, above and beyond the current costs required by the program as it is currently implemented, are not economically significant. The total annual cost associated with this Final Rule is approximately $1,872,769 per year or $166 per employer. The only additional costs on employers resulting from this Final Rule are those involved in (1) the placement of a Sunday advertisement, which replaces one of the former daily advertisement and the additional paperwork costs; (2) the new paperwork and retention requirements; and (3) contacting laid-off workers to notify them of a job opportunity.[6]

Cost of the Sunday Advertisement

The cost range for advertising and recruitment is taken from a recent (October 2008) sample of newspapers in various urban and rural U.S. cities, and reflects approximate costs for placing one 10-line advertisement in those newspapers. The cost of advertising in a Sunday paper instead of during the week is approximately $234, which represents an increase of approximately $31.16 over the weekday advertisement.[7] The additional total cost for the 11,267 employers utilizing the H–2B program of one Sunday ad would average approximately $351,080 assuming that such ads would not have been placed by the business as part of its normal practices to recruit U.S. workers.[8]

Cost of Paperwork and Record Retention Requirements

The paperwork and record retention costs are minimal, as records will require a burden of approximately 1.35 hours per year per application. Based on the median hourly wage rate for a Human Resources Manager ($40.47), as published by the Department's Occupational Information Network, O*Net OnLine, and increased by a factor of 1.42 to account for employee benefits and other compensation, a total cumulative burden of 15,210 hours will result in a total cost of $874,118, or $77.58 per employer.

Cost To Notify Laid-Off Workers of Job Opportunity

A final cost to employers for implementing the requirements of this Final Rule is the cost associated with notifying laid-off workers of a job opportunity. The Department estimates that the total cost to meet this requirement is $647,571 or $57.48 per employer. To make this cost determination, the Department estimated it would take an employer's Human Resources Manager approximately 3 minutes to notify each laid-off worker. The Department does not have data to determine how many laid-off workers an employer would be required to notify. Therefore, the Department projected this number based on the total number of employees requested on the applications. Based on PY 2006 data, employers requested visas for 247,287 foreign workers, for an average of 22 employees per employer. We then multiplied this number by 3 minutes (the time estimate to notify each laid-off worker) to determine that it will take each employer approximately one hour to meet this requirement. Thus, the cost per employer is the hourly salary for the Human Resource Manager to make the calls or $57.47.

Benefits

We also project that employers will experience significant time-savings as a result of the reengineered process. The Department estimates the average time-savings to employers will be at least 28 days from the current process, based on the current average H–2B application processing time of 73 days in the fiscal year (FY) 2007 (October 1, 2006–September 30, 2007). Although the Department cannot estimate the cost savings as a result of this time saved, it believes that employers will experience a variety of economic benefits, including benefits from predictability of workforce size and availability regardless of geographic area, as a result of reengineering the application process.

The Department received seven comments related to the cost of this rulemaking. One comment was directed at the cost to small businesses and has been addressed in Section B of this section of the preamble below. The remaining six comments were related to the costs to the SWAs, which is not a cost calculated in the total cost of this Final Rule because they are considered transfer costs under OMB Circular A–4. Therefore, the Department has addressed those comments in Section C of this section of the preamble. The Department notes, however, that based on the comments, it reduced the number of required advertisements from three in the preamble to two in this Final Rule, which is reflected in the cost analysis above.

*B. Regulatory Flexibility Analysis/ SBREFA*

The Regulatory Flexibility Act (RFA) at 5 U.S.C. 603 requires agencies to prepare a regulatory flexibility analysis to determine whether a regulation will have a significant economic impact on a substantial number of small entities. Section 605 of the RFA allows an agency to certify a rule in lieu of preparing an analysis if the regulation is not expected to have a significant economic impact on a substantial number of small entities. A significant economic impact is defined as eliminating more than 10 percent of the businesses' profits; exceeding 1 percent of the gross revenue of the entities in a particular sector; or exceeding 5 percent of the labor costs of the entities in the sector. Further under the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801 (SBREFA), an agency is required to produce compliance guidance for small entities if the rule has a significant economic impact. Although the RFA and the SBREFA analyses were included as separate preamble sections in the proposed rule, the Department has included them in one preamble section in this Final Rule to avoid unnecessary duplication. The Department has certified that this Final Rule does not have a significant economic impact on a substantial number of small entities.

1. Definition of a Small Entity

A small entity is one that is ''independently owned and operated and which is not dominant in its field of operation.'' The definition of small business varies from industry to

[6] The Department notes that this cost is not new to the H–2B program because it has been required in program guidance. However, because it is new to the regulation, we have included it in this analysis.

[7] The Department based this average on 10 locations with the highest number of H–2B applications, including the following: Houston, Texas; Orlando, Florida; Vail, Colorado; Orange County, California; Cape Cod, Massachusetts; Detroit, Michigan; Baton Rouge, Louisiana; Houma, Louisiana; Columbus, Ohio; and Washington, DC.

[8] The Department notes that this cost is based on the highest costs in each location. Fees are likely to be lower given that many newspapers offer lower rates for consecutive ads, for placing two ads in the same week, or for purchasing a Sunday and weekday ad.

industry to the extent necessary to properly reflect industry size differences. An agency must either use the SBA definition for a small entity, or, establish an alternative definition. Given that this rulemaking crosses industry sectors, the Department has adopted the SBA size standards defined in 13 CFR 121.201. The SBA utilizes annual revenue in some industries, while utilizing number of employees in others to determine whether or not a business is considered a small business. Historically however, the Department has not collected information about an employer's industry classification, annual revenues, or number of employees currently on payroll in the H–2B program. Therefore, the Department cannot accurately and comprehensively categorize each applicant-employer for the purpose of conducting the RFA analysis by industry and size standard. In lieu of the industry and size standard analysis, the Department based the estimated costs of the reformed H–2B process assuming all employers-applicants were small entities.

2. Factual Basis for Certification

The factual basis for such a certification is that this Final Rule does not affect a substantial number of small entities and there will not be a significant economic impact on them. The Department receives more than 10,000 applications a year under this program. In FY 2006 (October 1, 2005–September 30, 2006), ETA received from SWAs 11,267 applications from employers seeking temporary labor certification under the H–2B program. As mentioned earlier, the Department does not collect information regarding the numbers of small entities participating in the H–2B program. The Department believes that this rule may potentially affect as many as 11,267 employers participating in this program, assuming that each employer only has one application.

Although there may be a substantial number of small entities impacted by this Final Rule, the Department has determined that this rule will not have a significant economic impact on those small businesses that utilize the program. The RFA and the SBREFA, which amended the RFA, require that an agency promulgating regulations segment and analyze industrial sectors into several appropriate size categories for the industry being regulated. Even though the foreign labor certification programs are open to all industries, the Department does not have sufficient data to analyze the universe of H–2B applicants by industry sector. However, the Department was able to analyze the PY 2006 data to determine that landscape occupations [9] accounted for approximately 31 percent of all the applications filed. According to SBA guidelines for the landscape industry, all employers with annual receipts at or below $6.5 million are considered small businesses. The cost of this rule for those employers at this threshold would be approximately .003 percent of their annual revenues; even for employers with annual receipts of only $500,000, the cost would represent only .036 percent of revenues.[10] The Department also recognizes that there are potentially very small business that might be affected. Therefore, for purposes of comparing costs, this rule would cost small entities that had gross annual receipts of $120,000 and profits of $12,000 approximately .15 percent of their revenues, which would not be significant.

The Department believes that the costs incurred by employers under this Final Rule will not be substantially different from those incurred under the current application filing process. Employers seeking to hire foreign workers on a temporary basis under the H–2B program must continue to establish to the Secretary's satisfaction that their recruitment attempts have not yielded enough qualified and available U.S. workers. Similar to the current process, employers under this H–2B process will file a standardized application but will retain recruitment documentation, a recruitment report, and any supporting evidence or documentation justifying the temporary need for the services or labor to be performed. To estimate the cost of this reformed H–2B process on employers, the Department calculated each employer will pay an additional $31.16 to meet the advertising requirements for a job opportunity, and will spend an additional 1.35 hours staff time preparing the standardized application, narrative statement of temporary need, final recruitment report, and retaining all other required documentation (*e.g.*, newspaper ads, business necessity) for audit purposes or $81.57 per employer. The Department also estimated that it will take an employer approximately one hour to notify laid-off workers of a job opportunity, or $66.46.

Using the RFA standard to determine whether a rule will have a substantial impact on a significant number of small businesses, the Department determined that this Final Rule will not eliminate more than 10 percent of the businesses' profits; exceed 1 percent of the gross revenue of the entities in a particular sector; or exceed 5 percent of the labor costs of the entities in the sector. The total cost per employer is approximately $179, which represents .15 percent of the gross receipts and profits of a small entity with $120,000 in revenues and $12,000 profits. Therefore, this rule will not have a significant impact on a substantial number of small businesses.

The Department received one comment on this section, which generally stated that the rule would increase the cost to employers, especially given the changes to advertising. Although this statement is partly true given that the cost of the rule increased by approximately $179, in light of the other non-quantifiable benefits, the Final Rule will likely represent a cost-savings to the employer. Therefore, for the reasons stated, the Department believes that total costs for any small entities affected by this program will be reduced or stay the same as the costs for participating in the current program. Even assuming that all entities who file H–2B labor certification applications qualify as small businesses, there will be no net negative economic effect.

*C. Unfunded Mandates Reform Act of 1995*

Section 202 of the Unfunded Mandates Reform Act (UMRA) of 1995 (2 U.S.C. 1501 *et seq.*) directs agencies to assess the effects of a Federal regulatory action on State, local, and tribal governments, and the private sector to determine whether the regulatory action imposes a Federal mandate. A Federal mandate is defined in the Act at 2 U.S.C. 658(5)–(7) to include any provision in a regulation that imposes an enforceable duty upon State, local, or tribal governments, or imposes a duty upon the private sector which is not voluntary. A decision by a private entity to obtain an H–2B worker is purely voluntary and is, therefore,

[9] The Department notes that this was the only occupation that could be paralleled with the industry classifications required by the SBA and described in 13 CFR 121.201. The landscape industry includes grounds keeping, lawn services, landscaping, tree planting, tree trimming, and tree surgeons. However, the Department does not require employers to list a North American Industry Classification System (NAICS) code for each employment position under the H–2B program, and therefore, the data calculated for this example is not as accurate as it would be with NAICS coding. For instance, some landscaping duties require bricklaying, which we note has been used as a separate employment category on some of the applications. Without the coding it is not possible to categorize occupations accurately. Therefore, the Department notes that we used this industry merely to provide an example of how this rule could affect a category of employers.

[10] The cost of the rule ($166) divided by the projected annual receipts of the business.

excluded from any reporting requirement under the Act.

The Department received six comments on this section from SWAs related to the increase in cost and workload and/or the lack of funding to support the new H–2B processing requirements. One commenter generally noted that its jurisdiction was neither financially nor functionally prepared to take on this added workload. Three States specifically stated that the funds provided under the Wagner-Peyser Act were insufficient to carry out their H–2B responsibilities prior to the changes in this rule, and the new eligibility verification requirements increased their funding challenges. Three States specifically related the lack of resources to the additional cost of storing and processing the I–9 documents related to the eligibility verification requirements.

The Department disagrees that this Final Rule imposes an unfunded mandate. As noted in the proposed rule, the Department is not insensitive to the resource and time constraints facing SWAs in their administration of H–2B activities and the difficulties inherent in making informed referrals on a population of workers that may be itinerant and difficult to contact. 73 FR 29950, May 28, 2008. However, we do not believe that this requirement will result in a significant workload increase or administrative burden. The Department points out that although there may be some new requirements for SWAs, there are also many requirements for SWAs that have been eliminated in this Final Rule given the reengineered approach. The Department believes reduced burden from the old requirements more than offsets any additional burden finalized here. The SWAs will experience a direct impact on their foreign labor certification activities in the elimination of certain H–2B activities under this Final Rule. These eliminated activities are currently funded by the Department under grants provided under the Wagner-Peyser Act, 29 U.S.C. 49 *et seq.* In addition, other tools will be available to the SWAs to make this requirement relatively easy to implement, such as the E-Verify system. As a result, the net effect of this Final Rule will likely be to ensure the amounts of such grants available to each State correspond or even increase relative to its workload under the H–2B program in the receipt, processing and monitoring of each application.

One State commented that the new eligibility verification requirements could lead to discriminatory practices subject to legal challenge, which in this commenter's opinion, the legal costs associated with any defense also represented an unfunded mandate. The Department believes it is premature to presume that the States will have to bear a significant cost to defend against any potential litigation associated with the implementation of this Final Rule, and which is typically considered part of a grantee's programmatic responsibility, should it occur.

Therefore, for the reasons stated above, the Department finds that this Final Rule does not impose an unfunded mandate.

*D. Executive Order 13132—Federalism*

Executive Order 13132 addresses the Federalism impact of an agency's regulations on the States' authority. Under E.O. 13132, Federal agencies are required to consult with States prior to and during the implementation of national policies that have a direct effect on the States, the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. Further, an agency is permitted to limit a State's discretion when it has statutory authority and the regulation is a national activity that addresses a problem of national significance.

The Department received one comment on this section. This commenter stated that the Department's reversal of a long-standing position on U.S. worker self-attestation creates a Federalism impact. According to this commenter, TEGL 11–07, Change 1, mandates that SWAs perform pre-employment eligibility verifications on every U.S. worker that requests a referral to an H–2A job order. This commenter requests that the Department prepare a summary impact statement and acknowledge that many States currently have attestation-based systems for U.S. worker access to public labor exchange services.

The Department disagrees with this commenter's assessment of a Federalism impact and therefore, the need for a summary impact statement. In this case there is no direct effect on the States because the States are not in the best position to address the needs to re-engineer a Federal program to relieve the backlog that has occurred due to inadequate staffing, funding, or other issues of concern. The issues addressed by the regulations are of national concern to ensure an effective program that regulates temporary alien workers and protects U.S. workers.

As noted elsewhere in this preamble, the Department attempted to reform this program in 2005. To meet the demands of the considerable workload increases for both the Department and the SWAs and limited appropriations, the Department determined that regulatory changes were still necessary. These changes are consistent with the Department's review, program experience, and years of stakeholder feedback on longstanding concerns about the integrity of the prior program. Therefore, as a program of national scope, the Department is implementing requirements that apply uniformly to all States.

Even if there were an argument that the Department should defer to the States on the eligibility verification requirements, the Department is authorized by the INA to implement Federal regulations to ensure consistency across States on immigration matters. Therefore, rather than having separate eligibility verification processes that vary from State to State, the Department is exercising its right under the INA to impose consistent requirements for all participants across the H–2B program. In addition, given that the H–2B program is an immigration-related program, it also is a program of national security and therefore, of national significance with Federal oversight and uniformity. The verification requirement is designed to strengthen the integrity of the temporary labor certification process, afford employers a legal pool of applicants, protect U.S. workers, and improve confidence in and use of the H–2B program.

Further, the relationship the States have with this program and the Federal Government is through grants from the Department to the States for the sole purpose of maintaining consistency across States. As a voluntary Federal program, the Department may change the direction from time to time as dictated by the changes to immigration-related concerns, but at the same time are consistent with the underlying legislation.

Therefore, for the reasons stated, the Department has determined that this rule does not have sufficient Federalism implications to warrant the preparation of a summary impact statement.

*E. Executive Order 13175—Indian Tribal Governments*

Executive Order 13175 requires Federal agencies to develop policies in consultation with tribal officials when those policies have tribal implications. This Final Rule regulates the H–2B visa program and does not have tribal implications. Therefore, the Department has determined that this E.O. does not apply to this rulemaking. The Department did not receive any comments related to this section.

*F. Assessment of Federal Regulations and Policies on Families*

Section 654 of the Treasury and General Government Appropriations Act of 1999 (5 U.S.C. 601 note) requires agencies to assess the impact of Federal regulations and policies on families. The assessment must address whether the regulation strengthens or erodes the stability, integrity, autonomy, or safety of the family.

The Final Rule does not have an impact on the autonomy or integrity of the family as an institution, as it is described under this provision. The Department did not receive any comments related to this section.

*G. Executive Order 12630—Protected Property Rights*

Executive Order 12630, Governmental Actions and the Interference with Constitutionality Protected Property Rights, prevents the Federal government from taking private property for public use without compensation. It further institutes an affirmative obligation that agencies evaluate all policies and regulations to ensure there is no impact on constitutionally protected property rights. Such policies include rules and regulations that propose or implement licensing, permitting, or other condition requirements or limitations on private property use, or that require dedications or exactions from owners of private property.

The Department did not receive any comments on this section. The Department certifies that this Final Rule does not infringe on protected property rights.

*H. Executive Order 12988—Civil Justice Reform*

Section 3 of E.O. 12988, Civil Justice Reform, requires Federal agencies to draft regulations in a manner that will reduce needless litigation and will not unduly burden the Federal court system. Therefore, agencies are required to review regulations for drafting errors and ambiguity; to minimize litigation; ensure that it provides a clear legal standard for affected conduct rather than a general standard; and promote simplification and burden reduction.

The rule has been drafted in clear language and with detailed provisions that aim to minimize litigation. The purpose of this Final Rule is to reengineer the H–2B program and simplify the application process. Therefore, the Department has determined that the regulation meets the applicable standards set forth in sec. 3 of E.O. 12988. The Department received no comments regarding this section.

*I. Plain Language*

Every Federal agency is required to draft regulations that are written in plain language to better inform the public about policies. The Department has assessed this Final Rule under the plain language requirements and determined that it follows the Government's standards requiring documents to be accessible and understandable to the public. The Department did not receive any comments related to this section.

*J. Executive Order 13211—Energy Supply*

This Final Rule is not subject to E.O. 13211, which assesses whether a regulation is likely to have a significant adverse effect on the supply, distribution, or use of energy. Accordingly, the Department has determined that this rule does not represent a significant energy action and does not warrant a Statement of Energy Effects. The Department did not receive any comments related to this section.

*K. Paperwork Reduction Act*

1. Summary

As part of its continuing effort to reduce paperwork and respondent burden, the Department of Labor conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

In accordance with the Paperwork Reduction Act (44 U.S.C. 3501), information collection requirements, which must be implemented as a result of this regulation, a clearance package containing proposed forms was submitted to OMB on February 14, 2008, along with its proposed rule to reform the H–2A agricultural foreign labor certification program, and then again on May 22, 2008, in conjunction with the H–2B proposed rulemaking preceding this Final Rule. Therefore, the public was given 60 days to comment on this information collection with both submissions, for a total of 120 days. All comments received were taken into consideration and a final package was submitted to OMB. The collection of information for the current H–2B program under the regulations in effect prior to the effective date of this rule were approved under OMB control number 1205–0015 (Form ETA 750).

This Final Rule implements the use of the new information collection, which OMB approved on November 21, 2008 under OMB control number 1205–0466. The Expiration Date is November 30, 2011. The new forms, ETA 9141 and ETA 9142, have a public reporting burden estimated to average 55 minutes for Form ETA 9141 and 2.75 hours for Form ETA 9142 per response or application filed.

This paperwork package applies—as does this Final Rule—to the H–2B, H–1B, H–1B1, H–1C, E–3, and PERM programs. The burden hours associated with the additional programs are a result of the wage determination and retention of document requirements. Under this Final Rule, and the implementation schedule it establishes, employers applying to any of these programs must use the ETA Form 9141, a single, Federal form that replaces the State-specific forms previously used to obtain prevailing wage determinations. There are no additional costs to the employer associated with the implementation of this new form, as costs are defined by the Paperwork Reduction Act. As the Department notes elsewhere in this preamble, the H–1C program was inadvertently removed. Consistent with the proposed rule at 73 FR 29947, May 28, 2008, it was the Department's intention to standardize all forms for better program effectiveness and efficiency in its non-agricultural programs, which necessarily extends also to the H–1C program.

For an additional explanation of how the Department calculated the burden hours and related costs, the Paperwork Reduction Act package for this information collection may be obtained from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or by contacting the Department at: Office of Policy Development and Research, Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210 or by phone request to 202–693–3700 (this is not a toll-free number) or by e-mail at *DOL_PRA_PUBLIC@dol.gov*.

The Department received six comments on this section, all related to the H–2B program. One commenter stated that the form ETA 9141 was unnecessarily long and complex and should be simplified. The Department has attempted to shorten the form and make it easier to use. It has been reduced from seven pages to four pages.

Three of the comments related to the burden associated with the paperwork requirements. Two final commenters stated that they did not have the funding or staff time to manage the record retention requirements or to process and store the paperwork. None of the commenters specifically addressed the issue of our methodology or assumptions, or the other programs to which the ETA 9141 now applies.

The paperwork burden estimate for the form used for the H–2B program under the regulations in effect prior to the effective date of this Final Rule, (form ETA 750—OMB control number 1205–0015) was approximately 1.4 hours. Under this new collection of information, the Department estimates that the burden will be approximately 2.75 hours for Form ETA 9142. We based this calculation on a burden estimate of 1.4 hours for those program requirements that remained the same and allocated approximately 1.35 hours for the additional information requirements.

Although the Department did not receive any comments related to the remaining programs (H–1B, H–1B1, E–3, H–1C, and PERM), it notes that only the Form ETA 9141 applies to these programs. This Form will be used in lieu of the State form for submitting a prevailing wage request. Although the burden hours for each State application vary, the Department estimates the burden hours to complete the State forms to be approximately 1.0 hour. As a result, and for the reasons discussed elsewhere in this preamble, the Department does not expect the paperwork burden hours to increase for these programs.

In sum, without more persuasive analysis rebutting the analysis used by the Department, we assume our calculations are representative of the actual hourly burden for the new collection, which represents no increase for most programs and a minimal increase for the H–2B program.

*L. Catalog of Federal Domestic Assistance Number*

This program is listed in the Catalog of Federal Domestic Assistance at Number 17–273, ''Temporary Labor Certification for Foreign Workers.''

**List of Subjects**

*20 CFR Part 655*

Administrative practice and procedure, Foreign workers, Employment, Employment and training, enforcement, Forest and forest products, Fraud, Health professions, Immigration, Labor, Longshore and harbor work, Migrant labor, Passports and visas, Penalties, Reporting and recordkeeping requirements, Unemployment, Wages, Working conditions.

*20 CFR Part 656*

Administrative practice and procedure, Agriculture, Aliens, Employment, Employment and training, Enforcement, Forest and forest products, Fraud, Guam, Health professions, Immigration, Labor, Passports and visas, Penalties, Reporting and recordkeeping requirements, Students, Unemployment, Wages, Working conditions.

■ For the reasons stated in the preamble, the Department of Labor amends 20 CFR parts 655 and 656 as follows:

## PART 655—TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES

■ 1. The authority citation for part 655 is revised to read as follows:

**Authority:** Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 1182(m), (n) and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Public Law 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Public Law 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Public Law 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Public Law 103–206, 107 Stat. 2428; sec. 412(e), Public Law 105–277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Public Law 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Public Law 109–423, 120 Stat. 2900; and 8 CFR 214.2(h).

Section 655.00 issued under 8 U.S.C. 1101(a)(15)(H)(ii), 1184(c), and 1188; and 8 CFR 214.2(h).

Subpart A issued under 8 U.S.C. 1101(a)(15)(H)(ii)(b), 1103(a), and 1184(a) and (c); and 8 CFR 214.2(h).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; and 8 CFR 214.2(h).

Subpart C issued under 8 CFR 214.2(h).

Subparts D and E authority repealed.

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); and sec. 323(c), Public Law 103–206, 107 Stat. 2428.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b)(1), 1182(n) and (t), and 1184(g) and (j); sec. 303(a)(8), Public Law 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 412(e), Public Law 105–277, 112 Stat. 2681; and 8 CFR 214.2(h).

Subparts J and K authority repealed.

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m); sec. 2(d), Public Law 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Public Law 109–423, 120 Stat. 2900; and 8 CFR 214.2(h).

■ 2. Revise the heading of Part 655 to read as set forth above.

■ 3. Revise subpart A to read as follows:

**Subpart A—Labor Certification Process and Enforcement of Attestations for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H–2B Workers)**

Sec.



## Subpart A—Labor Certification Process and Enforcement of Attestations for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H–2B Workers)

### § 655.1 Purpose and scope of subpart A.

(a) Before granting the petition of an employer to admit nonimmigrant workers on H–2B visas for temporary

nonagricultural employment in the United States (U.S.), the Secretary of Homeland Security is required to consult with appropriate agencies regarding the availability of U.S. workers. Immigration and Nationality Act of 1952 (INA), as amended, secs. 101(a)(15)(H)(ii)(b) and 214(c)(1), 8 U.S.C. 1101(a)(15)(H)(ii)(b) and 1184(c)(1).

(b) Regulations of the Department of Homeland Security (DHS) for the U.S. Citizenship and Immigration Services (USCIS) at 8 CFR 214.2(h)(6)(iv) require that, except for Guam, the petitioning H–2B employer attach to its petition a determination from the Secretary of Labor (Secretary) that:

(1) There are not sufficient U.S. workers available who are capable of performing the temporary services or labor at the time of filing of the petition for H–2B classification and at the place where the foreign worker is to perform the work; and

(2) The employment of the foreign worker will not adversely affect the wages and working conditions of U.S. workers similarly employed.

(c) This subpart sets forth the procedures governing the labor certification process for the temporary employment of nonimmigrant foreign workers in the U.S. in occupations other than agriculture and registered nursing.

(1) This subpart sets forth the procedures through which employers may apply for H–2B labor certifications, as well as the procedures by which such applications are considered and how they are granted or denied.

(2) This subpart sets forth the procedures governing the Department's investigatory, inspection, and law enforcement functions to assure compliance with the terms and conditions of employment under the H–2B program. The authority for such functions has been delegated by the Secretary of Homeland Security to the Secretary of Labor and re-delegated within the Department to the Employment Standards Administration (ESA) Wage and Hour Division (WHD). This subpart sets forth the WHD's investigation and enforcement actions.

### § 655.2 Territory of Guam.

Subpart A of this part does not apply to temporary employment in the Territory of Guam, and the Department of Labor (Department or DOL) does not certify to the USCIS of DHS the temporary employment of nonimmigrant foreign workers under H–2B visas, or enforce compliance with the provisions of the H–2B visa program provisions in the Territory of Guam. Pursuant to DHS regulations, 8 CFR 214.2(h)(6)(v) administration of the H–2B temporary labor certification program is performed by the Governor of Guam, or the Governor's designated representative.

### § 655.3 Special procedures.

(a) *Systematic process.* This subpart provides procedures for the processing of H–2B applications from employers for the certification of employment of nonimmigrant positions in nonagricultural employment.

(b) *Establishment of special procedures.* The Office of Foreign Labor Certification (OFLC) Administrator has the authority to establish or to devise, continue, revise, or revoke special procedures in the form of variances for the processing of certain H–2B applications when employers can demonstrate, upon written application to the OFLC Administrator, that special procedures are necessary. These include special procedures currently in effect for the handling of applications for tree planters and related reforestation workers, professional athletes, boilermakers coming to the U.S. on an emergency basis, and professional entertainers. Prior to making determinations under this paragraph (b), the OFLC Administrator may consult with employer and worker representatives.

### § 655.4 Definitions of terms used in this subpart.

For the purposes of this subpart:

*Act* means the Immigration and Nationality Act or INA, as amended, 8 U.S.C. 1101 *et seq.*

*Administrative Law Judge* means a person within the Department's Office of Administrative Law Judges appointed pursuant to 5 U.S.C. 3105, or a panel of such persons designated by the Chief Administrative Law Judge from the Board of Alien Labor Certification Appeals established by part 656 of this chapter, which will hear and decide appeals as set forth in § 655.115.

*Administrator, Office of Foreign Labor Certification (OFLC)* means the primary official of the Office of Foreign Labor Certification, ETA, or the Administrator's designee.

*Administrator, Wage and Hour Division (WHD)*, Employment Standards Administration means the primary official of the WHD, or the Administrator's designee.

*Agent* means a legal entity or person authorized to act on behalf of the employer for temporary non-agricultural labor certification purposes that is not itself an employer as defined in this subpart. The term ''agent''' specifically excludes associations or other organizations of employers.

*Applicant* means a lawful U.S. worker who is applying for a job opportunity for which an employer has filed an *Application for Temporary Employment Certification* (Form ETA 9142).

*Application for Temporary Employment Certification* means the Office of Management and Budget (OMB)-approved form submitted by an employer to secure a temporary nonagricultural labor certification determination from DOL. A complete submission of the *Application for Temporary Employment Certification* includes the form, all valid wage determinations as required by § 655.101(a)(1) and the U.S. worker recruitment report.

*Area of Intended Employment* means the geographic area within normal commuting distance of the place (worksite address) of intended employment of the job opportunity for which the certification is sought. There is no rigid measure of distance which constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (*e.g.*, average commuting times, barriers to reaching the worksite, quality of regional transportation network, etc.). If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a location outside of an MSA may be within normal commuting distance of a location that is inside (*e.g.*, near the border of) the MSA.

*Attorney* means any person who is currently a member in good standing of the bar of the highest court of any State, possession, territory, or commonwealth of the United States, or the District of Columbia, and who is not under suspension, debarment or disbarment from practice before any court or the Department, the Board of Immigration Appeals, the immigration judges, or DHS under 8 CFR 292.3, 1003.101. Such a person is permitted to act as an agent or attorney for an employer under this subpart.

*Board of Alien Labor Certification Appeals (BALCA or Board)* means the permanent Board established by part 656 of this chapter, chaired by the Chief Administrative Law Judge, and consisting of Administrative Law Judges assigned to the Department and designated by the Chief Administrative Law Judge to be members of BALCA.

The Board is located in Washington, DC, and reviews and decides appeals in Washington, DC.

*Center Director* means the OFLC official to whom the OFLC Administrator has delegated his authority for purposes of National Processing Center (NPC) operations and functions.

*Certifying Officer (CO)* means the OFLC official designated by the Administrator, OFLC with making programmatic determinations on employer-filed applications under the H–2B program.

*Chief Administrative Law Judge* means the chief official of the Department's Office of Administrative Law Judges or the Chief Administrative Law Judge's designee.

*Date of need* means the first date the employer requires services of the H–2B workers as listed on the application.

*Department of Homeland Security (DHS)* means the Federal agency having jurisdiction over certain immigration-related functions, acting through its agencies, including the U.S. Citizenship and Immigration Services.

*Eligible worker* means an individual who is not an unauthorized alien (as defined in sec. 274A(h)(3) of the INA, 8 U.S.C. 1324a(h)(3), or in this paragraph (c)) with respect to the employment in which the worker is engaging.

*Employee* means employee as defined under the general common law of agency. Some of the factors relevant to the determination of employee status include: The hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors should be considered and no one factor is dispositive.

*Employer* means:

(1) A person, firm, corporation or other association or organization:

(i) Has a place of business (physical location) in the U.S. and a means by which it may be contacted;

(ii) Has an employer relationship with respect to H–2B employees or related U.S. workers under this part; and

(iii) Possesses, for purposes of the filing of an application, a valid Federal Employer Identification Number (FEIN).

(2) Where two or more employers each have the definitional indicia of employment with respect to an employee, those employers may be considered to jointly employ that employee.

*Employment and Training Administration or ETA* means the agency within the Department, which includes the OFLC and has been delegated authority by the Secretary to fulfill the Secretary's mandate under the Act.

*ETA National Processing Center (NPC)* means a National Processing Center established by the OFLC for the processing of applications submitted in connection with the Department's mandate pursuant to the INA.

*Full-time*, for purposes of temporary labor certification employment, means 30 or more hours per week, except that where a State or an established practice in an industry has developed a definition of full-time employment for any occupation that is less than 30 hours per week, that definition shall have precedence.

*H–2B Petition* means the form and accompanying documentation required by DHS for employers seeking to employ foreign persons as H–2B nonimmigrant workers.

*INA* means the Immigration and Nationality Act, as amended, 8 U.S.C. 1101 *et seq.*

*Job contractor* means a person, association, firm, or a corporation that meets the definition of an employer and who contracts services or labor on a temporary basis to one or more employers, which is not an affiliate, branch or subsidiary of the job contractor, and where the job contractor will not exercise any supervision or control in the performance of the services or labor to be performed other than hiring, paying, and firing the workers.

*Job opportunity* means one or more job openings with the petitioning employer for temporary employment at a place in the U.S. to which U.S. workers can be referred. Job opportunities consisting solely of job duties that will be performed totally outside the United States, its territories, possessions, or commonwealths cannot be the subject of an *Application for Temporary Employment Certification*.

*Joint employment* means that where two or more employers each have sufficient definitional indicia of employment to be considered the employer of an employee, those employers may be considered to jointly employ that employee. An employer in a joint employment relationship to an employee may be considered a ''joint employer'' of that employee.

*Layoff* means any involuntary separation of one or more U.S. employees without cause or prejudice.

*Metropolitan Statistical Area (MSA)* means those geographic entities defined by the U.S. Office of Management and Budget (OMB) for use by Federal statistical agencies in collecting, tabulating, and publishing Federal statistics. A metro area contains a core urban area of 50,000 or more population, and a micro area contains an urban core of at least 10,000 (but less than 50,000) population. Each metro or micro area consists of one or more counties and includes the counties containing the core urban area, as well as any adjacent counties that have a high degree of social and economic integration (as measured by commuting to work) with the urban core.

*Offered Wage* means the highest of the prevailing wage, Federal minimum wage, the State minimum wage, or local minimum wage.

*Office of Foreign Labor Certification (OFLC)* means the organizational component within ETA that provides national leadership and policy guidance and develops regulations and procedures by which it carries out the responsibilities of the Secretary under the INA, as amended, concerning foreign workers seeking admission to the U.S. in order to work under sec. 101(a)(15)(H)(ii)(b) of the INA, as amended.

*Occupational Employment Statistics Survey (OES)* means that program under the jurisdiction of the Bureau of Labor Statistics (BLS) that provides annual wage estimates for occupations at the State and MSA levels.

*Prevailing Wage Determination (PWD)* means the prevailing wage for the position, as described in § 655.10(b), that is the subject of the *Application for Temporary Employment Certification*.

*Professional Athlete* shall have the meaning ascribed to it in INA sec. 212(a)(5)(A)(iii)(II), which defines ''professional athlete'' as an individual who is employed as an athlete by:

(1) A team that is a member of an association of six or more professional sports teams whose total combined revenues exceed $10,000,000 per year, if the association governs the conduct of its members and regulates the contests and exhibitions in which its member teams regularly engage; or

(2) Any minor league team that is affiliated with such an association.

*Representative* means an individual employed by or authorized to act on behalf of the employer with respect to the recruitment activities entered into for and attestations made with respect to the *Application for Temporary Employment Certification*. A representative who interviews and/or considers U.S. workers for the job that is subject of the Application must be the person who normally interviews or

considers, on behalf of the employer, applicants for job opportunities such as that offered in the application, but which do not involve labor certifications.

*Secretary* means the Secretary of Labor, the chief official of the U.S. Department of Labor, or the Secretary's designee.

*Secretary of Homeland Security* means the chief official of the Department of Homeland Security or the Secretary of Homeland Security's designee.

*Secretary of State* means the chief official of the U.S. Department of State or the Secretary of State's designee.

*State Workforce Agency (SWA)*, formerly known as State Employment Security Agency, means the State government agency that receives funds pursuant to the Wagner-Peyser Act to administer public labor exchange delivered through the State's one-stop delivery system in accordance with the Wagner-Peyser Act. (29 U.S.C. 49 *et seq.*).

*Strike* means a labor dispute wherein employees engage in a concerted stoppage of work (including stoppage by reason of the expiration of a collective-bargaining agreement) or engage in any concerted slowdown or other concerted interruption of operations. Whether a job opportunity is vacant by reason of a strike or lock out will be determined by evaluating for each position identified as vacant in the *Application for Temporary Employment Certification* whether the specific vacancy has been caused by the strike or lock out.

*Successor in Interest* means that, in determining whether an employer is a successor in interest, the factors used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act will be considered. When considering whether an employer is a successor, the primary consideration will be the personal involvement of the firm's ownership, management, supervisors, and others associated with the firm in the violations resulting in debarment. Normally, wholly new management or ownership of the same business operation, one in which the former management or owner does not retain a direct or indirect interest, will not be deemed to be a successor in interest for purposes of debarment. A determination of whether or not a successor in interest exists is based on the entire circumstances viewed in their totality. The factors to be considered include:

(1) Substantial continuity of the same business operations;

(2) Use of the same facilities;

(3) Continuity of the work force;

(4) Similarity of jobs and working conditions;

(5) Similarity of supervisory personnel;

(6) Similarity in machinery, equipment, and production methods;

(7) Similarity of products and services; and

(8) The ability of the predecessor to provide relief.

*United States (U.S.)*, when used in a geographic sense, means the continental United States, Alaska, Hawaii, the Commonwealth of Puerto Rico, and the territories of Guam, the Virgin Islands, and, as of the transition program effective date, as defined in the Consolidated Natural Resources Act of 2008, Public Law 110–229, Title VII, the Commonwealth of the Northern Mariana Islands.

*United States Citizenship and Immigration Services (USCIS)* means the Federal agency within DHS making the determination under the INA whether to grant petitions filed by employers seeking H–2B workers to perform temporary nonagricultural work in the U.S.

*United States Worker (U.S. Worker)* means a worker who is either

(1) A citizen or national of the U.S.; or

(2) An alien who is lawfully admitted for permanent residence in the U.S., is admitted as a refugee under sec. 207 of the INA, is granted asylum under sec. 208 of the INA, or is an immigrant otherwise authorized (by the INA or by DHS) to be employed in the U.S.

*Within [number and type] days* will, for purposes of determining an employer's compliance with timing requirements with respect to appeals and requests for review, begin to run on the first business day after the Department sends a notice to the employer by means normally assuring next-day delivery, and will end on the day that the employer sends whatever communication is required by these rules back to the Department, as evidenced by a postal mark or other similar receipt.

### § 655.5 Application Filing Transition.

(a) *Compliance with these regulations.* Except as provided in paragraphs (b) and (c) of this section, employers filing applications for H–2B workers on or after the effective date of these regulations where the date of need for the services or labor to be performed is on or after October 1, 2009, must comply with all of the obligations and assurances in this subpart. SWAs will no longer accept for processing applications filed by employers for H–2B workers for temporary or seasonal nonagricultural services on or after January 18, 2009.

(b) *Applications filed under former regulations.* (1) For applications filed with the SWAs serving the area of intended employment prior to the effective date of these regulations, the SWAs shall continue to process all active applications under the former regulations and transmit all completed applications to the appropriate NPC for review and issuance of a labor certification determination.

(2) For applications filed with the SWAs serving the area of intended employment prior to the effective date of these regulations that were completed and transmitted to the NPC, the NPC shall continue to process all active applications under the former regulations and issue a labor certification determination.

(c) *Applications filed with the NPC under these regulations.* Employers filing applications on or after the effective date of these regulations where their date of need for H–2B workers is prior to October 1, 2009, must receive a prevailing wage determination from the SWA serving the area of intended employment. The SWA shall process such requests in accordance with the provisions of § 655.10. Once the employer receives its prevailing wage determination from the SWA, it must conduct all of the pre-filing recruitment steps set forth under this subpart prior to filing an *Application for Temporary Employment Certification* with the NPC.

### § 655.6 Temporary need.

(a) To use the H–2B program, the employer must establish that its need for nonagricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary. 8 CFR 214.2(h)(6)(ii).

(b) The employer's need is considered temporary if justified to the Secretary as either a one-time occurrence, a seasonal need, a peakload need, or an intermittent need, as defined by the Department of Homeland Security. 8 CFR 214.2(h)(6)(ii)(B).

(c) Except where the employer's need is based on a one-time occurrence, the Secretary will, absent unusual circumstances, deny an *Application for Temporary Employment Certification* where the employer has a recurring, seasonal or peakload need lasting more than 10 months.

(d) The temporary nature of the work or services to be performed in applications filed by job contractors will be determined by examining the job contractor's own need for the services or labor to be performed in addition to the needs of each individual employer with

whom the job contractor has agreed to provide workers as part of a signed work contract or labor services agreement.

(e) The employer filing the application must maintain documentation evidencing the temporary need and be prepared to submit this documentation in response to a Request for Further Information (RFI) from the CO prior to rendering a Final Determination or in the event of an audit examination. The documentation required in this section must be retained by the employer for a period of no less than 3 years from the date of the labor certification.

**§§ 655.7–655.9 [Reserved]**

**§ 655.10 Determination of prevailing wage for temporary labor certification purposes.**

(a) *Application process.* (1) The employer must request a prevailing wage determination from the NPC in accordance with the procedures established by this regulation.

(2) The employer must obtain a prevailing wage determination that is valid either on the date recruitment begins or the date of filing a complete *Application for Temporary Employment Certification* with the Department.

(3) The employer must offer and advertise the position to all potential workers at a wage at least equal to the prevailing wage obtained from the NPC.

(b) *Determinations.* Prevailing wages shall be determined as follows:

(1) Except as provided in paragraph (e) of this section, if the job opportunity is covered by a collective bargaining agreement (CBA) that was negotiated at arms' length between the union and the employer, the wage rate set forth in the CBA is considered as not adversely affecting the wages of U.S. workers, that is, it is considered the ''prevailing wage'' for labor certification purposes.

(2) If the job opportunity is not covered by a CBA, the prevailing wage for labor certification purposes shall be the arithmetic mean, except as provided in paragraph (b)(4) of this section, of the wages of workers similarly employed at the skill level in the area of intended employment. The wage component of the BLS Occupational Employment Statistics Survey (OES) shall be used to determine the arithmetic mean, unless the employer provides a survey acceptable to OFLC under paragraph (f) of this section.

(3) If the job opportunity involves multiple worksites within an area of intended employment and different prevailing wage rates exist for the same opportunity and staff level within the area of intended employment, the prevailing wage shall be based on the highest applicable wage among all relevant worksites.

(4) If the employer provides a survey acceptable under paragraph (f) of this section that provides a median but does not provide an arithmetic mean, the prevailing wage applicable to the employer's job opportunity shall be the median of the wages of U.S. workers similarly employed in the area of intended employment.

(5) The employer may use a current wage determination in the area determined under the Davis-Bacon Act, 40 U.S.C. 276a *et seq.,* 29 CFR part 1, or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq.*

(6) The NPC will enter its wage determination on the form it uses for these purposes, indicate the source, and return the form with its endorsement to the employer within 30 days of receipt of the request for a prevailing wage determination. The employer must offer this wage (or higher) to both its H–2B workers and any similarly employed U.S. worker hired in response to the recruitment required as part of the application.

(c) *Similarly Employed.* For purposes of this section, ''similarly employed'' means having substantially comparable jobs in the occupational category in the area of intended employment, except that, if a representative sample of workers in the occupational category cannot be obtained in the area of intended employment, similarly employed means:

(1) Having jobs requiring a substantially similar level of comparable skills within the area of intended employment; or

(2) If there are no substantially comparable jobs in the area of intended employment, having substantially comparable jobs with employers outside of the area of intended employment.

(d) *Validity period.* The NPC must specify the validity period of the prevailing wage, which in no event may be more than 1 year or less than 3 months from the determination date. For employment that is less than one year in duration, the prevailing wage determination shall apply and shall be paid the prevailing wage by the employer, at a minimum, for the duration of the employment.

(e) *Professional athletes.* In computing the prevailing wage for a professional athlete when the job opportunity is covered by professional sports league rules or regulations, the wage set forth in those rules or regulations is considered the prevailing wage (see sec. 212(p)(2) of the INA).

(f) *Employer-provided wage information.* (1) If the job opportunity is not covered by a CBA, or by a professional sports league's rules or regulations, the NPC will consider wage information provided by the employer in making a Prevailing Wage Determination. An employer survey can be submitted either initially or after NPC issuance of a PWD derived from the OES survey.

(2) In each case where the employer submits a survey or other wage data for which it seeks acceptance, the employer must provide specific information about the survey methodology, including such items as sample size and source, sample selection procedures, and survey job descriptions, to allow a determination of the adequacy of the data provided and validity of the statistical methodology used in conducting the survey in accordance with guidance issued by the OFLC national office.

(3) The survey must be based upon recently collected data:

(i) Any published survey must have been published within 24 months of the date of submission, must be the most current edition of the survey, and must be based on data collected not more than 24 months before the publication date.

(ii) A survey conducted by the employer must be based on data collected within 24 months of the date it is submitted for consideration.

(4) If the employer-provided survey is found not to be acceptable, the NPC shall inform the employer in writing of the reasons the survey was not accepted.

(5) The employer, after receiving notification that the survey it provided for consideration is not acceptable, may file supplemental information as provided in paragraph (g) of this section, file a new request for a PWD, appeal under § 655.11, or, if the initial PWD was requested prior to submission of the employer survey, acquiesce to the initial PWD.

(g) *Submission of supplemental information by employer.* (1) If the employer disagrees with the wage level assigned to its job opportunity, or if the NPC informs the employer its survey is not acceptable, or if there is another legitimate basis for such a review, the employer may submit supplemental information to the NPC.

(2) The NPC must consider one supplemental submission relating to the employer's survey, the skill level assigned to the job opportunity, or any other legitimate basis for the employer to request such a review. If the NPC does not accept the employer's survey after considering the supplemental information, or affirms its determination concerning the skill level, the NPC must

inform the employer, in writing, of the reasons for its decision.

(3) The employer may then apply for a new wage determination, appeal under § 655.11, or acquiesce to the initial PWD.

(h) *The prevailing wage cannot be lower than required by any other law.* No PWD for labor certification purposes made under this section permits an employer to pay a wage lower than the highest wage required by any applicable Federal, State, or local law.

(i) *Retention of Documentation.* The employer must retain the PWD for 3 years and submitted to a CO in the event it is requested in an RFI or an audit or to a Wage and Hour representative in the event of a Wage and Hour investigation.

**§ 655.11 Certifying officer review of prevailing wage determinations.**

(a) *Request for review of prevailing wage determinations.* Any employer desiring review of a PWD must make a written request for such review within 10 days of the date from when the final PWD was issued. The request for review must be sent to the NPC postmarked no later than 10 days after the determination; clearly identify the PWD for which review is sought; set forth the particular grounds for the request; and include all materials submitted to the NPC for purposes of securing the PWD.

(b) *NPC Review.* Upon the receipt of a written request for review, the NPC shall review the employer's request and accompanying documentation, including any supplementary material submitted by the employer.

(c) *Designations.* The Director of the NPC will determine which CO will review the employer's request for review.

(d) *Review on the record.* The CO shall review the PWD solely on the basis upon which the PWD was made and after review may:

(1) Affirm the PWD issued by the NPC; or

(2) Modify the PWD.

(e) *Request for review by BALCA.* Any employer desiring review of a CO's decision on a PWD must make a written request for review of the determination by BALCA within 30 calendar days of the date of the decision of the CO. The CO must receive the written request for BALCA review no later than the 30th day after the date of its final determination including the date of the final determination.

(1) The request for review, statements, briefs, and other submissions of the parties and amicus curiae must contain only legal arguments and only such evidence that was within the record upon which the decision on the PWD by the NPC was based.

(2) The request for review must be in writing and addressed to the CO who made the determination. Upon receipt of a request for a review, the CO must immediately assemble an indexed appeal file in reverse chronological order, with the index on top followed by the most recent document.

(3) The CO must send the Appeal File to the Office of Administrative Law Judges, Board of Alien Labor Certification Appeals, 800 K Street, NW., Suite 400–N, Washington, DC 20001–8002.

(4) The BALCA shall handle appeals in accordance with § 655.33.

**§§ 655.12–655.14 [Reserved]**

**§ 655.15 Required pre-filing recruitment.**

(a) *Time of Filing of Application.* An employer may not file an *Application for Temporary Employment Certification* before all of the pre-filing recruitment steps set forth in this section have been fully satisfied, except where specifically exempted from some or all of those requirements by these regulations or special procedures. Applications submitted not meeting this requirement shall not be accepted for processing.

(b) *General Attestation Obligation.* An employer must attest on the *Application for Temporary Employment Certification* to having performed all required steps of the recruitment process as specified in this section.

(c) *Retention of documentation.* The employer filing the *Application for Temporary Employment Certification* must maintain documentation of its advertising and recruitment efforts, including prevailing wage determinations, as required in this subpart and be prepared, upon written request, to submit this documentation in response to an RFI from the CO prior to the CO rendering a Final Determination or in the event of a CO-directed audit examination. The documentation required in this section must be retained by the employer for a period of no less than 3 years from the date of the certification.

(d) *Recruitment Steps.* An employer filing an application must:

(1) Obtain a prevailing wage determination from the NPC in accordance with procedures in § 655.10;

(2) Submit a job order to the SWA serving the area of intended employment;

(3) Publish two print advertisements (one of which must be on a Sunday, except as provided in paragraph (f)(4) of this section); and

(4) Where the employer is a party to a collective bargaining agreement governing the job classification that is the subject of the H–2B labor certification application, the employer must formally contact the local union that is party to the collective bargaining agreement as a recruitment source for able, willing, qualified, and available U.S. workers.

(e) *Job Order.* (1) The employer must place an active job order with the SWA serving the area of intended employment no more than 120 calendar days before the employer's date of need for H–2B workers, identifying it as a job order to be placed in connection with a future application for H–2B workers. Unless otherwise directed by the CO, the SWA must keep the job order open for a period of not less than 10 calendar days. Documentation of this step shall be satisfied by maintaining a copy of the SWA job order downloaded from the SWA Internet job listing site, a copy of the job order provided by the SWA, or other proof of publication from the SWA containing the text of the job order and the start and end dates of posting. If the job opportunity contains multiple work locations within the same area of intended employment and the area of intended employment is found in more than one State, the employer shall place a job order with the SWA having jurisdiction over the place where the work has been identified to begin. Upon placing a job order, the SWA receiving the job order under this paragraph shall promptly transmit, on behalf of the employer, a copy of the active job order to all States listed in the application as anticipated worksites.

(2) The job order submitted by the employer to the SWA must satisfy all the requirements for newspaper advertisements contained in § 655.17.

(f) *Newspaper Advertisements.* (1) During the period of time that the job order is being circulated for intrastate clearance by the SWA under paragraph (e) of this section, the employer must publish an advertisement on 2 separate days, which may be consecutive, one of which must be a Sunday advertisement (except as provided in paragraph (f)(2) of this section), in a newspaper of general circulation serving the area of intended employment that has a reasonable distribution and is appropriate to the occupation and the workers likely to apply for the job opportunity. Both newspaper advertisements must be published only after the job order is placed for active recruitment by the SWA.

(2) If the job opportunity is located in a rural area that does not have a newspaper with a Sunday edition, the

employer must, in place of a Sunday edition advertisement, advertise in the regularly published daily edition with the widest circulation in the area of intended employment.

(3) The newspaper advertisements must satisfy the requirements contained in § 655.17. The employer must maintain copies of newspaper pages (with date of publication and full copy of advertisement), or tear sheets of the pages of the publication in which the advertisements appeared, or other proof of publication containing the text of the printed advertisements and the dates of publication furnished by the newspaper.

(4) If a professional, trade or ethnic publication is more appropriate for the occupation and the workers likely to apply for the job opportunity than a general circulation newspaper, and is the most likely source to bring responses from able, willing, qualified, and available U.S. workers, then the employer may use a professional, trade or ethnic publication in place of one of the newspaper advertisements, but may not replace the Sunday advertisement (or the substitute permitted by paragraph (f)(2) of this section).

(g) *Labor Organizations.* During the period of time that the job order is being circulated for intrastate clearance by the SWA under paragraph (e) of this section, an employer that is already a party to a collective bargaining agreement governing the job classification that is the subject of the H–2B labor certification application must formally contact by U.S. Mail or other effective means the local union that is party to the collective bargaining agreement. An employer governed by this paragraph must maintain dated logs demonstrating that such organizations were contacted and notified of the position openings and whether they referred qualified U.S. worker(s), including number of referrals, or were non-responsive to the employer's request.

(h) *Layoff.* If there has been a layoff of U.S. workers by the applicant employer in the occupation in the area of intended employment within 120 days of the first date on which an H–2B worker is needed as indicated on the submitted *Application for Temporary Employment Certification,* the employer must document it has notified or will notify each laid-off worker of the job opportunity involved in the application and has considered or will consider each laid-off worker who expresses interest in the opportunity, and the result of the notification and consideration.

(i) *Referral of U.S. workers.* SWAs may only refer for employment individuals for whom they have verified identity and employment authorization through the process for employment verification of all workers that is established by INA sec. 274A(b). SWAs must provide documentation certifying the employment verification that satisfies the standards of INA sec. 274A(a)(5) and its implementing regulations at 8 CFR 274a.6.

(j) *Recruitment Report.* (1) No fewer than 2 calendar days after the last date on which the job order was posted and no fewer than 5 calendar days after the date on which the last newspaper or journal advertisement appeared, the employer must prepare, sign, and date a written recruitment report. The employer may not submit the H–2B application until the recruitment report is completed. The recruitment report must be submitted to the NPC with the application. The employer must retain a copy of the recruitment report for a period of 3 years.

(2) The recruitment report must:

(i) Identify each recruitment source by name;

(ii) State the name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report, and the disposition of each worker, including any applicable laid-off workers;

(iii) If applicable, explain the lawful job-related reason(s) for not hiring any U.S. workers who applied or were referred to the position.

(3) The employer must retain résumés (if available) of, and evidence of contact with (which may be in the form of an attestation), each U.S. worker who applied or was referred to the job opportunity. Such résumés and evidence of contact must be retained along with the recruitment report for a period of no less than 3 years, and must be provided in response to an RFI or in the event of an audit or an investigation.

### § 655.17 Advertising requirements.

All advertising conducted to satisfy the required recruitment steps under § 655.15 before filing the *Application for Temporary Employment Certification* must meet the requirements set forth in this section and must contain terms and conditions of employment which are not less favorable than those to be offered to the H–2B workers. All advertising must contain the following information:

(a) The employer's name and appropriate contact information for applicants to send résumés directly to the employer;

(b) The geographic area of employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the services or labor;

(c) If transportation to the worksite(s) will be provided by the employer, the advertising must say so;

(d) A description of the job opportunity (including the job duties) for which labor certification is sought with sufficient detail to apprise applicants of services or labor to be performed and the duration of the job opportunity;

(e) The job opportunity's minimum education and experience requirements and whether or not on-the-job training will be available;

(f) The work hours and days, expected start and end dates of employment, and whether or not overtime will be available;

(g) The wage offer, or in the event that there are multiple wage offers, the range of applicable wage offers, each of which must not be less than the highest of the prevailing wage, the Federal minimum wage, State minimum wage, or local minimum wage applicable throughout the duration of the certified H–2B employment; and

(h) That the position is temporary and the total number of job openings the employer intends to fill.

### §§ 655.18–655.19 [Reserved]

### § 655.20 Applications for temporary employment certification.

(a) *Application Filing Requirements.* An employer who desires to apply for labor certification of temporary employment for one or more nonimmigrant foreign positions must file a completed *Application for Temporary Employment Certification* form, and a copy of the recruitment report completed in accordance with § 655.15(j).

(b) *Filing.* An employer must complete the *Application for Temporary Employment Certification* and send it by U.S. Mail or private mail courier to the NPC. Employers are strongly encouraged to keep receipts of any mailings. The Department will publish a Notice in the **Federal Register** identifying the address or addresses to which applications must be mailed, and will also post these addresses on the Department's Internet Web site at *http://www.foreignlaborcert.doleta.gov/*. The form must bear the original signature of the employer (and that of the employer's authorized attorney or agent if the employer is represented by an attorney or agent). The Department

may, at a future date, require applications to be filed electronically in addition to or instead of by U.S. Mail or private mail courier.

(c) Except where otherwise permitted under § 655.3, an association or other organization of employers is not permitted to file master applications on behalf of its employer-members under the H–2B program.

(d) Certification of more than one position may be requested on the application as long as all H–2B workers will perform the same services or labor on the same terms and conditions, in the same occupation, in the same area of intended employment, and during the same period of employment.

(e) Except where otherwise permitted under § 655.3, only one *Application for Temporary Employment Certification* may be filed for worksite(s) within one area of intended employment for each job opportunity with an employer.

(f) Where a one-time occurrence lasts longer than one year, but less than 18 months, the employer will be issued a labor certification for the entire period of need. Where a one-time occurrence lasts 18 months or longer, the employer will be required to conduct another labor market for the portion of time beyond 12 months.

**§ 655.21 Supporting evidence for temporary need.**

(a) *Statement of Temporary Need.* Each *Application for Temporary Employment Certification* must include attestations regarding temporary need in the appropriate sections. The employer must include a detailed statement of temporary need containing the following:

(1) A description of the employer's business history and activities (*i.e.*, primary products or services) and schedule of operations throughout the year;

(2) An explanation regarding why the nature of the employer's job opportunity and number of foreign workers being requested for certification reflect a temporary need;

(3) An explanation regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peakload, or intermittent need under § 655.6(b) as defined by DHS under 8 CFR 214.2(h)(6)(ii)(B); and

(4) If applicable, a statement justifying any increase or decrease in the number of H–2B positions being requested for certification from the previous year.

(b) *Request for Supporting Evidence.* In circumstances where the CO requests evidence or documentation substantiating the employer's temporary need through a RFI under § 655.23(c) to support a Final Determination, or notifies the employer that its application is being audited under § 655.24, the employer must timely furnish the requested supplemental information or evidence or documentation. Failure to provide the information requested or late submissions may be grounds for the denial of the application. All such documentation or evidence becomes part of the record of the application.

(c) *Retention of documentation.* The documentation required in this section and any other supporting evidence justifying the temporary need by the employer filing the *Application for Temporary Employment Certification* must be retained for a period of no less than 3 years from the date of the certification.

**§ 655.22 Obligations of H–2B employers.**

An employer seeking H–2B labor certification must attest as part of the *Application for Temporary Employment Certification* that it will abide by the following conditions of this subpart:

(a) The employer is offering terms and working conditions normal to U.S. workers similarly employed in the area of intended employment, meaning that they may not be unusual for workers performing the same activity in the area of intended employment, and which are not less favorable than those offered to the H–2B worker(s) and are not less than the minimum terms and conditions required by this subpart.

(b) The specific job opportunity for which the employer is requesting H–2B certification is not vacant because the former occupant(s) is (are) on strike or locked out in the course of a labor dispute involving a work stoppage.

(c) The job opportunity is open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, handicap, or citizenship, and the employer has conducted the required recruitment, in accordance with the regulations, and has been unsuccessful in locating sufficient numbers of qualified U.S. applicants for the job opportunity for which labor certification is sought. Any U.S. worker applicants were rejected only for lawful, job-related reasons, and the employer must retain records of all rejections.

(d) During the period of employment that is the subject of the labor certification application, the employer will comply with applicable Federal, State and local employment-related laws and regulations, including employment-related health and safety laws;

(e) The offered wage equals or exceeds the highest of the prevailing wage, the applicable Federal minimum wage, the State minimum wage, and local minimum wage, and the employer will pay the offered wage during the entire period of the approved H–2B labor certification.

(f) Upon the separation from employment of H–2B worker(s) employed under the labor certification application, if such separation occurs prior to the end date of the employment specified in the application, the employer will notify the Department and DHS in writing (or any other method specified by the Department or DHS in the **Federal Register** or the Code of Federal Regulations) of the separation from employment not later than 2 work days after such separation is discovered by the employer. An abandonment or abscondment shall be deemed to begin after a worker fails to report for work at the regularly scheduled time for 5 consecutive working days without the consent of the employer. Employees may be terminated for cause.

(g)(1) The offered wage is not based on commissions, bonuses, or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis that equals or exceeds the prevailing wage, or the legal Federal, State, or local minimum wage, whichever is highest. The employer must make all deductions from the worker's paychecks that are required by law. The job offer must specify all deductions not required by law that the employer will make from the worker's paycheck. All deductions must be reasonable. However, an employer subject to the FLSA may not make deductions that would violate the FLSA.

(2) The employer has contractually forbidden any foreign labor contractor or recruiter whom the employer engages in international recruitment of H–2B workers to seek or receive payments from prospective employees, except as provided for in DHS regulations at 8 CFR 214.2(h)(5)(xi)(A). This provision does not prohibit employers or their agents from receiving reimbursement for costs that are the responsibility of the worker, such as government required passport or visa fees.

(h) The job opportunity is a bona fide, full-time temporary position, the qualifications for which are consistent with the normal and accepted qualifications required by non-H–2B employers in the same or comparable occupations.

(i) The employer has not laid off and will not lay off any similarly employed U.S. worker in the occupation that is the subject of the *Application for*

*Temporary Employment Certification* in the area of intended employment within the period beginning 120 calendar days before the date of need through 120 calendar days after the date of need, except where the employer also attests that it offered the job opportunity that is the subject of the application to those laid off U.S. worker(s) and the U.S. worker(s) either refused the job opportunity or was rejected for the job opportunity only for lawful, job-related reasons.

(j) The employer and its attorney or agents have not sought or received payment of any kind from the employee for any activity related to obtaining the labor certification, including payment of the employer's attorneys' or agent fees, *Application for Temporary Employment Certification*, or recruitment costs. For purposes of this paragraph, payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in kind payments, and free labor.

(k) If the employer is a job contractor, it will not place any H–2B workers employed pursuant to the labor certification application with any other employer or at another employer's worksite unless:

(1) The employer applicant first makes a written bona fide inquiry as to whether the other employer has displaced or intends to displace any similarly employed U.S. workers within the area of intended employment within the period beginning 120 days before through 120 calendar days after the date of need, and the other employer provides written confirmation that it has not so displaced and does not intend to displace such U.S. workers, and

(2) All worksites are listed on the certified *Application for Temporary Employment Certification*, including amendments or modifications.

(l) The employer will not place any H–2B workers employed pursuant to this application outside the area of intended employment listed on the *Application for Temporary Employment Certification* unless the employer has obtained a new temporary labor certification from the Department.

(m) Unless the H–2B worker will be sponsored by another subsequent employer, the employer will inform H–2B workers of the requirement that they leave the U.S. at the end of the authorized period of stay provided by DHS or separation from the employer, whichever is earlier, as required in § 655.35 of this part (absent any extension or change of such worker's status or grace period pursuant to DHS regulations), and that if dismissed by the employer prior to the end of the period, the employer is liable for return transportation.

(n) The dates of temporary need, reason for temporary need, and number of positions being requested for labor certification have been truly and accurately stated on the application.

**§ 655.23 Receipt and processing of applications.**

(a) *Filing Date.* Applications received by U.S. Mail or private courier shall be considered filed when determined by the NPC to be complete. Incomplete applications shall not be accepted for processing or assigned a receipt date, but shall be returned by U.S. Mail to the employer or the employer's representative as incomplete.

(b) *Processing.* The CO will review complete applications for an absence of errors that would prevent certification and for compliance with the criteria for certification. The CO will make a determination to certify, deny, or issue a Request for Further Information prior to making a Final Determination on the application. Criteria for certification, as used in this subpart, are whether the employer has: established the need for the nonagricultural services or labor to be performed is temporary in nature; established that the number of worker positions being requested for certification is justified and represent bona fide job opportunities; made all the assurances and met all the obligations required by § 655.22; and complied with all requirements of the program.

(c) *Request for Further Information.* (1) If the CO determines that the employer has made all necessary attestations and assurances, but the application fails to comply with one or more of the criteria for certification in paragraph (b) of this section, the CO must issue a RFI to the employer. The CO will issue the written RFI within 7 calendar days of the receipt of the application, and send it by means normally assuring next-day delivery.

(2) The RFI must:

(i) Specify the reason(s) why the application is not sufficient to grant temporary labor certification, citing the relevant regulatory standard(s) and/or special procedure(s);

(ii) Specify a date, no later than 7 calendar days from the date of the written RFI, by which the supplemental information and documentation must be received by the CO to be considered; and

(iii) State that, upon receipt of a response to the written RFI, or expiration of the stated deadline for receipt of the response, the CO will review the existing application as well as any supplemental materials submitted by the employer and issue a Final Determination. If unusual circumstances warrant, the CO may issue one or more additional RFIs prior to issuing a Final Determination.

(3) The CO will issue the Final Determination or the additional RFI within 7 business days of receipt of the employer's response, or within 60 days of the employer's date of need, whichever is later.

(4) Compliance with an RFI does not guarantee that the employer's application will be certified after submitting the information. The employer's documentation must justify its chosen standard of temporary need or otherwise overcome the stated deficiency in the application.

(d) Failure to comply with an RFI, including not providing all documentation within the specified time period, may result in a denial of the application. Such failure to comply with an RFI may also result in a finding by the CO requiring supervised recruitment under § 655.30 in future filings of H–2B temporary labor certification applications.

**§ 655.24 Audits.**

(a) *Discretion.* OFLC will conduct audits of H–2B temporary labor certification applications. The applications selected for audit will be chosen within the sole discretion of OFLC.

(b) *Audit Letter.* When an application is selected for audit, the CO shall issue an audit letter to the employer. The audit letter will:

(1) State the application has been selected for audit and note documentation that must be submitted by the employer;

(2) Specify a date, no fewer than 14 days and no more than 30 days from the date of the audit letter's issuance, by which the required documentation must be received by the CO; and

(3) Advise that failure to comply with the audit process may result in a finding by the CO to:

(i) Require the employer to conduct supervised recruitment under § 655.30 in future filings of H–2B temporary labor certification applications for a period of up to 2 years, or

(ii) Debar the employer from future filings of H–2B temporary labor certification applications as provided in § 655.31.

(c) *Supplemental information.* During the course of the audit examination, the CO may request supplemental information and/or documentation from the employer to complete the audit.

(d) *Audit violations.* If, as a result of the audit, the CO determines the employer failed to produce all required documentation, or determines that the employer made a material misrepresentation with respect to the application, the employer may be required to conduct supervised recruitment under § 655.30 in future filings of H–2B temporary labor certification applications for up to 2 years, or may be subject to debarment pursuant to § 655.31 or other sanctions. The CO may provide the audit findings and underlying documentation to DHS, WHD, or another appropriate enforcement agency. The CO may refer any findings that an employer discouraged an eligible U.S. worker from applying, or failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, to the Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices.

**§§ 655.25–655.29 [Reserved]**

**§ 655.30 Supervised recruitment.**

(a) *Supervised recruitment.* Where an employer is found to have violated program requirements, to have made a material misrepresentation to the Department, or to have failed to adequately conduct recruitment activities or failed in any obligation of this part, the CO may require pre-filing supervised recruitment.

(b) *Requirements.* Supervised recruitment shall consist of advertising for the job opportunity or opportunities in accordance with the required recruitment steps outlined under § 655.15, except as otherwise provided below.

(1) The CO will direct where the advertisements are to be placed.

(2) The employer must supply a draft advertisement and job order to the CO for review and approval no fewer than 150 days before the date on which the foreign worker(s) will commence work unless notified by the CO of the need for Supervised Recruitment less than 150 days before the date of need, in which case the employer must supply the drafts within 30 days of receipt of such notification.

(3) Each advertisement must comply with the requirements of § 655.17(a).

(4) The advertisement shall be placed in accordance with guidance provided by the CO.

(5) The employer will notify the CO when the advertisements are placed.

(c) *Recruitment report.* No fewer than 2 days after the last day of the posting of the job order and no fewer than 5 calendar days after the date on which the last newspaper or journal advertisement appeared, the employer must prepare a detailed written report of the employer's supervised recruitment, signed by the employer as outlined in § 655.15(i). The employer must submit the recruitment report to the CO within 30 days of the date of the first advertisement and must retain a copy for a period of no less than 3 years. The recruitment report must contain a copy of all advertisements and a copy of the SWA job order, including the dates so placed.

(d) The CO may refer any findings that an employer or its representative discouraged an eligible U.S. worker from applying, or failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, to the Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices.

**§ 655.31 Debarment.**

(a) The Administrator, OFLC may not issue future labor certifications under this subpart to an employer and any successor in interest to the debarred employer, subject to the time limits set forth in paragraph (c) of this section, if:

(1) The Administrator, OFLC finds that the employer substantially violated a material term or condition of its temporary labor certification with respect to the employment of domestic or nonimmigrant workers; and

(2) The Administrator, OFLC issues a *Notice of Intent to Debar* no later than 2 years after the occurrence of the violation.

(b) The Administrator, OFLC may not issue future labor certifications under this subpart to an employer represented by an agent or attorney, subject to the time limits set forth in paragraph (c) of this section, if:

(1) The agent or attorney participated in, had knowledge of, or had reason to know of, the employer's substantial violation; and

(2) The Administrator issues the agent or attorney a *Notice of Intent to Debar* no later than 2 years after the occurrence of the violation.

(c) No employer, attorney, or agent may be debarred under this subpart for more than 3 years.

(d) For the purposes of this section, a substantial violation includes:

(1) A pattern or practice of acts of commission or omission on the part of the employer or the employer's agent that:

(i) Are significantly injurious to the wages or benefits offered under the H–2B program or working conditions of a significant number of the employer's U.S. or H–2B workers;

(ii) Reflect a significant failure to offer employment to each qualified domestic worker who applied for the job opportunity for which certification was being sought, except for lawful job-related reasons;

(iii) Reflect a significant failure to comply with the employer's obligations to recruit U.S. workers as set forth in this subpart;

(iv) Reflect a significant failure to comply with the RFI or audit process pursuant to §§ 655.23 or 655.24;

(v) Reflect the employment of an H–2B worker outside the area of intended employment, or in an activity/activities, not listed in the job order (other than an activity minor and incidental to the activity/activities listed in the job order), or after the period of employment specified in the job order and any approved extension; or

(vi) Reflect a significant failure to comply with the supervised recruitment process pursuant to § 655.30.

(2) Fraud involving the *Application for Temporary Employment Certification* or a response to an audit;

(3) A significant failure to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, or law enforcement function under this subpart;

(4) A significant failure to comply with one or more sanctions or remedies imposed by the ESA for violation(s) of obligations under this subpart found by that agency (if applicable), or with one or more decisions or orders of the Secretary or a court order secured by the Secretary; or

(5) A single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected.

(e) DOL procedures for debarment under this section will be as follows:

(1) The Administrator, OFLC will send to the employer, attorney, or agent a *Notice of Intent to Debar* by means normally ensuring next-day delivery, which will contain a detailed statement of the grounds for the proposed debarment. The employer, attorney, or agent may submit evidence in rebuttal within 14 calendar days of the date the notice is issued. The Administrator, OFLC must consider all relevant evidence presented in deciding whether to debar the employer, attorney, or agent.

(2) If rebuttal evidence is not timely filed by the employer, attorney, or agent, the *Notice of Intent to Debar* will become the final decision of the Secretary and take effect immediately at the end of the 14-day period.

(3) If, after reviewing the employer's timely filed rebuttal evidence, the Administrator, OFLC determines that the employer, attorney, or agent more likely than not meets one or more of the bases for debarment under § 655.31(d), the Administrator, OFLC will notify the employer, by means normally ensuring next-day delivery, within 14 calendar days after receiving such timely filed rebuttal evidence, of his/her final determination of debarment and of the employer, attorney, or agent's right to appeal.

(4) The *Notice of Debarment* must be in writing, must state the reason for the debarment finding, including a detailed explanation of the grounds for and the duration of the debarment, and must offer the employer, attorney, or agent an opportunity to request a hearing. The notice must state that to obtain such a review or hearing, the debarred party must, within 30 calendar days of the date of the notice file a written request to the Chief Administrative Law Judge, United States Department of Labor, 800 K Street, NW., Suite 400–N, Washington, DC 20001–8002, and simultaneously serve a copy to the Administrator, OFLC. The debarment will take effect 30 days from the date the *Notice of Debarment* is issued, unless a request for a hearing is properly filed within 30 days from the date the *Notice of Debarment* is issued. The timely filing of a request for a hearing stays the debarment pending the outcome of the appeal.

(5)(i) *Hearing.* Within 10 days of receipt of the request for a hearing, the Administrator, OFLC will send a certified copy of the ETA case file to the Chief Administrative Law Judge by means normally assuring next-day delivery. The Chief Administrative Law Judge will immediately assign an ALJ to conduct the hearing. The procedures in 29 CFR part 18 apply to such hearings, except that the request for a hearing will not be considered to be a complaint to which an answer is required.

(ii) *Decision.* After the hearing, the ALJ must affirm, reverse, or modify the Administrator, OFLC 's determination. The ALJ's decision must be provided immediately to the employer, Administrator, OFLC, DHS, and DOS by means normally assuring next-day delivery. The ALJ's decision is the final decision of the Secretary, unless either party, within 30 calendar days of the ALJ's decision, seeks review of the decision with the Administrative Review Board (ARB).

(iii) Review by the ARB.

(A) Any party wishing review of the decision of an ALJ must, within 30 days of the decision of the ALJ, petition the ARB to review the decision. Copies of the petition must be served on all parties and on the ALJ. The ARB must decide whether to accept the petition within 30 days of receipt. If the ARB declines to accept the petition or if the ARB does not issue a notice accepting a petition within 30 days after the receipt of a timely filing of the petition, the decision of the ALJ shall be deemed the final agency action. If a petition for review is accepted, the decision of the ALJ shall be stayed unless and until the ARB issues an order affirming the decision. The ARB must serve notice of its decision to accept or not to accept the petition upon the ALJ and upon all parties to the proceeding in person or by certified mail.

(B) Upon receipt of the ARB's notice to accept the petition, the Office of Administrative Law Judges shall promptly forward a copy of the complete hearing record to the ARB.

(C) Where the ARB has determined to review such decision and order, the ARB shall notify each party of:

(*1*) The issue or issues raised;

(*2*) The form in which submissions shall be made (*i.e.*, briefs, oral argument, etc.); and

(*3*) The time within which such presentation shall be submitted.

(D) The ARB's final decision must be issued within 90 days from the notice granting the petition and served upon all parties and the ALJ, in person or by certified mail. If the ARB fails to provide a decision within 90 days from the notice granting the petition, the ALJ's decision will be the final decision of the Secretary.

(f) *Inter-Agency Reporting.* After completion of the appeal process, DOL will inform DHS and other appropriate enforcement agencies of the findings and provide a copy of the *Notice of Debarment*.

**§ 655.32 Labor certification determinations.**

(a) *COs.* The Administrator, OFLC, is the Department's National CO. The Administrator, and the CO(s) in the NPC (by virtue of delegation from the Administrator), have the authority to certify or deny applications for temporary employment certification under the H–2B nonimmigrant classification. If the Administrator directs that certain types of temporary labor certification applications or specific applications under the H–2B nonimmigrant classification be handled by the National OFLC, the Director of the Chicago NPC will refer such applications to the Administrator.

(b) *Determination.* The CO will make a determination either to grant or deny the *Application for Temporary Employment Certification*. The CO will grant the application if and only if the employer has met all the requirements of this subpart, including the criteria for certification defined in § 655.23(b), thus demonstrating that an insufficient number of qualified U.S. workers are available for the job opportunity for which certification is sought and the employment of the H–2B workers will not adversely affect the benefits, wages, and working conditions of similarly employed U.S. workers.

(c) *Notice.* The CO will notify the employer in writing (either electronically or by U.S. Mail) of the labor certification determination.

(d) *Approved certification.* If temporary labor certification is granted, the CO must send the certified *Application for Temporary Employment Certification* and a Final Determination letter to the employer, or, if appropriate, to the employer's agent or attorney with a copy to the employer. The Final Determination letter will notify the employer to file the certified application and any other documentation required by USCIS with the appropriate USCIS office.

(e) *Denied certification.* If temporary labor certification is denied, the Final Determination letter will:

(1) State the reason(s) certification is denied, citing the relevant regulatory standards and/or special procedures;

(2) If applicable, address the availability of U.S. workers in the occupation as well as the prevailing benefits, wages, and working conditions of similarly employed U.S. workers in the occupation and/or any applicable special procedures;

(3) Offer the employer an opportunity to request administrative review of the denial available under § 655.33, or to file a new application in accordance with specific instructions provided by the CO; and

(4) State that if the employer does not request administrative review in accordance with § 655.33, the denial is final and the Department will not further consider that application for temporary alien nonagricultural labor certification.

(f) *Partial Certification.* The CO may, in his/her discretion, and to ensure compliance with all statutory and regulatory requirements, issue a partial certification, reducing either the period of need, the number of H–2B positions being requested, or both, based upon information the CO receives in the course of processing the temporary labor certification application, an RFI, or otherwise. If a partial labor certification

is issued, the Final Determination letter will:

(1) State the reason(s) for which either the period of need and/or the number of H–2B positions requested has been reduced, citing the relevant regulatory standards and/or special procedures;

(2) If applicable, address the availability of U.S. workers in the occupation;

(3) Offer the employer an opportunity to request administrative review of the partial labor certification available under § 655.33; and

(4) State that if the employer does not request administrative review in accordance with § 655.33, the partial labor certification is final and the Department will not further consider that application for temporary nonagricultural labor certification.

**§ 655.33 Administrative review.**

(a) Request for review. If a temporary labor certification is denied, in whole or in part, under § 655.32, the employer may request review of the denial by the BALCA. The request for review:

(1) Must be sent to the BALCA, with a copy simultaneously sent to the CO who denied the application, within 10 calendar days of the date of determination;

(2) Must clearly identify the particular temporary labor certification determination for which review is sought;

(3) Must set forth the particular grounds for the request;

(4) Must include a copy of the Final Determination; and

(5) May contain only legal argument and such evidence as was actually submitted to the CO in support of the application.

(b) Upon the receipt of a request for review, the CO shall, within 5 business days assemble and submit the Appeal File using means to ensure same day or overnight delivery, to the BALCA, the employer, and the Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor, U.S. Department of Labor.

(c) Within 5 business days of receipt of the Appeal File, the counsel for the CO may submit, using means to ensure same day or overnight delivery, a brief in support of the CO's decision.

(d) The Chief Administrative Law Judge may designate a single member or a three member panel of the BALCA to consider a particular case.

(e) The BALCA must review a denial of temporary labor certification only on the basis of the Appeal File, the request for review, and any legal briefs submitted and must:

(1) Affirm the denial of the temporary labor certification; or

(2) Direct the CO to grant the certification; or

(3) Remand to the CO for further action.

(f) The BALCA should notify the employer, the CO, and counsel for the CO of its decision within 5 business days of the submission of the CO's brief or 10 days after receipt of the Appeal File, whichever is earlier, using means to ensure same day or overnight delivery.

**§ 655.34 Validity of temporary labor certifications.**

(a) *Validity Period.* A temporary labor certification is valid only for the period of time between the beginning and ending dates of employment, as certified by the OFLC Administrator on the *Application for Temporary Employment Certification.* The certification expires on the last day of authorized employment.

(b) *Scope of Validity.* A temporary labor certification is valid only for the number of H–2B positions, the area of intended employment, the specific services or labor to be performed, and the employer specified on the certified *Application for Temporary Employment Certification* and may not be transferred from one employer to another.

(c) *Amendments to Applications.* (1) Applications may be amended at any time, before the CO's certification determination, to increase the number of positions requested in the initial application by not more than 20 percent (50 percent for employers requesting less than 10 positions) without requiring an additional recruitment period for U.S. workers. Requests for increases above the percent prescribed, without additional recruitment, may be approved by the CO only when the request is submitted in writing, the need for additional workers could not have been reasonably foreseen, and the employer's services or products will be in jeopardy prior to the time that new H–2B workers could be secured.

(2) Applications may be amended to make minor changes in the period of employment, only when a written request is submitted to the CO and written approval obtained in advance. In considering whether to approve the request, the CO will review the reason(s) for the request, determine whether the reason(s) are on the whole justified, and take into account the effect(s) of a decision to approve on the adequacy of the underlying test of the domestic labor market for the job opportunity.

(3) Other amendments to the application, including elements of the job offer and the place of work, may be requested, in writing, and will be granted if the CO determines the proposed amendment(s) are justified and will have no significant effect upon the CO's ability to make the labor certification determination required under § 655.32.

(4) The CO may change the date of need to reflect an amended date when delays occur in the adjudication of the *Application for Temporary Employment Certification,* through no fault of the employer, and the certification would otherwise become valid after the initial date of need.

**§ 655.35 Required departure.**

(a) *Limit to worker's stay.* As defined further in DHS regulations, a temporary labor certification shall limit the authorized period of stay for any H–2B worker whose admission is based upon it. 8 CFR 214.2(h)(13). A foreign worker may not remain in the U.S. beyond the validity period of admission by DHS in H–2B status nor beyond separation from employment, whichever occurs first, absent any extension or change of such worker's status or grace period pursuant to DHS regulations.

(b) *Notice to worker.* Upon establishment of a pilot program by DHS for registration of departure, the employer must notify any H–2B worker starting work at a job opportunity for which the employer has obtained labor certification that the H–2B worker, when departing the U.S. by land at the conclusion of employment as described in paragraph (a) of this section, must register such departure at the place and in the manner prescribed by DHS. This requirement will apply only to H–2B foreign workers entering from ports of entry participating in the DHS pilot program.

**§ 655.50 Enforcement process.**

(a) *Authority of the WHD Administrator.* The WHD Administrator shall perform all the Secretary's investigative and enforcement functions under secs. 1101(a)(15)(H)(ii)(b), 103(a)(6), and 214(c) of the INA, pursuant to the delegation of authority from the Secretary of Homeland Security to the Secretary of Labor.

(b) *Conduct of investigations.* The Administrator, WHD, shall, either pursuant to a complaint or otherwise, conduct such investigations as may, in the judgment of the Administrator, be appropriate, and in connection therewith, may enter and inspect such places and such records (and make transcriptions or copies thereof), question such persons, and gather such information as deemed necessary by the Administrator to determine compliance

regarding the matters which are the subject of investigation.

(c) *Employer cooperation/availability of records.* An employer shall at all times cooperate in administrative and enforcement proceedings. An employer being investigated shall make available to the WHD Administrator such records, information, persons, and places as the Administrator deems appropriate to copy, transcribe, question, or inspect. Where the records are maintained at a central recordkeeping office, other than in the place or places of employment, such records must be made available for inspection and copying within 72 hours following notice from the Secretary, or a duly authorized and designated representative. No employer or representative or agent of an employer subject to the provisions of secs. 1101(a)(15)(H)(ii)(b) and 214(c) of the INA and/or of this subpart shall interfere with any official of the Department who is performing an investigation, inspection, or law enforcement function pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(b) or 1184(c). Any such interference shall be a violation of the labor certification application and of this subpart, and the Administrator may take such further actions as the Administrator considers appropriate. (Federal criminal statutes prohibit certain interference with a Federal officer in the performance of official duties. 18 U.S.C. 111 and 18 U.S.C. 1114.)

(d) *Confidentiality.* The WHD Administrator shall, to the extent possible under existing law, protect the confidentiality of any person who provides information to the Department in confidence in the course of an investigation or otherwise under this subpart.

**§ 655.60 Violations.**

The WHD Administrator, through investigation, shall determine whether an employer has—

(a) Filed a petition with ETA that willfully misrepresents a material fact.

(b) Substantially failed to meet any of the conditions of the labor certification application attested to, as listed in § 655.22, or any of the conditions of the DHS Form I–129, Petition for a Nonimmigrant Worker for an H–2B worker in 8 CFR 214.2(h).

(c) Misrepresented a material fact to the State Department during the visa application process.

**§ 655.65 Remedies for violations.**

(a) Upon determining that an employer has willfully failed to pay wages, in violation of the attestation required by § 655.22(e) or willfully required employees to pay for fees or expenses prohibited by § 655.22(j), or willfully made impermissible deductions from pay as provided in § 655.22(g), the WHD Administrator may assess civil money penalties that are equal to the difference between the amount that should have been paid and the amount that actually was paid to such nonimmigrant(s), not to exceed $10,000.

(b) Upon determining that an employer has terminated by layoff or otherwise any employee described in § 622.55(k) of this part, within the period described in that section, the Administrator may assess civil money penalties that are equal to the wages that would have been earned but for the layoff at the H–2B rate for that period, not to exceed $10,000. No civil money penalty shall be assessed, however, if the employee refused the job opportunity, or was terminated for lawful, job-related reasons.

(c) The Administrator may assess civil money penalties in an amount not to exceed $10,000 per violation for any substantial failure to meet the conditions provided in the H–2B *Application for Temporary Employment Certification* or the DHS Form I–129, Petition for a Nonimmigrant Worker for an H–2B worker or successor form, or any willful misrepresentation in the application or petition, or a failure to cooperate with a Department audit or investigation.

(d) Substantial failure in paragraph (b) of this section shall mean a willful failure that constitutes a significant deviation from the terms and conditions of the labor condition application or the DHS Form I–129, Petition for a Nonimmigrant Worker for an H–2B worker or successor form.

(e) For purposes of this subpart, ''willful failure'' means a knowing failure or a reckless disregard with respect to whether the conduct was contrary to sec. 214(c) of the INA, or this subpart. See *McLaughlin* v. *Richland Shoe Co.,* 486 U.S. 128 (1988); see also *Trans World Airlines* v. *Thurston,* 469 U.S. 111 (1985).

(f) The provisions of this subpart become applicable upon the date that the employer's labor condition application is certified and/or upon the date employment commences, whichever is earlier. The employer's submission and signature on the labor certification application and DHS Form I–129, Petition for a Nonimmigrant Worker for an H–2B worker or successor form constitutes the employer's representation that the statements on the application are accurate and its acknowledgment and acceptance of the obligations of the program. The employer's acceptance of these obligations is re-affirmed by the employer's submission of the petition (Form I–129), supported by the labor certification.

(g) In determining the amount of the civil money penalty to be assessed pursuant to paragraphs (b) and (c) of this section, the WHD Administrator shall consider the type of violation committed and other relevant factors. In determining the level of penalties to be assessed, the highest penalties shall be reserved for willful failures to meet any of the conditions of the application that involve harm to U.S. workers. Other factors which may be considered include, but are not limited to, the following:

(1) Previous history of violation, or violations, by the employer under the INA and this subpart, and 8 CFR 214.2;

(2) The number of U.S. or H–2B workers employed by the employer and affected by the violation or violations;

(3) The gravity of the violation or violations;

(4) Efforts made by the employer in good faith to comply with the INA and regulatory provisions of this subpart and at 8 CFR 214.2(h);

(5) The employer's explanation of the violation or violations;

(6) The employer's commitment to future compliance; and

(7) The extent to which the employer achieved a financial gain due to the violation, or the potential financial loss to the employer's workers.

(h) *Disqualification from approval of petitions.* Where the WHD Administrator finds a substantial failure to meet any conditions of the application or in a DHS Form I–129, or a willful misrepresentation of a material fact in an application or in a DHS Form I–129, as those terms are defined in § 655.31, the Administrator may recommend that ETA debar the employer for a period of no less than 1 year, and no more than 3 years.

(i) If the WHD Administrator finds a violation of the provisions specified in this subpart, the Administrator may impose such other administrative remedies as the Administrator determines to be appropriate, including reinstatement of displaced U.S. workers, or other appropriate legal or equitable remedies. If the WHD Administrator finds that an employer has not paid wages at the wage level specified under the application and required by § 655.22(e), the Administrator may require the employer to provide for payment of such amounts of back pay as may be required to comply with the requirements of § 655.22(e).

(j) The civil money penalties determined by the WHD Administrator to be appropriate are due for payment within 30 days of the assessment by the Administrator, or upon the decision by an administrative law judge where a hearing is timely requested, or upon the decision by the Secretary where review is granted. The employer shall remit the amount of the civil money penalty by certified check or money order made payable to the order of ''Wage and Hour Division, Labor.'' The remittance shall be delivered or mailed to the Wage and Hour Division office in the manner directed in the Administrator's notice of determination. The payment or performance of any other remedy prescribed by the Administrator shall follow procedures established by the Administrator.

(k) The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. 2461 note), requires that inflationary adjustments to civil money penalties in accordance with a specified cost-of-living formula be made, by regulation, at least every 4 years. The adjustments are to be based on changes in the Consumer Price Index for all Urban Consumers (CPI–U) for the U.S. City Average for All Items. The adjusted amounts will be published in the **Federal Register**. The amount of the penalty in a particular case will be based on the amount of the penalty in effect at the time the violation occurs.

### § 655.70 WHD Administrator's determination.

(a) The WHD Administrator's determination shall be served on the employer by personal service or by certified mail at the employer's last known address. Where service by certified mail is not accepted by the employer, the Administrator may exercise discretion to serve the determination by regular mail.

(b) The WHD Administrator shall file with the Chief Administrative Law Judge, U.S. Department of Labor, a copy of the Administrator's determination.

(c) The WHD Administrator's written determination shall:

(1) Set forth the determination of the Administrator and the reason or reasons therefore, and in the case of a finding of violation(s) by an employer, prescribe the amount of any back wages and civil money penalties assessed and the reason therefor.

(2) Inform the employer that a hearing may be requested pursuant to § 655.71.

(3) Inform the employer that in the absence of a timely request for a hearing, received by the Chief Administrative Law Judge within 15 calendar days of the date of the determination, the determination of the Administrator shall become final and not appealable.

(4) Set forth the procedure for requesting a hearing, give the addresses of the Chief Administrative Law Judge (with whom the request must be filed) and the representative(s) of the Solicitor of Labor (upon whom copies of the request must be served).

(5) Where appropriate, inform the employer that the Administrator will notify ETA and DHS of the occurrence of a violation by the employer.

### § 655.71 Request for hearing.

(a) An employer desiring review of a determination issued under § 655.70, including judicial review, shall make a request for such an administrative hearing in writing to the Chief Administrative Law Judge at the address stated in the notice of determination. In such a proceeding, the Administrator shall be the prosecuting party, and the employer shall be the respondent. If such a request for an administrative hearing is timely filed, the WHD Administrator's determination shall be inoperative unless and until the case is dismissed or the Administrative Law Judge issues an order affirming the decision.

(b) No particular form is prescribed for any request for hearing permitted by this section. However, any such request shall:

(1) Be dated;

(2) Be typewritten or legibly written;

(3) Specify the issue or issues stated in the notice of determination giving rise to such request;

(4) State the specific reason or reasons why the employer believes such determination is in error;

(5) Be signed by the employer making the request or by an authorized representative of such employer; and

(6) Include the address at which such employer or authorized representative desires to receive further communications relating thereto.

(c) The request for such hearing must be received by the Chief Administrative Law Judge, at the address stated in the WHD Administrator's notice of determination, no later than 15 calendar days after the date of the determination. An employer which fails to meet this 15-day deadline for requesting a hearing may thereafter participate in the proceedings only by consent of the administrative law judge.

(d) The request may be filed in person, by facsimile transmission, by certified or regular mail, or by courier service. For the requesting employer's protection, if the request is by mail, it should be by certified mail. If the request is by facsimile transmission, the original of the request, signed by the employer or authorized representative, shall be filed within 10 days.

(e) Copies of the request for a hearing shall be sent by the employer or authorized representative to the WHD official who issued the WHD Administrator's notice of determination, and to the representative(s) of the Solicitor of Labor identified in the notice of determination.

### § 655.72 Hearing rules of practice.

(a) Except as specifically provided in this subpart, and to the extent they do not conflict with the provisions of this subpart, the ''Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges'' established by the Secretary at 29 CFR part 18 shall apply to administrative proceedings under this subpart.

(b) As provided in the Administrative Procedure Act, 5 U.S.C. 556, any oral or documentary evidence may be received in proceedings under this part. The Federal Rules of Evidence and subpart B of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 CFR part 18, subpart B) shall not apply, but principles designed to ensure production of relevant and probative evidence shall guide the admission of evidence. The administrative law judge may exclude evidence which is immaterial, irrelevant, or unduly repetitive.

### § 655.73 Service of pleadings.

(a) Under this subpart, a party may serve any pleading or document by regular mail. Service on a party is complete upon mailing to the last known address. No additional time for filing or response is authorized where service is by mail. In the interest of expeditious proceedings, the administrative law judge may direct the parties to serve pleadings or documents by a method other than regular mail.

(b) Two copies of all pleadings and other documents in any administrative law judge proceeding shall be served on the attorneys for the WHD Administrator. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–2716, Washington, DC 20210, and one copy shall be served on the attorney representing the Administrator in the proceeding.

(c) Time will be computed beginning with the day following service and includes the last day of the period

unless it is a Saturday, Sunday, or Federally-observed holiday, in which case the time period includes the next business day.

**§ 655.74 Conduct of proceedings.**

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § 655.71, the Chief Administrative Law Judge shall promptly appoint an administrative law judge to hear the case.

(b) The administrative law judge shall notify all parties of the date, time and place of the hearing. All parties shall be given at least 14 calendar days notice of such hearing.

(c) The administrative law judge may prescribe a schedule by which the parties are permitted to file a prehearing brief or other written statement of fact or law. Any such brief or statement shall be served upon each other party. Post-hearing briefs will not be permitted except at the request of the administrative law judge. When permitted, any such brief shall be limited to the issue or issues specified by the administrative law judge, shall be due within the time prescribed by the administrative law judge, and shall be served on each other party.

**§ 655.75 Decision and order of administrative law judge.**

(a) The administrative law judge shall issue a decision. If any party desires review of the decision, including judicial review, a petition for Administrative Review Board (Board) review thereof shall be filed as provided in § 655.76. If a petition for review is filed, the decision of the administrative law judge shall be inoperative unless and until the Board issues an order affirming the decision, or unless and until 30 calendar days have passed after the Board's receipt of the petition for review and the Board has not issued notice to the parties that the Board will review the administrative law judge's decision.

(b) The decision of the administrative law judge shall include a statement of findings and conclusions, with reasons and basis therefore, upon each material issue presented on the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator, WHD; the reason or reasons for such order shall be stated in the decision.

(c) In the event that the WHD Administrator assesses back wages for wage violation(s) of § 655.22(e), (g), or (j) based upon a PWD obtained by the Administrator from OFLC during the investigation and the administrative law judge determines that the Administrator's request was not warranted, the administrative law judge shall remand the matter to the Administrator for further proceedings on the Administrator's determination. If there is no such determination and remand by the administrative law judge, the administrative law judge shall accept as final and accurate the wage determination obtained from OFLC or, in the event the employer filed a timely appeal under § 655.11, the final wage determination resulting from that process. Under no circumstances shall the administrative law judge determine the validity of the wage determination or require submission into evidence or disclosure of source data or the names of establishments contacted in developing the survey which is the basis for the PWD.

(d) The administrative law judge shall not render determinations as to the legality of a regulatory provision or the constitutionality of a statutory provision.

(e) The decision shall be served on all parties in person or by certified or regular mail.

**§ 655.76 Appeal of administrative law judge decision.**

(a) The WHD Administrator or an employer desiring review of the decision and order of an administrative law judge, including judicial review, shall petition the Department's Administrative Review Board (Board) to review the decision and order. To be effective, such petition shall be received by the Board within 30 calendar days of the date of the decision and order. Copies of the petition shall be served on all parties and on the administrative law judge.

(b) No particular form is prescribed for any petition for the Board's review permitted by this subpart. However, any such petition shall:

(1) Be dated;

(2) Be typewritten or legibly written;

(3) Specify the issue or issues stated in the administrative law judge decision and order giving rise to such petition;

(4) State the specific reason or reasons why the party petitioning for review believes such decision and order are in error;

(5) Be signed by the party filing the petition or by an authorized representative of such party;

(6) Include the address at which such party or authorized representative desires to receive further communications relating thereto; and

(7) Attach copies of the administrative law judge's decision and order, and any other record documents which would assist the Board in determining whether review is warranted.

(c) Whenever the Board determines to review the decision and order of an administrative law judge, a notice of the Board's determination shall be served upon the administrative law judge, upon the Office of Administrative Law Judges, and upon all parties to the proceeding within 30 calendar days after the Board's receipt of the petition for review. If the Board determines that it will review the decision and order, the order shall be inoperative unless and until the Board issues an order affirming the decision and order.

(d) Upon receipt of the Board's notice, the Office of Administrative Law Judges shall within 15 calendar days forward the complete hearing record to the Board.

(e) The Board's notice shall specify:

(1) The issue or issues to be reviewed;

(2) The form in which submissions shall be made by the parties (e.g., briefs); and

(3) The time within which such submissions shall be made.

(f) All documents submitted to the Board shall be filed with the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–5220, Washington, DC 20210. An original and two copies of all documents shall be filed. Documents are not deemed filed with the Board until actually received by the Board. All documents, including documents filed by mail, shall be received by the Board either on or before the due date.

(g) Copies of all documents filed with the Board shall be served upon all other parties involved in the proceeding.

(h) The Board's final decision shall be served upon all parties and the administrative law judge.

**§ 655.80 Notice to OFLC and DHS.**

(a) The WHD Administrator shall, as appropriate, notify DHS and OFLC of the final determination of a violation and recommend that DHS not approve petitions filed by an employer. The Administrator's notification will address the type of violation committed by the employer and the appropriate statutory period for disqualification of the employer from approval of petitions.

(b) The Administrator shall notify DHS and OFLC upon the earliest of the following events:

(1) Where the Administrator determines that there is a basis for a finding of violation by an employer, and no timely request for hearing is made; or

(2) Where, after a hearing, the administrative law judge issues a

decision and order finding a violation by an employer, and no timely petition for review is filed with the Department's Administrative Review Board (Board); or

(3) Where a timely petition for review is filed from an administrative law judge's decision finding a violation and the Board either declines within 30 days to entertain the appeal, or reviews and affirms the administrative law judge's determination; or

(4) Where the administrative law judge finds that there was no violation by an employer, and the Board, upon review, issues a decision holding that a violation was committed by an employer.

■ 4. Amend § 655.715 by adding a definition for the ''Center Director'' to read as follows:

**§ 655.715 Definitions.**

* * * * *

*Center Director* means the Department official to whom the Administrator has delegated his authority for purposes of NPC operations and functions.

* * * * *

■ 5. Amend § 655.731 by revising paragraphs (a)(2) introductory text, (a)(2)(ii), (b)(3)(iii)(A), and (d)(2) and (3) to read as follows:

**§ 655.731 What is the first LCA requirement regarding wages?**

* * * * *

(a) * * *

(2) The prevailing wage for the occupational classification in the area of intended employment must be determined as of the time of filing the application. The employer shall base the prevailing wage on the best information available as of the time of filing the application. Except as provided in this section, the employer is not required to use any specific methodology to determine the prevailing wage and may utilize a wage obtained from an OFLC NPC (OES), an independent authoritative source, or other legitimate sources of wage data. One of the following sources shall be used to establish the prevailing wage:

* * * * *

(ii) If the job opportunity is in an occupation which is not covered by paragraph (a)(2)(i) of this section, the prevailing wage shall be the arithmetic mean of the wages of workers similarly employed, except that the prevailing wage shall be the median when provided by paragraphs (a)(2)(ii)(A), (b)(3)(iii)(B)(2), and (b)(3)(iii)(C)(2) of this section. The prevailing wage rate shall be based on the best information available. The following prevailing wage sources may be used:

(A) *OFLC National Processing Center (NPC) determination.* Prior to January 1, 2010, the SWA having jurisdiction over the area of intended employment shall continue to receive and process prevailing wage determination requests, but shall do so in accordance with these regulatory provisions and Department guidance. On or after January 1, 2010, the NPC shall receive and process prevailing wage determination requests in accordance with these regulations and with Department guidance. Upon receipt of a written request for a PWD on or after January 1, 2010, the NPC will determine whether the occupation is covered by a collective bargaining agreement which was negotiated at arms length, and, if not, determine the arithmetic mean of wages of workers similarly employed in the area of intended employment. The wage component of the Bureau of Labor Statistics Occupational Employment Statistics survey shall be used to determine the arithmetic mean, unless the employer provides an acceptable survey. The NPC shall determine the wage in accordance with secs. 212(n) and 212(t) of the INA. If an acceptable employer-provided wage survey provides a median and does not provide an arithmetic mean, the median shall be the prevailing wage applicable to the employer's job opportunity. In making a PWD, the Chicago NPC will follow 20 CFR 656.40 and other administrative guidelines or regulations issued by ETA. The Chicago NPC shall specify the validity period of the PWD, which in no event shall be for less than 90 days or more than 1 year from the date of the determination.

(*1*) An employer who chooses to utilize an NPC PWD shall file the labor condition application within the validity period of the prevailing wage as specified in the PWD. Any employer desiring review of an NPC PWD, including judicial review, shall follow the appeal procedures at 20 CFR 656.41. Employers which challenge an NPC PWD under 20 CFR 656.41 must obtain a ruling prior to filing an LCA. In any challenge, the Department and the NPC shall not divulge any employer wage data collected under the promise of confidentiality. Once an employer obtains a PWD from the NPC and files an LCA supported by that PWD, the employer is deemed to have accepted the PWD (as to the amount of the wage) and thereafter may not contest the legitimacy of the PWD by filing an appeal with the CO (see 20 CFR 656.41) or in an investigation or enforcement action.

(*2*) If the employer is unable to wait for the NPC to produce the requested prevailing wage for the occupation in question, or for the CO and/or the BALCA to issue a decision, the employer may rely on other legitimate sources of available wage information as set forth in paragraphs (a)(2)(ii)(B) and (C) of this section. If the employer later discovers, upon receipt of the PWD from the NPC, that the information relied upon produced a wage below the final PWD and the employer was paying the NPC-determined wage, no wage violation will be found if the employer retroactively compensates the H–2B nonimmigrant(s) for the difference between wage paid and the prevailing wage, within 30 days of the employer's receipt of the PWD.

(*3*) In all situations where the employer obtains the PWD from the NPC, the Department will deem that PWD as correct as to the amount of the wage. Nevertheless, the employer must maintain a copy of the NPC PWD. A complaint alleging inaccuracy of an NPC PWD, in such cases, will not be investigated.

(B) *An independent authoritative source.* The employer may use an independent authoritative wage source in lieu of an NPC PWD. The independent authoritative source survey must meet all the criteria set forth in paragraph (b)(3)(iii)(B) of this section.

* * * * *

(b) * * *

(3) * * *

(iii) * * *

(A) A copy of the prevailing wage finding from the NPC for the occupation within the area of intended employment.

* * * * *

* * * * *

(d) * * *

(2) In the event the Administrator obtains a prevailing wage from ETA pursuant to paragraph (d)(1) of this section, and the employer desires review, including judicial review, the employer shall challenge the ETA prevailing wage only by filing a request for review under § 656.41 of this chapter within 30 days of the employer's receipt of the PWD from the Administrator. If the request is timely filed, the decision of OFLC is suspended until the Center Director issues a determination on the employer's appeal. If the employer desires review, including judicial review, of the decision of the NPC Center Director, the employer shall make a request for review of the determination by the Board of Alien Labor Certification Appeals (BALCA) under § 656.41(e) of this chapter within 30 days of the receipt of the decision of

the Center Director. If a request for review is timely filed with the BALCA, the determination by the Center Director is suspended until the BALCA issues a determination on the employer's appeal. In any challenge to the wage determination, neither ETA nor the NPC shall divulge any employer wage data collected under the promise of confidentiality.

(i) Where an employer timely challenges an OFLC PWD obtained by the Administrator, the 30-day investigative period shall be suspended until the employer obtains a final ruling. Upon such a final ruling, the investigation and any subsequent enforcement proceeding shall continue, with the PWD as determined by the BALCA serving as the conclusive determination for all purposes.

(ii) [Reserved]

(3) For purposes of this paragraph (d), OFLC may consult with the NPC to ascertain the prevailing wage applicable under the circumstances of the particular complaint.

■ 6. Amend § 655.1102 to add the definition of ''Office of Foreign Labor Certification (OFLC)'' to read as follows:

**§ 655.1102 What are the definitions of terms that are used in these regulations?**

* * * * *

*Office of Foreign Labor Certification (OFLC)* means the organizational component within the ETA that provides national leadership and policy guidance and develops regulations and procedures to carry out the responsibilities of the Secretary of Labor under the INA concerning foreign workers seeking admission to the United States.

* * * * *

■ 7. Amend § 655.1112 by revising paragraph (c)(2) to read as follows:

**§ 655.1112 Element II—What does ''no adverse effect on wages and working conditions'' mean?**

* * * * *

(c) * * *

(2) Determination of prevailing wage for H–1C purposes. In the absence of collectively bargained wage rates, the National Processing Center (NPC) having jurisdiction as determined by OFLC shall determine the prevailing wage for similarly employed nurses in the geographic area in accordance with administrative guidelines issued by ETA for prevailing wage determination requests submitted on or after the effective date of these regulations.

(i) Prior to the effective date of these regulations, the SWA having jurisdiction over the area of intended employment shall continue to receive and process prevailing wage determination requests in accordance with the regulatory provisions and Department guidance in effect prior to January 1, 2009. On or after the effective date of these regulations, the NPC shall receive and process prevailing wage determination requests in accordance with these regulations and with Department guidance. A facility seeking to determine the prevailing wage must request a prevailing wage determination from the NPC having jurisdiction for providing the prevailing wage over the proposed area of intended employment not more than 90 days prior to the date the attestation is submitted to the Department. The NPC must enter its wage determination on the form it uses and return the form with its endorsement to the employer. Once a facility obtains a prevailing wage determination from the NPC and files an attestation supported by that prevailing wage determination, the facility shall be deemed to have accepted the prevailing wage determination as accurate and appropriate (as to both the occupational classification and the wage rate) and thereafter shall not contest the legitimacy of that prevailing wage determination in an investigation or enforcement action pursuant to subpart M of this part.

(ii) A facility may challenge the prevailing wage determination with the NPC having provided such determination according to administrative guidelines issued by ETA, but must obtain a final ruling prior to filing an attestation.

* * * * *

## PART 656—LABOR CERTIFICATION PROCESS FOR PERMANENT EMPLOYMENT OF ALIENS IN THE UNITED STATES

■ 8. The authority citation for part 656 is revised to read as follows:

**Authority:** 8 U.S.C. 1182(a)(5)(A), 1182(p)(1); sec.122, Public Law 101–649, 109 Stat. 4978; and Title IV, Public Law 105–277, 112 Stat. 2681.

■ 9. Amend § 656.3 by revising the definitions of ''Prevailing wage determination (PWD)'' and ''State Workforce Agency (SWA)'' to read as follows:

**§ 656.3 Definitions, for purposes of this part, of terms used in this part.**

* * * * *

*Prevailing wage determination (PWD)* means the prevailing wage provided or approved by an OFLC National Processing Center (NPC), in accordance with OFLC guidance governing foreign labor certification programs. This includes PWD requests processed for purposes of employer petitions filed with DHS under Schedule A or for sheepherders.

* * * * *

*State Workforce Agency (SWA),* formerly known as State Employment Security Agency (SESA), means the state agency that receives funds under the Wagner-Peyser Act to provide employment-related services to U.S. workers and employers and/or administers the public labor exchange delivered through the state's one-stop delivery system in accordance with the Wagner-Peyser Act.

* * * * *

**§ 656.15 [Amended]**

■ 10. Amend § 656.15:

■ a. By removing the words ''in duplicate;'' from paragraph (a); and

■ b. By removing paragraph (f) and redesignating paragraph (g) as paragraph (f).

■ 11. Amend § 656.40 by revising paragraphs (a), (b) introductory text, (c), (g), (h) and (i) to read as follows:

**§ 656.40 Determination of prevailing wage for labor certification purposes.**

(a) *Application process.* The employer must request a PWD from the NPC, on a form or in a manner prescribed by OFLC. Prior to January 1, 2010, the SWA having jurisdiction over the area of intended employment shall continue to receive and process prevailing wage determination requests in accordance with the regulatory provisions and Department guidance in effect prior to January 1, 2009. On or after January 1, 2010, the NPC shall receive and process prevailing wage determination requests in accordance with these regulations and with Department guidance. The NPC will provide the employer with an appropriate prevailing wage rate. The NPC shall determine the wage in accordance with sec. 212(t) of the INA. Unless the employer chooses to appeal the center's PWD under § 656.41(a) of this part, it files the Application for Permanent Employment Certification either electronically or by mail with the processing center of jurisdiction and maintains the PWD in its files. The determination shall be submitted to the CO, if requested.

(b) *Determinations.* The National Processing Center will determine the appropriate prevailing wage as follows:

* * *

(c) *Validity Period.* The National Processing Center must specify the validity period of the prevailing wage, which in no event may be less than 90 days or more than 1 year from the

determination date. To use a prevailing wage rate provided by the NPC, employers must file their applications or begin the recruitment period required by §§ 656.17(e) or 656.21 of this part within the validity period specified by the NPC.

* * * * *

(g) *Employer-provided wage information.* (1) If the job opportunity is not covered by a CBA, or by a professional sports league's rules or regulations, the NPC will consider wage information provided by the employer in making a PWD. An employer survey can be submitted either initially or after NPC issuance of a PWD derived from the OES survey. In the latter situation, the new employer survey submission will be deemed a new PWD request.

(2) In each case where the employer submits a survey or other wage data for which it seeks acceptance, the employer must provide the NPC with enough information about the survey methodology, including such items as sample size and source, sample selection procedures, and survey job descriptions, to allow the NPC to make a determination about the adequacy of the data provided and validity of the statistical methodology used in conducting the survey in accordance with guidance issued by the OFLC national office.

(3) The survey submitted to the NPC must be based upon recently collected data.

(i) A published survey must have been published within 24 months of the date of submission to the NPC, must be the most current edition of the survey, and the data upon which the survey is based must have been collected within 24 months of the publication date of the survey.

(ii) A survey conducted by the employer must be based on data collected within 24 months of the date it is submitted to the NPC.

(4) If the employer-provided survey is found not to be acceptable, the NPC will inform the employer in writing of the reasons the survey was not accepted.

(5) The employer, after receiving notification that the survey it provided for NPC consideration is not acceptable, may file supplemental information as provided by paragraph (h) of this section, file a new request for a PWD, or appeal under § 656.41.

(h) *Submittal of supplemental information by employer.* (1) If the employer disagrees with the skill level assigned to its job opportunity, or if the NPC informs the employer its survey is not acceptable, or if there are other legitimate bases for such a review, the employer may submit supplemental information to the NPC.

(2) The NPC will consider one supplemental submission about the employer's survey or the skill level the NPC assigned to the job opportunity or any other legitimate basis for the employer to request such a review. If the NPC does not accept the employer's survey after considering the supplemental information, or affirms its determination concerning the skill level, it will inform the employer of the reasons for its decision.

(3) The employer may then apply for a new wage determination or appeal under § 656.41 of this part.

(i) Frequent users. The Secretary will issue guidance regarding the process by which employers may obtain a wage determination to apply to a subsequent application, when the wage is for the same occupation, skill level, and area of intended employment. In no case may the wage rate the employer provides the NPC be lower than the highest wage required by any applicable Federal, State, or local law.

(ii) [Reserved]

* * * * *

■ 12. Revise § 656.41 to read as follows:

**§ 656.41 Review of prevailing wage determinations.**

(a) *Review of NPC PWD.* Any employer desiring review of a PWD made by a CO must make a request for such review within 30 days of the date from when the PWD was issued. The request for review must be sent to the director of the NPC that issued the PWD within 30 days of the date of the PWD; clearly identify the PWD from which review is sought; set forth the particular grounds for the request; and include all the materials pertaining to the PWD submitted to the NPC up to the date of the PWD received from the NPC.

(b) *Processing of request by NPC.* Upon the receipt of a request for review, the NPC will review the employer's request and accompanying documentation, and add any material that may have been omitted by the employer, including any material the NPC sent the employer up to the date of the PWD.

(c) *Review on the record.* The director will review the PWD solely on the basis upon which the PWD was made and, upon the request for review, may either affirm or modify the PWD.

(d) *Request for review by BALCA.* Any employer desiring review of the director's determination must make a request for review by the BALCA within 30 days of the date of the Director's decision.

(1) The request for review, statements, briefs, and other submissions of the parties and amicus curiae must contain only legal arguments and only such evidence that was within the record upon which the director made his/her affirmation of the PWD.

(2) The request for review must be in writing and addressed to the director of the NPC making the determination. Upon receipt of a request for a review, the director will assemble an indexed appeal file in reverse chronological order, with the index on top followed by the most recent document.

(3) The director will send the Appeal File to the Office of Administrative Law Judges, BALCA. The BALCA handles the appeals in accordance with §§ 656.26 and 656.27.

Signed in Washington, DC, this 12th day of December, 2008.

**Brent R. Orrell,**

*Deputy Assistant Secretary, Employment and Training Administration.*

**Alexander J. Passantino,**

*Acting Administrator, Wage and Hour Division, Employment Standards Administration.*

[FR Doc. E8–29995 Filed 12–18–08; 8:45 am]

BILLING CODE 4510–FP–P


Federal Register

**Friday,**

**December 19, 2008**

## Part VI

# Department of Health and Human Services

**45 CFR Part 88**

**Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law; Final Rule**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**45 CFR Part 88**

**RIN 0991–AB48**

## Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law

**AGENCY:** Office of the Secretary, HHS.

**ACTION:** Final rule.

**SUMMARY:** The Department of Health and Human Services (HHS) is issuing a final rule to ensure that Department funds do not support morally coercive or discriminatory practices or policies in violation of federal law, pursuant to the Church Amendments (42 U.S.C. 300a–7), Public Health Service (PHS) Act § 245 (42 U.S.C. 238n), and the Weldon Amendment (Consolidated Appropriations Act, 2008, Public Law 110–161, Div. G, § 508(d), 121 Stat. 1844, 2209). This final rule defines certain key terms. In order to ensure that recipients of Department funds know about their legal obligations under these federal health care conscience protection laws, the Department is requiring written certification by certain recipients that they will comply with all three statutes, as applicable. Finally, this final rule assigns responsibility for complaint handling and investigation among the Department's Office for Civil Rights and Department program offices.

**DATES:** This rule is effective January 20, 2009.

**FOR FURTHER INFORMATION CONTACT:** For further information regarding this rule, contact: Brenda Destro, (202) 401–2305, Office of Public Health and Science, Department of Health and Human Services, Room 728E, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201. For information regarding how to file a complaint with the Office for Civil Rights, U.S. Department of Health and Human Services, contact: Vernell Lancaster, (202) 260–7180, Office for Civil Rights, Department of Health and Human Services, Room 533F, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

**SUPPLEMENTARY INFORMATION:**

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## I. Introduction

*Statutory Background*

Several provisions of federal law prohibit recipients of certain federal funds from coercing individuals in the health care field into participating in actions they find religiously or morally objectionable. These same provisions also prohibit discrimination on the basis of one's objection to, participation in, or refusal to participate in, specific medical procedures, including abortion or sterilization. In addition, there is a statutory provision that prohibits the federal government and State and local governments from discriminating against individual and institutional providers who refuse, among other things, to receive training in abortions, require or provide such training, perform abortions, or refer for or make arrangements for abortions or training in abortions. More recently, an appropriations provision has been enacted (and reenacted or incorporated into every appropriations act since the appropriations act for Fiscal Year 2005) that prohibits certain federal agencies and programs and State and local governments that receive certain federal funds from discriminating against individuals and institutions that refuse to, among other things, provide, refer for, pay for, or cover, abortion. These statutes are collectively referred to as the ''federal health care conscience protection statutes.'' This rule is intended to ensure that, in the delivery of health care and other health services, recipients of Department funds do not support coercive or discriminatory practices in violation of these laws.

*Conscience Clauses/Church Amendments [42 U.S.C. 300a–7]*

The conscience provisions contained in 42 U.S.C. 300a–7 (collectively known as the ''Church Amendments'') were enacted at various times during the 1970s in Response to debates over whether receipt of federal funds required the recipients of such funds to perform abortions or sterilizations. The first conscience provision in the Church Amendments, 42 U.S.C. 300a–7(b), provides that ''[t]he receipt of any grant, contract, loan, or loan guarantee under [certain statutes implemented by the Department of Health and Human Services] * * * by any individual or entity does not authorize any court or any public official or other public authority to require'': (1) The individual to perform or assist in a sterilization procedure or an abortion, if it would be contrary to his/her religious beliefs or moral convictions; (2) the entity to make its facilities available for sterilization procedures or abortions, if the performance of sterilization procedures or abortions in the facilities is prohibited by the entity on the basis of religious beliefs or moral convictions; or (3) the entity to provide personnel for the performance of sterilization procedures or abortions, if it would be contrary to the religious beliefs or moral convictions of such personnel.

The second conscience provision in the Church Amendments, 42 U.S.C. 300a–7(c)(1), prohibits any entity which receives a grant, contract, loan, or loan guarantee under certain Department-implemented statutes from discriminating against any physician or other health care personnel in employment, promotion, termination of employment, or the extension of staff or other privileges because the individual either ''performed or assisted in the performance of a lawful sterilization procedure or abortion, or because he refused to perform or assist in the performance of such a procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.''

The third conscience provision, contained in 42 U.S.C. 300a–7(c)(2), prohibits any entity which receives a grant or contract for biomedical or behavioral research under any program administered by the Department from discriminating against any physician or other health care personnel in employment, promotion, termination of employment, or extension of staff or other privileges ''because he performed or assisted in the performance of any lawful health service or research activity, or because he refused to perform or assist in the performance of any such service or activity on the grounds that his performance of such service or activity would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting any such service or activity.''

The fourth conscience provision, 42 U.S.C. 300a–7(d), provides that ''[n]o individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by [the Department] if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions.''

The final conscience provision contained in the Church Amendments, 42 U.S.C. 300a–7(e), prohibits any entity that receives a grant, contract, loan, or loan guarantee under certain Departmentally implemented statutes from denying admission to, or otherwise discriminating against, ''any applicant (including for internships and residencies) for training or study because of the applicant's reluctance, or willingness, to counsel, suggest, recommend, assist, or in any way participate in the performance of abortions or sterilizations contrary to or consistent with the applicant's religious beliefs or moral convictions.''

*Public Health Service Act § 245 [42 U.S.C. 238n]*

Enacted in 1996, section 245 of the Public Health Service Act (PHS Act) prohibits the federal government and any State or local government receiving federal financial assistance from discriminating against any health care entity on the basis that the entity (1) refuses to receive training in the performance of abortions, to require or provide such training, to perform such abortions, or to provide referrals for such training or such abortions; (2) refuses to make arrangements for such activities; or (3) attends or attended a post-graduate physician training program or any other training program in the health professions that does not (or did not) perform abortions or require, provide, or refer for training in the performance of abortions or make arrangements for the provision of such training. For the purposes of this protection, the statute defines ''financial assistance'' as including, ''with respect to a government program,'' ''governmental payments provided as reimbursement for carrying out health-related activities.'' In addition, PHS Act § 245 requires that, in determining whether to grant legal status to a health care entity (including a State's determination of whether to issue a license or certificate (such as a medical license)), the federal government and any State or local government receiving federal financial assistance deem accredited any post-graduate physician training program that would be accredited, but for the reliance on an accrediting standard that, regardless of whether such standard provides exceptions or exemptions, requires an entity: (1) To perform induced abortions; or (2) to require, provide, or refer for training in the performance of induced abortions, or make arrangements for such training.

*Weldon Amendment [Consolidated Appropriations Act, 2008, Public Law 110–161, Div. G, § 508(d), 121 Stat. 1844, 2209 (Dec. 26, 2007)]*

The Weldon Amendment, originally adopted as section 508(d) of the Labor-HHS Division (Division F) of the 2005 Consolidated Appropriations Act, Public Law 108–447 (Dec. 8, 2004), has been readopted (or incorporated by reference) in each subsequent HHS appropriations act. Title V of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2006, Public Law 109–149, § 508(d), 119 Stat. 2833, 2879–80; Revised Continuing Appropriations Resolution of 2007, Public Law 110–5, § 2, 121 Stat. 8, 9; Consolidated Appropriations Act, 2008, Public Law 110–161, Div. G, § 508(d), 121 Stat. 1844, 2209; Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Public Law 110–329, Div. A, § 101, 122 Stat. 3574, 3575. The Weldon Amendment provides that ''[n]one of the funds made available under this Act [making appropriations for the Departments of Labor, Health and Human Services, and Education] may be made available to a federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.'' It also defines ''health care entity'' to include ''an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan.''

*The Proposed Rule*

On August 26, 2008 (73 FR 50274), the Office of the Secretary, Department of Health and Human Services, published a Notice of Proposed Rulemaking (proposed rule) entitled, ''Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices In Violation of Federal Law.'' The proposed rule set forth the purpose of the proposed rule, proposed definitions to clarify the meaning of statutory requirements, and proposed to require certain recipients and sub-recipients of Departmental funds to certify their compliance with the statutory requirements.

The Comment: period closed on September 25, 2008.

*The Final Rule*

As noted in the preamble to the proposed rule, the Department is concerned about the development of an environment in sectors of the health care field that is intolerant of individual objections to abortion or other individual religious beliefs or moral convictions. Such developments may discourage individuals from entering health care professions. Such developments also promote the mistaken belief that rights of conscience and self-determination extend to all persons, except health care providers. Additionally, religious and faith-based organizations have a long tradition of providing medical care in the United States, and they continue to do so today—some of these are among the largest providers of health care in this nation. Such institutions may have traditions of issuing clear public guidance which informs the members of their workforces, including physicians having privileges at their institutions, of the parameters under which they should operate in accordance with the organization's overall mission and ethics. A trend that isolates and excludes some among various religious, cultural, and/or ethnic groups from participating in the delivery of health care is especially troublesome when considering current and anticipated shortages of health care professionals in many medical disciplines and regions of the country.

The Department is committed to its mission of expanding patient access to necessary health care services. Americans can enjoy healthier, happier, and more productive lives through access to, and appropriate utilization of, all of the life-saving and life-improving procedures and services produced by medical innovation. The Department has a long history of demonstrated success in facilitating the improvement of lives in this way.

A necessary element in ensuring the best possible care for patients is protecting the integrity of the doctor-patient relationship. Patients need full access to their health care provider's best judgment as informed by practice, knowledge, and experience. This

relationship requires open communication between both parties so patients can be confident that the care they seek and receive is endorsed by their health care provider. It is one of the reasons for the common practice of patients meeting with several health care providers in order to find the one in whom they are most confident about entrusting their care. This helps ensure patients receive the care they believe is appropriate, and that doctors provide care that they are comfortable providing.

The doctor-patient relationship requires a balancing of interests. The patient has an interest in obtaining legal health care services—and, in the context of federally funded health care programs, an eligible patient may have the right to obtain certain health care services from certain entities. This must be balanced against the statutory right of the provider in the context of a federally funded entity to not be discriminated against based on a refusal to participate in a service to which they have objections, such as abortion. As stated above, Congress recognized those provider rights in several statutes.

The Department seeks to ensure this balance through raising awareness of federal health care conscience protection laws by specifically including reference to the nondiscrimination provisions contained in the Church Amendments, PHS Act § 245, and the Weldon Amendment in certifications currently required of most existing and potential recipients of Department funds. It also seeks to provide for Departmental enforcement of these three statutes.

Toward these ends, the Department has concluded that regulations and related efforts are necessary, in order to (1) educate the public and health care providers on the obligations imposed, and protections afforded, by federal law; (2) work with State and local governments and other recipients of funds from the Department to ensure compliance with the nondiscrimination requirements embodied in the Church Amendments, PHS Act § 245, and the Weldon Amendment; (3) when such compliance efforts prove unsuccessful, enforce these health care conscience protection laws through the various Department mechanisms currently in existence, to ensure that Department funds do not support morally coercive or discriminatory practices or policies in violation of federal law; and (4) otherwise take an active role in promoting open communication within the health care field, and between providers and patients, fostering a more inclusive, tolerant environment in the health care industry than may currently exist.

The ability of patients to access health care services, including abortion and reproductive health services, is long-established and is not changed in this rule. Instead, this rule implements federal laws protecting health care workers and institutions from being compelled to participate in, or from being discriminated against for refusal to participate in, health services or research activities that may violate their consciences, including abortion and sterilization, by entities that receive certain funding from the Department. (It also implements the provisions of federal law which protect health care personnel from being discriminated against for their participation in any lawful health service or research activity, including abortion and sterilization, by entities that receive certain funding from the Department.) Delivery of health care services is significantly improved when patients and health care providers have full, open, and honest conversations about the services they request and provide. These conversations are particularly useful at the beginning of a patient-provider relationship. This rule should help generate greater transparency between patients and providers and foster open discussion, which should strengthen relationships between patients and providers, as well as those between entities and their employees.

This final rule sets out, and provides further definition of, the rights and responsibilities created by the federal health care provider conscience provisions. It clarifies the scope of protections to applicable members of the Department's workforce, as well as health care entities and members of the workforces of entities receiving Department funds. This final rule also requires certain recipients and sub-recipients of Department funds to certify compliance with these federal requirements. In order to ensure proper enforcement, this final rule defines certain terms for the purposes of this final rule.

As was stated in the preamble to the proposed rule, the Office for Civil Rights (OCR) of the Department of Health and Human Services has been designated to receive complaints of discrimination and coercion based on the healthcare conscience protection statutes and this regulation. OCR will coordinate handling of complaints with the staff of the Departmental programs from which the entity, with respect to whom a complaint has been filed, receives funding (*i.e.*, Department funding component). Enforcement of the requirements set forth in this regulation will be conducted by staff of the Department funding component through the usual and ordinary program mechanisms. Compliance with the requirements promulgated herein will likely be examined as part of any broader compliance review conducted by Department staff. If the Department becomes aware that a State or local government or an entity may have undertaken activities that could lead to violation of, or may actually be in violation of, the requirements or prohibitions promulgated herein, the Department will work with such government or entity to assist such government or entity to comply or come into compliance with such requirements or prohibitions. If, despite the Department's assistance, compliance is not achieved, the Department will consider all legal options, including termination of funding, return of funds paid out in violation of health care conscience protection provisions under 45 CFR parts 74, 92, and 96, as applicable.

## II. Comments on the Proposed Rule

On August 26, 2008 (73 FR 50274), Department of Health and Human Services published the proposed rule. The Department received a large volume of Comments on the proposed rule, both from Commenters supporting the proposed rule, as well as from those opposing the proposed rule. Comments came from a wide variety of individuals and organizations, including private citizens, individual and institutional health care providers, religious organizations, patient advocacy groups, professional organizations, universities and research institutions, consumer organizations, and State and federal agencies and representatives. Comments dealt with a range of issues surrounding the proposed rule, including the need for the rule; what kinds of workers would be protected by the proposed rule; what services are covered by the proposed rule; whether health care workers use the regulation to discriminate against patients; what significant implementation issues could be associated with the rule; legal arguments; and the cost impacts of the proposed rule. Many Comments from health care providers, members of the public, and others confirmed the need to promulgate this regulation to raise awareness of federal conscience protections and provide for their enforcement.

A summary of the substantive Comments, and the Department's Responses to those Comments, follows.

*A. Comments on Proposed New § 88.1—Purpose*

No Comments were received pertaining to this section.

*B. Comments on Proposed New § 88.2—Definitions*

Assist in the Performance

*Comment:* Many Comments suggested that the proposed definition of ''assist in the performance'' was too broad. These Comments focused primarily on the inclusion of referral, training, and other arrangements within the ambit of this statutory term, claiming that this would allow an individual or institution to refuse to provide information or counseling about an objectionable procedure to which he or it objected. Commenters also expressed concern that the definition was too broad because, they asserted, a health care provider has an obligation to provide or assist patients with a referral or other information that allows the patient to receive health care services, regardless of the health care provider's conscientious objection.

*Response:* Commenters raising these concerns may lack understanding of the context in which the term ''assist in the performance'' is used in the statutes and in this regulation. The term is only used in the Church Amendments and in the provisions of this regulation that implement those statutory provisions. As noted above (see section I), all provisions of the Church Amendment use the term ''assist in the performance'' to ensure that individuals are protected from being required to assist in the performance of certain health care services or research activities, and from being discriminated against on the basis that the individual (1) assisted in the performance of a legal health service or research activity, or (2) refused to assist in the performance of such a health service or research activity because it would be contrary to his religious beliefs or moral conviction. Given that context, in interpreting the term ''assist in the performance,'' the Department has sought to provide broad protection for individuals, consistent with the plain language of the statutes. As a policy matter, the Department believes that limiting the definition of the statutory term ''assist in the performance'' only to those activities that constitute direct involvement with a procedure, health service, or research activity, falls short of implementing the protections Congress intended under federal law. However, we recognized the potential for abuse if the term was unlimited. Accordingly, we proposed—and here finalize—a definition of ''assist in the performance'' that is limited to ''any activity with a reasonable connection to a procedure, health service or health service program, or research activity.'' We also finalize the limitation in the definition that required the individual involved to be ''a part of the workforce of a Department-funded entity.''

We wish to clarify here the scope of federal law respecting the protections afforded with respect to ''assist[ing] in the performance'' of a procedure, health service, or research activity. Whether the relevant provision of the Church Amendments uses the term ''individual'' (42 U.S.C. 300a–7(b)(1), (d)), ''personnel'' (42 U.S.C. 300a–7(b)(2)(B)), ''any physician or other health care personnel'' (42 U.S.C. 300a–7(c)(1)–(2)), or applicant [ ] for training or study'' (42 U.S.C. 300a–7(e)), the term ''assist in the performance'' of a procedure, health service, or research activity applies to people. Thus, the protections of the Church Amendments with respect to ''assist[ing] in the performance'' of a procedure, health service, or research activity are afforded only with respect to people. To the extent such entities' or institutions' refusal to assist in the performance of such an activity would not be protected by PHS Act § 245, the Weldon Amendment, or the Church Amendments at section 300a–7(b)(2), such entities or institutions would have to arrange to provide any information or service otherwise required by law.

Individual and Workforce

*Comment:* Some Comments questioned whether the proposed definitions of the terms ''individual'' and ''workforce'' are too broad. Comments suggested that the definitions of these two terms would require a health care facility to apply the protections to all of its employees and contractors, no matter how removed their involvement is from the delivery of abortion or sterilization services. Other Comments expressed concern that the proposed definition of ''workforce'' would extend the conscience protections to volunteers and trainees. Commenters were also concerned that physicians, hospitals, and other health care institutions may find the definition burdensome in various areas of their operation (*e.g.*, janitorial services, medical recordkeeping, security, reception services). Lastly, Comments asserted that the definition of ''workforce'' needs to be changed to provide a complete list of the types of individuals who fall within it.

*Response:* The Department believes that its proposed definition of ''individual'' is consistent with the statutory language and the intent of Congress as gleaned from an examination of the provisions in context. We had proposed to define ''individual'' as ''a member of the workforce of an entity/health care entity.''

As noted above, the term ''individual'' is used in two provisions of the Church Amendments: 42 U.S.C. 300a–7(b)(1) [1] and 42 U.S.C. 300a–7(d).[2] In other provisions of the Church Amendments, Congress chose to use more clearly limiting terms: ''personnel'' (42 U.S.C. 300a–7(b)(2)(B)), ''any physician or other health care personnel'' (42 U.S.C. 300a–7(c)(1)&(2)), or ''applicant [] for training or study'' (42 U.S.C. 300a–7(e)). In addition, those other provisions are explicitly limited to discrimination in the employment/privileging or education/training contexts, while 42 U.S.C. 300a–7(d) is not so limited: It provides that ''[n]o individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by [HHS]'' if doing so ''would be contrary to his religious beliefs or moral convictions.'' Given this context, we believe that Congress did not intend that the term ''individual'' be limited to employees or health care personnel with privileges at a Department-funded entity, and that it is reasonable to include volunteers and trainees in the definition of ''workforce.'' These laws are intended to protect the conscience rights of all individuals participating in health care services, and research programs and activities receiving certain federal funds, or that are administered by the Department. The Department provides a definition of the term ''workforce'' to serve as a limiting criterion to ensure that individuals that are not under the control of an entity receiving Department funds do not claim the protection afforded by the statues. We further note that, where the individual is assisting in the performance of a sterilization procedure or abortion (or

[1] 42 U.S.C. 300a–7(b)(1) provides that the ''[t]he receipt of any grant, contract, loan, or loan guarantee under [certain statutes implemented by HHS] * * * by any individual * * * does not authorize any court or any public official or other public authority to require'' the individual to perform or assist in a sterilization procedure or an abortion if it would be contrary to his/her religious beliefs or moral convictions.

[2] 42 U.S.C. 300a–7(d) provides that ''[n]o individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by [HHS]'' if doing so ''would be contrary to his religious beliefs or moral convictions.''

any other health service or research activity) in which the provisions of the Church Amendments are relevant, the definition of ''assist in the performance'' further limits the protection to ''any activity with a reasonable connection to a procedure, health service or health program, or research activity * * *.'' Thus, we disagree with the Comment that the definitions would require a health care facility to apply protections to all of its employees and contractors no matter how far removed from the performance of sterilization procedures or abortion. The Department acknowledges that these definitions would include volunteers and trainees. It is clear that the statutes specifically envision that these protections apply to training programs, students, and applicants for training or study in the health professions. Regarding the Comment that physicians, hospitals or other providers may find it difficult or burdensome to comply with this requirement, the Department points to the fact that these requirements are not new, but are rather existing conditions on certain federal funds that recipients should be following already.

The Department agrees with the Comment that the term ''workforce'' should provide a complete identification of covered individuals, and will therefore replace the word ''includes'' with the word ''means'', to provide a clearer and more definitive definition.

As indicated in the proposed rule—and consistent with the scope of the Church Amendments, which include physicians and other health care providers that have privileges with an entity receiving funding from the Department—we intended the concept of ''workforce'' to include physicians and other health care providers who have privileges at the entity funded by the Department. After publication of the proposed rule, it came to the Department's attention that the language of the ''workforce'' definition may not be clear on this issue. Accordingly, to ensure clarity on this point, we are revising the definition of ''workforce'' by adding at the end ''or health care providers holding privileges with the entity.'' The definition now reads: '' 'workforce' means employees, volunteers, trainees, contractors, and other persons whose conduct, in the performance of work for a Department-funded entity, is under the control or authority of such entity, whether or not they are paid by the Department-funded entity, or health care providers holding privileges with the entity.

Health Care Entity/Entity

*Comment:* A number of Comments suggested that the definitions of ''health care entity'' and ''entity'' are too broad and go beyond those in the Public Health Service Act and the Weldon Amendment. They assert that the Department exceeded its rule-making authority when it applied the legal standard enunciated in the Weldon Amendment and Public Health Service Act to ''health care entities'' that are not encompassed by the definitions set forth in those statutes. Comments also requested that the Department clarify whether a health care entity includes pharmacists, nurses, occupational therapists, public-health workers, janitors working for health care entities, and technicians, as well as psychiatrists, psychologists, counselors, and other mental health workers, while others suggested that pharmacists should not be included. Lastly, one Commenter expressed concern that the proposed rule did not specify what amount of Departmental funding would place an entity under the purview of these regulations.

*Response:* The Department believes the definitions proposed in the proposed rule and adopted herein are appropriate and within its authority. In providing definitions of the term ''health care entity'' in their statutes, the Weldon Amendment and Public Health Services Act use the word ''include.'' As a matter of statutory drafting and construction, the use of that word indicates that the list following it is not exhaustive. In seeking to issue this regulation, the Department thought it would be beneficial to provide a clear and consistent definition that it would apply when implementing any of the three statutes. In proposing the definition, the Department intended it to be appropriately broad, but did not attempt to specifically list every possible entity or health profession classification, to avoid the situation that new health care professional classifications—or current health care professions inadvertently not listed—were not protected. As such, the Department used the terms ''health care professional'' and ''health care personnel'' to cover other professions such as pharmacists, nurses, occupational therapists, public-health workers, and technicians, as well as psychiatrists, psychologists, counselors, and other mental health workers. The Department rejects the suggestion that pharmacists or pharmacies be specifically excluded from the definition because that would seem inconsistent with both the text and the purpose of the statutes. Lastly, the Department is concerned that some Commenters may incorrectly believe that there is a minimum financial threshold below which entities may receive a certain amount of Departmental funds without being subject to he statutory provisions and these implementing regulations. As in other cases, such as Title VI of the Civil Rights Act of 1964, when an entity elects to receive any amount of federal funds, that entity agrees to follow all conditions and rules that apply to the use of those funds or upon which receipt of the funds is conditioned.

Health Service/Health Service Program

*Comment:* Several Comments declared that the definitions of ''health service'' and ''health service program'' inappropriately expand the scope of the conscience provisions to all medical treatments or services, biomedical and behavioral research, activities related to providing medicine, health care, or other services related to health or wellness (including programs such as Medicare and Medicaid). Some observed that the definitions include certain public health programs, such as vaccinations and family planning. Lastly, other Comments on these proposed definitions suggested that the definition of ''health service program'' be expanded to specifically include assisted suicide, transgender-related surgery and assisted reproductive technologies.

*Response:* Commenters' objections to this definition are fundamentally an objection to the Department's interpretation of the scope of the statutory protections themselves. We proposed to define ''health service program'' as including any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded, in whole or in part, by the Department, which may include components of programs operated by State or local governments. There is nothing in the statute to suggest that the term ''health service program'' in 42 U.S.C. 300a–7(d) is to be read narrowly. Moreover, given the context of the provision in which it appears, while individuals and health care personnel are protected with respect to their participation in research activities, it would not be the result of a broad understanding of ''health service,'' but because such individuals and healthcare personnel are engaged in performing or assisting in the performance of research activities funded under programs administered by the Department, which are subject to statutory protection. See 42 U.S.C. 300a–7(d). The definition and

the statutory protections apply to health services and research activities that are funded in whole or in part by the Department. For the Department to adopt a definition that removes protection from entire programs that are appropriately included in the definition, given the statutory context, would be inconsistent with our understanding of the purpose of the statutory provisions. The observation that some of these programs may involve important public health issues that may be controversial or objectionable to some is not a justification to eliminate the statutory protections. The Comment that seeks the inclusion of ''assisted suicide'' and other procedures in the definition of ''health service program'' is misinformed. This definition does not set out a list or description of the types of procedures to which a protected individual may or may not object, but the types of programs under which such protection exists.

While the Department had proposed to define the term ''health service,'' the Department has determined that the term is self-explanatory, and that a definition is not necessary, or may potentially confuse recipients. Accordingly, we do not finalize a definition of the term.

Recipient/Sub-Recipient

*Comment:* Several Comments expressed concern over extending the applicability of the proposed definitions of ''recipient'' and ''sub-recipient'' to foreign non-governmental organizations or international organizations (such as agencies of the United Nations) without reference to existing federal law governing U.S. foreign policy. These Comments claimed that it could create confusion among federal agencies about which laws to follow and could lead to unforeseen foreign policy complications. They added that it may also create confusion for entities that receive United States funding, but are located outside of the United States.

*Response:* The Department does not believe a conflict exists between these statutory requirements and U.S. foreign policy related to the use of federal funds abroad. To reduce any potential confusion among federal agencies, we proposed and here finalize a definitions of recipient and sub-recipient which permit the Department awarding agency to exercise discretion as to whether the terms include foreign or international organizations (such as agencies of the United Nations).

Other Definitions

*Comment:* Many Commenters asserted the term ''abortion'' should be defined in the regulation, some believing that, without such definition, the proposed rule does not provide sufficient information to direct health care providers to meet the obligations of the requirements. The main division among Commenters regarding the definition of abortion was whether certain contraceptive methods or services that have the potential to terminate a fertilized egg after conception but before implantation are considered abortion under the proposed rule. Several Commenters claimed that the proposed rule would seriously jeopardize Title X programs and Medicaid services if ''abortion'' is not clearly defined to exclude contraceptive services.

*Response:* After the full consideration of Comments on this issue, the Department declines to add a definition of abortion to the rule. As indicated by the Comments, such questions over the nature of abortion and the ending of a life are highly controversial and strongly debated. The Department believes it can enforce the federal health care conscience protection laws without an abortion definition just as the Department has enforced Hyde Amendment, Consolidated Appropriations Act, 2008, Public Law 110–161, Div. G, §§ 507, 508(a)–(c), 121 Stat. 1844, 2208 (Dec. 26, 2007), abortion funding restrictions without a formal definition. Additionally, nothing in this rule alters the obligation of federal Title X programs to deliver contraceptive services to clients in need as authorized by law and regulation.

*Comment:* Comments requested that the Department define many other terms or phrases that are used in the regulation. Some Comments suggested that the Department adopt a narrow definition of the term ''discrimination'' and make clear that the reassignment of an employee who states a religious or moral objection to a certain activity (such as abortion) does not constitute discrimination.

*Response:* The Department believes that these terms are sufficiently clear, and do not need further definition. The Department does not believe that a definition of the statutory term ''discrimination'' is necessary. The term ''discrimination'' is widely understood, and significant federal case law exists to aid entities in knowing what types of actions do or do not constitute unlawful discrimination. The Department expressly rejects the suggestion that the reassignment of an employee who states a religious or moral objection to a certain activity (such as abortion) may not constitute discrimination in all cases. Like most discrimination cases, the outcomes are dependent on the facts. It seems likely that there are situations where the reassignment of an employee for the refusal to perform a specific procedure could constitute unlawful discrimination. Likewise, the Department recognizes that circumstances exist where the reassignment of such an employee would not constitute unlawful discrimination. We encourage employers subject to the rule to have discussions with their employees that lead to mutually agreeable resolutions.

*Comment:* Some Comments asked that the Department define the terms ''religious belief'' and ''moral conviction'' to ensure that they would not be interpreted broadly.

*Response:* The Department declines to adopt particular definitions of these terms because the common definitions are plainly understood, and the Department intends that common sense interpretations apply. A well-defined body of federal law exists in this general topic, and the U.S. Supreme Court has repeatedly clarified that these terms are to be read broadly.

*C. Comments: on Proposed New § 88.3—Applicability*

No Comments were received specifically pertaining to this section.

*D. Comments on Proposed New § 88.4—Requirements and Prohibitions*

No Comments were received specifically pertaining to this section.

*E. Comments on Proposed New § 88.5—Written Certification of Compliance*

*Comment:* Several Comments stated that the requirement for written certification in proposed section 88.5 would be duplicative or unnecessary because current regulations already require written certification of compliance with federal nondiscrimination and civil rights laws. Other Comments suggested that the certifications be modified in order to avoid confusion on the part of recipients and sub-recipients.

*Response:* We find that a specific written certification is necessary to protect institutions under these laws. Many recipients (and sub-recipients) of Department funds currently must certify compliance with certain listed federal nondiscrimination laws, yet federal health care conscience protection laws are separate laws not specifically mentioned in existing forms. As part of a broad effort to raise awareness in the public, in the health care community, among recipients of Department funds, and among protected individuals and institutions, of their rights and responsibilities under existing federal

health care conscience protection laws, as well as to facilitate enforcement of these laws, the regulation requires certain recipients and sub-recipients of Department funds to certify their compliance in writing. Wherever possible, Department programs will attempt to integrate certifications required under this regulation into existing forms.

The Department has modified the certifications in section 88.5. They have been made clear so that recipients and sub-recipients know, by means of the certifications themselves, with which provisions they must comply based on the type of entity the recipient is or the type of funding mechanism through which they receive funds.

*Comment:* Comments asserted that the Department is overstepping its authority by making compliance with the federal health care conscience protection statutes a condition of payment, stating Congress has not made compliance a condition of payment and would have said so if that were its intent.

*Response:* The Department disagrees that the proposed rule exceeds its authority. It is important to emphasize that the Department and recipients of Department funds, including State and local governments, are obligated to comply with the health care protection conscience laws that have been in effect for many years, which prohibit federal funds from being used in a discriminatory or coercive manner against institutional and individual health care entities and workers for their participation or refusal to participate in abortions, other certain medical procedures, health services, or research activities that they find objectionable on religious or moral grounds. By employing existing regulatory enforcement measures to ensure compliance with such statutory requirements under 45 CFR parts 74, 92, and 96, as well as other measures, the Department does not exceed its authority, but rather is carrying out its obligation to enforce existing laws.

*F. Comments Received in Response: Specific Requests for Comments in the Proposed Rule*

Current Awareness of and Compliance With Provider Conscience Protections

*Comment:* This regulation implements existing federal health care conscience protection laws contained in the Church Amendments, the Public Health Service Act § 245 and the Weldon Amendment. Several Comments objected to the regulation on the grounds that these laws were sufficient in themselves and that their implementation by regulation was unnecessary or redundant. Generally, these Comments suggested that the health care field is sufficiently aware of the statutory protections available for provider conscience, and that no further regulatory effort was required in order to provide awareness of these laws or to assure compliance with them. Several other Comments, however, reported widespread lack of knowledge regarding these laws and inconsistent application of them. These Comments generally supported the regulation as a necessary and useful mechanism to support statutory protection. In addition, numerous Comments reported what they believed to be individual instances of violation of conscience, including health care providers suffering loss of employment, adverse actions during medical training, and discrimination in residency placement, among other consequences, due to their assertion of their conscience rights. Some Commenters also reported pressure to perform certain procedures from State authorities, professional organizations, or employers that appeared to the Commenters to be inconsistent with federal conscience protections.

*Response:* The Comments received in Response to the proposed rule support the Department position that the regulation is necessary to implement the statutes. While many people in the health care field may have general knowledge that conscience protections exist for providers, the scope of these protections is not always widely understood. Because Congress has enacted several different protections, an individual or organization may be aware that, for instance, a physician may not be compelled to perform abortions, but may not be aware of other aspects of the statutes providing conscience protection. Others may become aware of these laws, at least in detail, only when a dispute arises and a provider or entity attempts to assert their conscience rights; there may be subsequent disagreement over the nature of the rights asserted. The Department believes that coordinating the several related statutory protections, by incorporating their various requirements into this regulation, will allow for greater clarity and awareness of these protections within the health care field, in conjunction with other public education efforts connected with this regulation. In addition, the issuance of a regulation will allow for greater ease of administration, provide a Departmental point of contact for complaints regarding violations of the statutes and this regulation, and provide a uniform mechanism for investigating complaints of noncompliance. The types of noncompliance reported by Commenters are expected to be reduced as a result of this regulation.

Methods To Address Compliance Problems and Increase Awareness

*Comment:* Commenters who supported and opposed the rule both noted that the Department must increase awareness of health care provider conscientious objection rights, and the obligations this rule may pose for employers, entities, and States. Some Commenters also responded to the Department's request for Comments on methods which may be used by the Department and others to increase awareness among health care providers of their rights under laws protecting providers from discrimination for exercising their conscience rights.

Commenters who opposed the rule suggested that, as an alternative to further federal regulation, the Department should prepare and distribute informational materials to individual and institutional health care providers and State and local governments, and make these materials available on the HHS Web site. A Commenter also proposed that the Department develop continuing education courses for health care practitioners and attorneys, and that existing certifications that recipients of Departmental funds must currently sign could be modified to achieve the objectives of the rule.

*Response:* The Department agrees that the suggestions offered by Commenters of mechanisms for improving awareness of conscience rights among health care providers would increase the effectiveness of the rule. However, the rule seeks to achieve not only greater awareness of provider conscience rights, but also a more consistent understanding of the scope of these rights (and the corresponding obligations), greater ease of administration, provision of a Departmental point of contact for complaints regarding violations of the statutes and this regulation, a uniform mechanism for investigating complaints of noncompliance, and, as a result, greater compliance with the laws protecting these rights.

*Comment:* Commenters who supported the rule also offered suggestions on how both the Department and covered entities could increase awareness of the legal protections for health care provider conscience. Among the suggested activities were posting notices in high-traffic areas of buildings receiving

Department funds, providing information within educational programs that receive Department funds, including information in applications for training, applications for residency programs, and private insurance plans benefit descriptions, posting information on the Department or provider Web sites, including of information in employee handbooks, and sending e-mail or postal communications directly to providers. Comments were made on how to best attract attention to such postings by making them distinct from other materials in which they might be included.

*Response:* The Department agrees that these suggestions would contribute to significantly greater public awareness of health care provider conscience protections. The Department encourages covered entities to undertake such public awareness activities. The Department also recognizes that it must undertake reasonable outreach efforts in order for the rule to be effective at increasing awareness of, and compliance with, provider conscience protections in the statutes and this implementing regulation. Thus, the Department will consider all avenues available for increasing public awareness of health care conscience protection laws. Requiring certification of compliance by entities receiving Department funds provides an important vehicle for increasing awareness of health care conscience protection laws and ensuring compliance with them.

*Comment:* Some Comments declared that the description of notice/posting of health care provider conscience protections in the proposed rule should be enhanced. One argued that posting of notices on bulletin boards, where they appear among multiple notices, is not a very effective way of communicating the protections afforded under the regulation and statutes. Other Comments requested that notices of federal health care conscience protection statutes should be conspicuous and posted in such locations as provider offices and pharmacies and in such public communications as advertising, health plan promotion materials, Medicaid literature, Web sites, as well as applications for training, residency, and educational programs, and in employee/volunteer handbooks.

*Response:* The Department agrees that informing health care entities of their rights and responsibilities under federal health care provider conscience provisions is important to ensuring institutional and individual conscience rights are protected. Consequently, the Department encourages covered entities to undertake such educational/public awareness activities. Within its statutory authorities, the Department is exploring a number of options, including many of those suggested by Comments as well as others, to provide further public education and notice of federal health care conscience protection laws and this regulation.

Exceptions to the Written Certification Requirement in Proposed New § 88.5

*Comment:* Several Comments expressed concern that the certification requirement would create an administrative burden, and one Commenter suggested that the Department should not impose the certification requirements of the regulation on every Department grantee regardless of the grant's purpose.

*Response:* In its Notice of Proposed Rule Making, the Department solicited Comments on whether further exceptions should be made from certification requirements for recipients or sub-recipients of federal funds, where such recipients or sub-recipients receive Department funds for purposes unrelated to the provision of health care or medical research. Because there is concern among Commenters over any burden of a certification, including that stemming from certifications required without regard to a grant's purpose, and because there appears to be little objection to limiting the certification requirement in the way put forth for Comments in the proposed rule, the Department has determined to make further exceptions to the certification requirement for Departmental programs whose purpose is unrelated to health care provision, including certain programs currently administered by the Administration for Children and Families and the Administration on Aging. These programs often involve the provision of grants to States and other governments, or cash assistance or vouchers rather than direct services, and they are not likely to involve medical research, the participation of health care providers, or referral to health care providers. These programs are unlikely to encounter the circumstances contemplated by this regulation, and therefore the assurance of compliance represented by a certification is not considered necessary by the Department for such programs. The regulatory text has been changed by addition of sections 88.5(e)(4) and (e)(5), together with associated language and example programs in the preamble. Finally, in section 88.5(e)(6), we provide an exception from the written certification requirement for Indian tribes and tribal Organizations when contracting with the Indian Health Service under the Indian Self-Determination and Education Assistance Act. Of course, these entities must still comply with the relevant statutes, even if they are not under an obligation to make a certification.

Should Language Specify Written Certification Is a Material Prerequisite to Payment of Department Funds

*Comment:* The Department requested Comments on whether written certification of compliance with nondiscrimination provisions should contain language specifying that the certification is a material prerequisite to the payment of Department funds. The Department received a number of Comments in Response to this request, both in favor of and against including such language in the written certification of compliance. Those in favor of including material prerequisite language felt that such language was important as part of the written certification process to protect individuals and institutions from discriminatory treatment. Others stated that certification should not be a prerequisite for Department funding, noting that explicitly tying payment to compliance with the certification requirement would subject the certification process to the federal False Claims Act. One Commenter stated that, absent more explicit guidance on the policies and practices that will satisfy compliance, written certification should not be a material prerequisite to payment of Department funds.

*Response:* The Department does not consider the written certification of compliance to be a material prerequisite to the payment of Department funds any more than in any other similarly worded statute or regulation. As stated above, the Department intends to work with recipients and sub-recipients of Department funds to ensure compliance with the requirements or prohibitions promulgated in this regulation, and, if such assistance fails to achieve compliance, the Department will consider all legal options, including termination of funding and return of funds paid out in violation of health care conscience protection provisions under 45 CFR parts 74, 92, and 96, as applicable.

*G. General Comments*

*Comment:* Many Comments stated concern that the proposed regulation could serve as a pretext for health care workers to claim religious beliefs or moral objections under the protections

of the fourth provision of the Church Amendments, 42 U.S.C. 300a–7(d), in order to discriminate against certain classes of patients, including illegal immigrants, drug and alcohol users, patients with disabilities or patients with HIV, or on the basis of race or sexual preference.

*Response:* Comments offered a number of hypothetical situations where individual health care workers might attempt to discriminate against individuals on a variety of grounds, using provider conscience as a pretext, and have suggested that the proposed regulation would permit such activity. Many of the described hypothetical situations are vague or lack substantial detail, but to the extent that the Comments suggest that the regulation permits unlawful discrimination, we disagree. It is important to emphasize that the health care provider conscience protection provisions have existed in law for many years, and that this regulation only implements these existing requirements. As a result, there is nothing in this regulation that newly permits the types of actions described in Comments. It is also important to emphasize that the health care conscience protection laws exist as one part of a number of federal laws that address discrimination on a variety of grounds, and that the actions described in the hypothetical situations that violate federal civil rights laws, continue to violate federal civil rights laws.

We do not believe there is a conflict between the operation of health care conscience protection laws and other federal laws. Congress has enacted a network of laws that govern different activities, and we believe proper meaning can be given to all of them. There are several federal civil rights laws intended to protect individuals from discrimination in programs receiving federal financial assistance or in public accommodations based on their individual characteristics (*e.g.*, race, color, national origin, disability, age, sex and religion). In the former, the individuals protected by these laws typically are beneficiaries of, or applicants for, services and activities provided through federally funded programs. The health care conscience protection laws have a different purpose, protecting individual health care workers and entities from discrimination in connection with particular practices such as abortion, or from compulsion to perform health care activities that they find religiously or morally objectionable. As such, these two sets of laws are intended to protect different populations and on different grounds. On their face, there is no inherent inconsistency or conflict between these laws.

How various federal laws would apply to any particular situation depends largely on the facts of the situation. Thus, it is inappropriate to make definitive statements about legal outcomes in Response to the many scenarios raised in Comments. Entities subject to these laws are responsible for ensuring against illegal discrimination in providing health care services to the public, while also protecting the conscience rights of the health care workers who are affiliated with these entities. Because these laws do not on their face conflict, we believe it is possible in most situations for entities to act without violating any applicable federal laws. In many cases, for example, entities may accommodate health care worker conscience rights—while ensuring that all eligible patients are served, including members of federally protected classes—by managing the workforce to ensure sufficient coverage.

Many of the scenarios raised in Comments involved health care workers hypothetically discriminating against particular individuals on legally impermissible grounds (*e.g.*, race or disability). To the extent these scenarios implied that the health care conscience protection laws protect workers who object to providing services based on an individual's federally protected characteristics, we disagree. We believe such actions are outside of the scope of the health care provider conscience protections. Those laws protect health care workers' conscience rights with respect to particular actions or activities, not with respect to an individual's characteristics that are protected by federal law. To the extent there are actual conflicts between any of the health care conscience protection laws and federal civil rights laws, an entity would be required to comply with federal civil rights requirements.

Where the federal health care conscience protection laws and the civil rights laws are both conditioned on the receipt of federal funding, application of rules of statutory construction require continued compliance with federal civil rights laws. The health care conscience protection laws would not be interpreted to impliedly repeal federal civil rights requirements. Moreover, given the strong national policies embodied in federal civil rights laws that protect individuals from unlawful discrimination based on their federally protected individual characteristics, and that ensure that federally supported programs are available to all without discrimination, we believe that federal civil rights protections prevail.

*Comment:* A number of Comments argued that the proposed regulation would limit patient access to basic reproductive health care services, including contraceptive services. Many Comments also asserted that the proposed regulation would disproportionately affect certain sub-populations, including low-income patients, minorities, the uninsured, patients in rural areas, the Medicaid population, or other medically underserved populations. Some Comments further warned of health consequences, such as an increase in unintended pregnancy, should the proposed rule be promulgated. Finally, several Comments expressed concern that the proposed rule would limit access to emergency procedures, such as emergency contraception for rape victims, surgery for ectopic pregnancies, and other services.

*Response:* The Department recognizes that access to health care services is a challenge facing the entire health care system, and that it is not a challenge restricted to the context of reproductive health services. In recent years, the Department has proposed or implemented several important initiatives aimed at increasing access to quality health care, including by providing health care services for the poor, elderly and disabled; increasing access to quality medical care through expansion of the federal Community Health Center program; proposing to support and encourage States' efforts to work with the private marketplace to help ensure affordable health insurance; and supporting the enactment of proven medical liability reforms that increase patient access to quality medical care. The Department supports continuing such efforts into the future in addressing barriers to affordable, quality health care.

We disagree that this regulation would create new limitations on health care access, including basic reproductive health care services, services provided by publicly funded clinics, and health care services provided in emergency situations. First, this regulation does not expand the scope of existing federal laws, some of which have been in place for many years, protecting health care entities from discrimination on the basis of provider conscience with respect to abortion and certain other services to which a provider may have religious or moral objections. The Department has a duty to enforce these laws applying to recipients of Department funds. Even absent the issuance of this final rule,

recipients of Department funds are still required to comply with these laws; this regulation is intended to raise awareness of the laws among the public, protected health care entities, and recipients of Department funds, as well as to provide for enforcement of federal conscience protections.

Second, the current shortage of health care providers in certain areas of the country provides additional justification for protecting conscience rights. Many Comments we received, including those of many health care providers, stated that forcing providers to perform or participate in procedures that violate their consciences discourages individuals from entering or remaining in careers in the health professions. One Commenter wrote, ''by insisting that those who are willing to violate their consciences in the delivery of health care are the only persons who should enter the health care field, one contributes to the creation of a health care delivery system of professionals who blindly follow directives rather than conscience, putting society at risk.'' Unlike some Commenters, we believe that problems of access to health care can be resolved without requiring health care providers to violate their conscience. By protecting conscience rights in accord with federal law, we wish to encourage more individuals and institutions to participate in Department-funded health service programs in accord with their consciences and, thereby, increase access to quality health care services.

Third, with regard to contraceptive services, the Department continues to support efforts to make safe and effective contraceptives and family planning services available to women—and men—who cannot otherwise afford them. This regulation will ensure that such programs are carried out in a way that is consistent with existing federal health care conscience protection laws. While Comments posed many hypothetical situations in which they claimed access to contraceptive services would be limited, we have found no evidence that issuing these regulations to better ensure compliance with existing federal health care conscience protection laws will create additional barriers to accessing contraceptive services.

Fourth, we note that many Commenters who believed that this rule will significantly restrict access to contraceptives or increase teen pregnancies also submitted Comments stating that the rule was unnecessary because health care provider conscience protection laws are being followed and no provider rights are currently being violated. These two statements are contradictory. If access to any service significantly declined with the implementation of this rule and all other factors remained unchanged, that fact could be evidence that health care providers in question had previously been compelled to deliver the service over their conscience objections.

*Comment:* Comments argued that any revised rule should include guidance discussing ways to balance the rights of providers and patients, and one Commenter stated that any final rule should contain ''a forceful statement of patients' rights to receive health care services in accordance with their religious beliefs or conscience.'' The Commenter also argued that any certification should require health care entities to certify that the rights of patients are respected to the extent required by law.

*Response:* Patients' ability to access health care services, including abortion and reproductive health services, is long-established and is not changed in this rule. In issuing regulations implementing federal laws protecting health care entities' conscience rights, we recognize that many current or prospective recipients of Department funds must already certify or assure their compliance with certain federal nondiscrimination laws as a part of existing funding applications. We also encourage all participants in the health care system, including patients, health care providers, and those entities receiving Department funds, to review existing laws, regulations, and guidance, including the U.S. Constitution and federal laws enacted by Congress prohibiting discrimination by health care entities receiving certain federal funds. (For more information on these issues, visit the Web site of the Office for Civil Rights of the Department of Health and Human Services at *http://www.hhs.gov/ocr.*) We also encourage full and open communication between patients and providers on sensitive issues surrounding the provision of health care services, including issues of morality and conscience. Patients are best served when their providers communicate clearly and early about any services they decline to provide or participate in. We similarly encourage full and open communication between providers and their employers or the entities with which they have privileges on issues concerning the services the provider may be unwilling to perform. This would facilitate the appropriate accommodation of a provider's religious or moral objections to particular services, while at the same time enabling the employer/institution to meet the needs of its patients.

The Department seeks to strike a careful balance between the health care provider conscience protections provided in federal law, on the one hand, and patients' needs and the needs of the health care system on the other hand. A health care system that is intolerant of individual conscience, certain religious beliefs, ethnic and cultural traditions, or moral convictions serves to discourage individuals with diverse backgrounds and perspectives from entering the health care professions, further exacerbating health care access shortages and reducing quality of care. It is more likely to lead to situations in which a patient is receiving services or procedures from a provider who is not fully committed to the choice of care. We seek a health care field in which patients can be more confident that their provider shares their views and concerns as identified through mutually open communication. The final regulation takes a cautioned and balanced approach to ensure compliance with federal health care conscience protection laws by defining key terms, stating requirements and prohibitions, and requiring certain recipients and sub-recipients of Department funds to provide written certification of compliance. In so doing, we wish to promote diversity in the health professions, increasing access to health care services.

*Comment:* Some Comments expressed concern that the proposed rule could restrict access to contraceptives which are being used for purposes other than preventing pregnancy or are being used in conjunction with other medical treatments.

*Response:* According to 42 U.S.C. 300a–7(d), which applies to any program funded in whole or in part under a program administered by the Department, no protected individual may be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or part under a program implemented by HHS contrary to that individual's religious beliefs or moral convictions; the motivation of the patient or intended use of the service is irrelevant under the statute. We note that nothing in this rule changes the obligations of the federal Title X program or Medicaid to deliver contraceptives to eligible patients in need. However, we reiterate that we have found no evidence that these regulations will create new barriers in accessing contraception unless those contraceptives are currently delivered over the religious or moral objections of

the provider in such programs or research activities.

*Comment:* Some Comments requested the creation of a hotline to report patient access to care problems.

*Response:* Again, we do not anticipate a reduction in access to legal health services as a result of this regulation, much less a significant enough change to warrant the creation of a hotline. As a result, we decline to create a specific hotline solely to report patient access to care problems as part of this regulation. However, we encourage members of the public to visit *http://www.hhs.gov/about/referlst.html* for a list of available hotlines and information resources regarding Department programs and activities.

*Comment:* Comments asserted that the proposed rule, if finalized, would disrupt the ethical and legal requirements of providers to obtain informed consent from their patients. Commenters argued that principles of informed consent require health care providers to inform patients about all treatment options or reasonable alternatives, including those to which they object or refuse to perform because it would violate their consciences.

*Response:* We recognize that informed consent is crucial to the provision of quality health care services. This final rule raises awareness and provides for the enforcement of federal laws, some of which have been in effect for many years, protecting the conscience rights of health care entities. We are aware that nearly all States have laws protecting health care practitioners' rights of conscience to some degree or another, many providing full exemptions to any health care practitioner who conscientiously refuses to participate in an abortion. Over the last four decades, medical professional associations, such as the American Medical Association (AMA), have reaffirmed the rights of physicians and other health care personnel to practice medicine without violating their moral principles.[3] Despite the widespread and sustained existence of federal and State laws protecting the consciences of health care providers, we have found no evidence that protecting conscience rights disrupts the informed consent process between providers and patients. Rather, we believe the provider-patient relationship is best served by open communication of conscience issues surrounding the provision of health care services, including any conscientious objections providers or patients may have to providing, assisting, participating in, or receiving certain services or procedures.

To avoid potential conflicts from occurring, we emphasize the importance of and strongly encourage early, open, and respectful communication between providers and patients surrounding sensitive issues of health care, including issues of conscience, so that both parties' consciences are respected as patients are provided with necessary information to make informed decisions about their health care and choice of provider. We disagree that health care providers' consciences must be violated in order to meet requirements of informed consent in the provision of medical services.

*Comment:* Several Comments asserted that the proposed regulation could negatively impact and potentially hinder scientific research, arguing that hospital, academic, nonprofit, and corporate research activities that receive Department funds could have difficulty fulfilling their research contracts if workers were allowed to refuse participation. Offering several research activities as examples, Comments argued that Department-funded research institutions could be compromised because of personnel objections to conducting or supporting the research conducted there. Other Comments argued that health care quality and safety will be compromised by the proposed regulation because of the refusal of staff to do their jobs. Similarly, some Comments expressed concern that the regulation will adversely impact the academic rigor of medical education. They argued that professors at publicly funded medical schools could refuse to teach medical procedures or information they find morally objectionable, which would reduce the quality and breadth of medical education.

*Response:* The Department does not find evidence supporting the Comments' assertions. In enacting federal health care conscience protection laws, including the Church Amendments, PHS Act § 245, and the Weldon Amendment, Congress has clearly stated a policy that Department funding should not support coercive or discriminatory practices that violate individual conscience. The Church Amendments contain specific provisions relating to scientific research, while both the Church Amendments and PHS Act § 245 contain provisions applying to physician training and other training programs in the health professions regarding abortion and sterilization. Some provisions of the Church Amendments, for instance, which specifically mention scientific research (42 U.S.C. 300a–7(c)(2), ''biomedical or behavioral research,'' ''research activity''; 42 U.S.C. 300a–7(d), ''research activity'') and discrimination against applicants for training or study (42 U.S.C. 300a–1(e)), have been in effect for over three decades. PHS Act § 245 has been in effect since the mid-1990s. The Department is unaware of evidence showing a negative impact of federal conscience provisions on Department-funded scientific research, health services programs, training, or instruction in the health professions; nor have Comments provided evidence supporting the claim that regulations implementing existing federal conscience protections and requirements would hinder such activities. We also disagree with the Commenters' assertions to the extent that Commenters suggest that institutions must require health care providers to violate their consciences in order to conduct health services, training, or research activities.

*Comment:* Comments expressed concern that the proposed regulation will expand the ability of insurers to refuse to provide health care services, information, and referrals to patients. Other Comments expressed concern that the regulation could impact funding for programs that benefit immigrants or victims of domestic violence.

*Response:* As previously stated, this regulation does not expand the scope of existing federal conscience protections for health care entities, including health insurance plans. Rather, it provides for Departmental implementation and enforcement of existing federal health care conscience protection laws and educates the public and the health care community about laws protecting the consciences of health care entities that refuse to participate in abortions or other services in the case of Departmental grantees. We are unaware of any way in which the regulation could impact funding for programs that benefit immigrants or victims of domestic violence.

*Comment:* One Commenter thought the rule would increase spending and add a significant strain on Medicaid.

*Response:* We have not found evidence supporting the Commenter's assertion that the final rule would increase spending in Medicaid, in part because this final rule does not expand the scope of existing federal health care conscience protection laws, some of which have been in place for over thirty years.

*Comment:* Several Comments disagreed with the Department's assertion in the proposed rule that the

[3] See, *e.g.,* AMA House of Delegates Policy H–5.995 (issued 1973; reaffirmed 1986, 1996, 1997, and 2000).

regulation will not have an impact on family well being. Another Commenter stated that the Treasury and General Government Appropriations Act of 1999 requires the Department to determine if the proposed rule would affect family well-being. The Commenter stated that, if family well-being is affected, the Department must provide an impact assessment of these effects. The Commenter also stated that the proposed rule does not adequately address the impact on family well-being.

*Response:* As stated in the proposed rule, the Department has determined that the final rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999 (Pub. L. 105–277, 112 Stat. 2681). This final rule defines certain key terms, ensures that recipients of Department funds know about their legal obligations under existing federal health care provider conscience protection provisions, and requires written certification by certain recipients that they will comply with such provisions, as applicable.

*Comment:* Some Comments asserted that the proposed regulation follows from general laws restricting religious discrimination, such as Title VII of the Civil Rights Act of 1964, or the religious exercise clause of the First Amendment to the United States Constitution. Commenters on this topic disagreed over whether this suggested connection made the regulation necessary to implement core constitutional principles, or unnecessary because these rights are protected in other ways. Commenters pointed out current grantees, for instance, already certify to obey all nondiscrimination laws, and that a specific certification on conscience protection, as contemplated in the proposed regulation, would not be necessary.

*Response:* The Department agrees with Comments noting that federal health care conscience protections are consistent with constitutional and other statutory protections of religious belief and moral conviction. However, Congress has enacted specific and detailed legislation in the area of health care provider conscience applicable to recipients of certain federal funds which is broader in scope than protections afforded under Title VII and the other examples cited by some Commenters. Because they implement health care-specific statutory provisions applicable to recipients of certain federal funds, these regulations offer more administrable and directive guidance than do other existing laws prohibiting religious discrimination. Many organizations and individuals may not be aware of the scope of the conscience protections or their relationship to other federal nondiscrimination laws when certifying compliance with the latter. The Department believes that the responsibilities of certifying entities will be made clearer by a certification that explains federal health care conscience protection laws explicitly.

*Comment:* A few Comments suggested that the Department should gather more evidence of noncompliance before regulating in this area, for example, by commissioning a national survey to determine the prevalence of civil rights violations of provider conscience, and that, in the absence of statistical evidence that a significant number of violations are occurring, refrain from issuing implementing regulations.

*Response:* The Department disagrees that such a survey is a necessary precondition to issuing this regulation. The basis for the regulation is the existence of the several federal health care conscience protection laws. There are a number of purposes served by regulating in this area, including, but not limited to, making the health care community more aware of these rights and clarifying their scope through the exercise of agency expertise, as well as assuring compliance. The Department has good reason to believe that there are risks of non-compliance. By their nature, civil rights protections create responsibilities for entities such as recipients of federal funds or employers to do things they otherwise may not do. It has been the Department's experience that, in the absence of a clear statement of responsibilities, civil rights are less effectively exercised. Commenters did not indicate what they believed would be an ''acceptable'' level of civil rights violations preventable by this regulation. The Department's goal is compliance with federal law. In Response to the proposed rule, numerous Comments were received, including from those in the health care community, that indicated serious misunderstandings regarding statutory health care provider conscience protections, or which expressed a narrower view of the scope of these protections than is consistent with the Department's interpretation. Especially in light of the additional Comments alleging violations of conscience protection, this Commentary reinforces the Department's view that, in the absence of a clear statement of responsibilities, there is a serious risk that, either from misunderstanding or from a groundless and overly narrow view of health care provider conscience rights, these conscience rights will not be fully protected. How often these violations occur is not known, and it is unclear whether a valid survey could be conducted to determine this figure. Some health care providers may not at this time be aware their rights are being violated when they are compelled to act against their conscience, or they may not attempt to report such violations. As a result of this regulation, a procedure will be put in place to receive and compile complaints, extend protection to those who make them, and the complaints will be reviewed for validity. Consequently, a more reliable estimate of the prevalence of actual violations is likely to be obtained, which will enable the Department to track the extent of noncompliance over time.

*Comment:* Several Comments were concerned about the absence of implementation guidance in the proposed rule for communication of a provider's individual conscience objections to entities and to patients. Commenters presented a variety of suggestions for additional guidance in the rule concerning communication of a health care provider with his or her employer and patients. Several Comments recommended a requirement that employees submit a written statement of their conscience objection or objections. Some Comments suggested a requirement for posting or providing notice of limitations to health care services provided at a facility or office. One Commenter pointed out that the State of Illinois requires pharmacies that do not carry emergency contraception to post a sign directing patients to other pharmacies that do.

*Response:* We strongly encourage early, open, and mutually respectful communication of conscience concerns that may arise in the provision of medical services, including between employees and employers as well as between providers and patients. However, we concluded that it was neither feasible nor prudent in this final rule to provide specific guidance on methods and means for such communication given the vast array of circumstances and settings in which communications regarding conscience are likely to take place.

*Comment:* Comments stated that the proposed rule did not clarify what safeguards health care facilities were required to have in place when a medical professional refused to provide a particular service.

*Response:* In general, the Department acknowledges that not every institutional or individual health care provider offers every legal health service, and requiring them to do so would be neither appropriate nor prudent. At the same time, we encourage and expect health care facilities to take measures to protect conscience rights while ensuring access to health care services. The myriad number of circumstances occurring across different health care settings where the need to protect conscience rights may arise leads us to decline to prescribe particular measures in this final rule. Because federal health care conscience protection laws have been in place for many years, we fully expect health care entities to take the necessary steps to protect conscience rights while meeting the needs of their patients.

*Comment:* Another Commenter stated that the proposed rule does not address whether refusal to perform a service must be a consistent, across-the-board refusal, or whether it can be a ''graded refusal.'' For example, the proposed rule does not clarify if an employee can refuse to schedule sterilizations for young or single women but not for married women.

*Response:* We reiterate here that, for abortion-related activities as covered by the Weldon Amendment and Public Health Service Act § 245, a health care entity's refusal can be on any ground. (42 U.S.C. 300a–7(d), which applies to any program funded in whole or in part under a program administered by the Department, requires that no individual may be required to perform or assist in the performance of any part of a health service program or research activity contrary to that individual's religious beliefs or moral convictions. For involvement in abortion and sterilization as covered by the rest of 42 U.S.C. 300a–7, again, provisions require that no health care personnel be discriminated against for, among other reasons, his/her refusal to perform or assist in the performance of a sterilization procedure (or abortion) contrary to that professional's religious beliefs or moral convictions. Thus, in the case of these statutes, it is the individual's religious beliefs or moral convictions that will control in a particular case, rather than the frequency of the objection.

In addition, as we have previously noted, if the decision is being made based on an individual's characteristics that are federally protected, that is impermissible.

*Comment:* Comments argued that if a provider is unwilling to provide a certain service, it should give the patient a referral for that service. One Commenter asserted that providers should give patients a ''meaningful referral that will ensure that the patients receive continuity of care without facing an undue burden, such as traveling long distances or encountering additional barriers to obtaining the desired services.''

*Response:* Providers who object to participation in abortion or a particular health service may provide information on other options, if asked, but are under no obligation to do so. First, with respect to abortion, both PHS Act § 245 and the Weldon Amendment (among other things) specifically prohibit discrimination by the federal government and State and local governments, and federal agencies and programs, and State and local governments, respectively, against health care entities who refuse to refer for abortion. The Department could not enforce such a referral requirement without violating these provisions. With respect to entities imposing requirements on their employees or members of their workforces, the Church Amendments, while not identifying specific medical practices or services, uses very broad language to characterize the wide array of practices and services to be protected. For example, 42 U.S.C. 300a–7(d) states that individuals may not be required to perform or assist in the performance of ''any part of'' an objectionable health service program or research activity. For many health care providers, including many who Commented on the proposed rule, referral means assisting in the performance of objectionable procedures or services such as abortion and would violate their consciences. One health care practitioner Commenting on the proposed rule stated that referrals are a form of participation in objectionable acts, and forcing providers to provide referrals would effectively circumvent their moral objection. Federal law recognizes and protects the conscience rights of individuals and entities when it comes to referral for certain objectionable services. Taking the Church Amendments, the Weldon Amendment, and Public Health Service Act § 245 together, the regulation interprets these three federal laws in a way that is consistent with both the letter and the spirit of the law.

*Comment:* Some Comments argued that the proposed regulation seems to run counter to the Hippocratic Oath's admonition to ''do no harm'' to patients. Comments pointed out that health care providers must take this oath and agree to treat patients without judgment and provide patients with the care they need.

*Response:* According to the National Institutes of Health's National Library of Medicine (NLM), the Hippocratic Oath is an ancient medical text requiring new physicians to swear oaths by a number of deities to uphold several professional ethical imperatives, the most widely known of which is ''to do no harm.'' Notably, the NLM translation of the Hippocratic Oath also includes the prohibitions, ''I will not give a lethal drug to anyone if I am asked, nor will I advise such a plan, and similarly I will not give a woman a pessary to cause an abortion.'' The NLM further states that most medical schools do not require graduates to take the Hippocratic Oath. For those physicians who take the Hippocratic Oath or other similar oaths, federal law protects health care providers whose consciences lead them to recognize that participation in certain activities, such as abortion, harms others. Conscience is consistent with and is a necessary part of quality care.

*Comment:* Commenters expressed concern about impacts on health care delivery, burdens and costs (particularly on small employers), and overlap with existing protections afforded to protect religious conscience of healthcare workers under Title VII of the Civil Rights Act of 1964, and suggested that the Department adopt elements of Title VII jurisprudence in enforcing these laws. Commenters also stated that health care providers must be able to address staffing issues and otherwise appropriately screen job applicants to determine if they are capable and willing to perform the core services required of the job.

*Response:* We do not believe that it is necessary or appropriate to incorporate elements of Title VII jurisprudence into this provider conscience regulation. Title VII was enacted nine years before the first of the health care conscience protection laws was passed; it includes specific language with respect to reasonable accommodation and undue hardship with respect to religion. In contrast, the Church Amendment, the first of the health care conscience protection laws, is specific as to its prohibitions, and contains none of the reasonable accommodation or undue hardship language Congress elected to include in Title VII. This is also true of the additional health care conscience protection laws that Congress subsequently enacted. Notwithstanding the existence of Title VII, Congress passed a series of laws to explicitly protect provider conscience without using Title VII's formulation. Moreover, where Title VII is restricted to the

employment context, the provider conscience provisions are not so limited. As a result, we believe it is a reasonable interpretation of the statutes that Congress sought to ensure provider conscience protections that are distinct from, and extend beyond, those under Title VII. The Department's enforcement of the provider conscience laws will be informed, for example, by comparison to Title VII religious discrimination jurisprudence.

Congress enacted Title VII of the Civil Rights Act of 1964 to protect employees from discrimination by their employers with respect to certain individual characteristics, including religion. It applies to all employers of a certain size, regardless of whether the employer receives federal funding. In the context of the Title VII prohibition on employment discrimination on the basis of religion, Congress in 1972 limited the protection afforded to employees by defining ''religion'' as ''all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.'' Under the Title VII standard, an employer is, thus, only required to attempt to reasonably accommodate its current or prospective employee's religious objections if it would not place an undue burden on the employer. In contrast, the health care conscience protection provisions apply only to recipients of federal funding, and primarily to recipients of funding from the Department, regardless of size. Congress was capable of incorporating an express balancing of interests in health care conscience protection provisions, but it chose not to, in spite of its general familiarity with the balancing test in the Civil Rights Act religious nondiscrimination provision. We believe that it is reasonable to interpret this action by Congress to impose higher standards for provider conscience on employers in the health care and medical research that receives Departmental funding than is imposed on employers in general. Thus, we believe it is a reasonable interpretation that Congress in this context imposed a choice not between reasonable accommodations and undue burden, but between accommodation of religious belief or moral convictions and federal funding. Where an employer will not accommodate an employee's sincere religious belief or moral conviction, it may cease being eligible for federal funds and lose certain federal funding.

While it is a reasonable interpretation of the statutes that Congress did not intended to limit provider conscience protections to those provided to employees under the Title VII legal framework for religious accommodation requests, we also interpret nothing in the provider conscience statutes as preventing employers from accommodating employees' sincerely held religious beliefs, observances, and practices when requested as a means of accomplishing the same protections for provider conscience. As long as employees in the health care field are free from being discriminated against or required to participate in abortions or services they find religiously or morally objectionable, employers are free to balance employee rights with other interests in conducting their business operations. We envision that, through open communication between employees and employers about each other's respective needs and requirements, and by employers providing accommodations of employees' religious beliefs and moral convictions, full compliance with the health care conscience protection laws and organizational objectives can best be achieved.

Similarly, we do not foresee that the health care conscience protection laws and this regulation would necessarily constrain employers in the health care field to hire individuals or accept volunteers who, due to their religious beliefs or moral convictions, refuse to perform job duties that comprise the significant majority or the entirety of duties required by the position.

There are a number of reasons why these and other staffing concerns might not be constrained by protections afforded to health care workers on the basis of conscience. First, employers have no obligation under the health care conscience protection laws to employ persons who are unqualified to perform the functions required of the jobs that they seek to fill. A job applicant must be qualified or, typically among a pool of qualified applicants, the best qualified, to perform the core services of a job for which he/she is applying. It is difficult to conceive of a circumstance in which an applicant who is fundamentally opposed on religious or moral grounds to a particular medical procedure, health service program, or research activity, would be among the best qualified to perform that procedure, service, or activity. Additionally, a job applicant with a sincerely held religious belief or moral conviction against a lawful health service or activity would be unlikely to apply for a job in which that precise health service or activity constitutes a significant majority or the entirety of the job. That said, employers are to be expected to make rational hiring decisions based on due consideration of an applicant's knowledge, skills, ability, and desire to perform the essential functions of a job. To the extent a health care employer's adverse decision is based on an applicant's inability to perform the essential functions of a job, the decision would not typically constitute discrimination under the regulation even if the applicant had expressed an unwillingness to perform those functions on conscience grounds. However, an adverse decision predicated on an applicant's alleged ''inability'' could constitute unlawful discrimination if the employer's stated reasons are pretextual; for example, if the employer is using the definition of essential functions as a pretext for excluding applicants with certain religious beliefs or moral convictions. In applying this standard, the Department will remain vigilant against discrimination and the potential for employers to use an applicant's qualifications as a pretext for unlawful discrimination.

*Comment:* Comments requested clarification regarding the application of the written certification requirement in the proposed rule to programs receiving federal funding under the President's Emergency Plan for AIDS Relief (PEPFAR).

*Response:* PEPFAR funding is distributed to several federal agencies, including the federal Centers for Disease Control and Prevention (CDC) within the Department. If the activities of CDC under PEPFAR are funded from the annual Labor, Health and Human Services appropriations act, the Weldon Amendment would apply, as would certain provisions of the Church Amendments.

To the extent that CDC's PEPFAR programs are funded solely from the Department of State appropriations, the Weldon Amendment would not apply because the funds for PEPFAR would come from the Department of State's appropriations act. The Weldon Amendment applies to funds appropriated under the Labor/HHS appropriations act to which the Weldon Amendment is a rider. PHS Act § 245, 42 U.S.C. 238n, would not apply because section 245 applies to the federal government and to State and local governments receiving federal financial assistance. The Church Amendments at 42 U.S.C. 300a–7(b), (c)(1) and (e) apply to activities funded and carried out under the PHS Act, the Community Mental Health Centers Act,

and/or the Developmental Disabilities Assistance and Bill of Rights Act of 2000, and, thus, would not be applicable.

There are two provisions of the Church Amendments that apply more broadly. The Church Amendments at 42 U.S.C. 300a–7(c)(2) applies to grants or contracts for biomedical or behavioral research under any program administered by the Secretary of Health and Human Services. CDC's PEPFAR programs do not customarily involve such research.

The Church Amendments at 42 U.S.C. 300a–7(d) provides that ''[n]o individual shall be required to perform or assist in the performance of any part of a *health service program* or research activity *funded in whole or part under a program administered by the Secretary of Health and Human Services* if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions.'' 42 U.S.C. 300a–7(d) (emphasis added). PEPFAR is a program administered, in part, by HHS. PEPFAR funds are appropriated under the State Department's authorities and then transferred to HHS and fund grant programs that are developed, administered and implemented by HHS/CDC which provide health services, including HIV prevention, treatment, and care. Accordingly, CDC's PEPFAR programs would be subject to the requirements/prohibitions in 42 U.S.C. 300a–7(d), and foreign or international organizations (such as agencies of the United Nations) which are recipients or sub-recipients under CDC's PEPFAR programs may be recipients or sub-recipients for the purposes of this rule at CDC's discretion. We note that these requirements are consistent with a conscience protection clause already existing in the PEPFAR authorizing statute.

*Comment:* One Commenter requested clarification on the Office for Civil Rights' (OCR) experience and knowledge of employment discrimination and how OCR would handle a potential increase in workload associated with its role in the proposed rule as the office designated to receive complaints of discrimination.

*Response:* With a Headquarters office in Washington, DC, ten regional and two field offices located throughout the United States, OCR promotes and ensures that individuals have equal access to, and opportunity to participate in, and receive services from, all relevant Department-funded programs without facing unlawful discrimination, and that the privacy of their health information is protected. OCR is the sole agency within the Department charged with responsibility for enforcing these important federal protections. Through the enforcement work of its Headquarters policy staff and regional investigators, OCR annually resolves more than 12,000 citizen complaints alleging discrimination or a violation of the Privacy Rule under the Health Insurance Portability and Accountability Act (HIPAA). OCR provides training and technical assistance annually to individuals and health care entities nationwide that receive certain funds from the Department through its public education and compliance activities to promote and ensure compliance with applicable federal laws requiring nondiscriminatory access to Department programs and services and protection of the privacy of individually identifiable health information under the HIPAA Privacy Rule. OCR is therefore well-positioned within the Department to fulfill its designated role as the point of contact to receive, and coordinate with the Department-funding components the handling of, complaints from individual and institutional health care providers and entities seeking protection from discrimination in connection with particular practices, or from compulsion to perform health care activities, that they find religiously or morally objectionable. The Department-funding components will bear the actual responsibility for enforcement of the health care conscience protection laws through their usual and ordinary program mechanisms, which include termination of funding and return of funds paid out in violation of the health care provider conscience protection provisions under 45 CFR parts 74, 92, and 96.

OCR also has considerable experience working collaboratively with the Department-funding components to identify barriers and implement practices that can avoid potential discrimination in services, and also in supporting funding components' enforcement responsibilities. For example, OCR conducts fully coordinated investigations with the Administration for Children and Families (ACF) in its enforcement of the Multiethnic Placement Act (MEPA) of 1994, as amended by section 1808 of the Small Business Job Protection Act of 1996, which provides that state agencies may not delay or deny the placement of a child for adoption or into foster care on the basis of the race, color, or national origin of the adoptive or foster parent, or the child involved. OCR and ACF act collaboratively concerning the conduct of MEPA investigations and in resolution of MEPA complaints. Pursuant to a memorandum of understanding between OCR and ACF, OCR takes the lead in investigating violations; when OCR finds a violation of MEPA, ACF determines whether to require a monetary payment by the state as part of the resolution agreement and whether to require that the payment be an integral part of the resolution. In these ways, OCR routinely works with the staff of Departmental programs and brings its expertise to bear to ensure compliance with federal nondiscrimination requirements.

With respect to OCR's experience and knowledge in the area of employment discrimination complaints, OCR has served as the designated entity within the Department to receive a variety of discrimination complaints for over 40 years, including employment discrimination complaints. OCR's authority covers discrimination based on race, color, national origin, age, disability, sex, and religion. OCR's designated responsibilities under the provider conscience regulation to receive and coordinate the handling of discrimination complaints under the statutes and this implementing regulation, with the Departmental programs funding the entities at issue in any complaint, therefore, fall clearly within OCR's area of expertise and responsibility within the Department.

*Comment:* One Commenter noted that designating OCR as the office to receive complaints appears to overlap with EEOC jurisdiction, and could confuse employees as to when and where to file complaints.

*Response:* OCR, EEOC, and other federal agencies have developed procedures over the years to ensure appropriate handling of federal nondiscrimination complaints where there is overlapping jurisdiction.

The agencies responsible for federal nondiscrimination laws, including OCR and EEOC, coordinate to ensure these procedures are working and also confer on a case-by-case basis when needed to work out instances where there may be shared jurisdiction. As part of this coordination, federal agencies, including OCR, use a variety of methods, including consumer brochures, fact sheets, grassroots meetings, and the Internet, to get information to the public about their federal civil rights and when, where, and how to file discrimination complaints depending upon the facts of the complaint. The Department will continue to use appropriate means to educate the public about their rights and

how to file a complaint under the provider conscience regulation.

The Department agrees that it will be important to ensure that the regulated entities and their employees are aware that the EEOC retains its primary jurisdiction in the area of enforcing protections under Title VII prohibiting employment discrimination based on religion. The Department will explore all avenues available, in coordination with the EEOC, for increasing public awareness of both health care conscience protection laws and Title VII's protections against employment discrimination based on religion. Where there are overlapping interests between the EEOC and the Department with respect to enforcement of protections against religious discrimination in employment, the EEOC and OCR roles and responsibilities are set forth in a federal regulation which has been in effect for 25 years, 29 CFR part 1691, 48 FR 3574 (January 25, 1983) (as amended) (*Procedures for Complaints of Employment Discrimination filed against Recipients of Federal Financial Assistance*). This regulation provides for coordination between EEOC and OCR for review, investigation, and resolution of certain overlapping employment discrimination complaints, including those based on religion.

*Comment:* Several Comments questioned the authority of the Secretary to issue this regulation. They pointed out that several of the statutory provisions such as the Church amendments lacked an explicit delegation of rulemaking authority to the Department. Several of these Commentators also stated the ''housekeeping statute,'' 5 U.S.C. 301, does not authorize the Department to promulgate standards for entities outside the agency, and that this rule is, therefore, *ultra vires*.

*Response:* The Supreme Court has recognized the best, but not only, means by which an agency may promulgate binding legislative rules is through the issuance of regulations through notice and Comment rulemaking pursuant to delegated rulemaking authority. *United States* v. *Mead,* 533 U.S. 218 (2000). The Court has also found Chevron deference applicable where an agency has considerable expertise over a complex area and has given the issue careful consideration. *Barnhart* v. *Walton,* 535 U.S. 212 (2002); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). Lower courts have also recognized binding deference to the Department in determining whether recipients of federal funds are complying with myriad federal requirements. *Pharmaceutical Manfs.* v. *Thompson,* 362 F.3d 817 (DC Cir. 2004). All these deference factors are applicable here, and in addition to the notice and Comment the Secretary has conducted here.

Regardless of the Department's authority to promulgate legislative rules in this instance, it is well settled in case law that every agency has the inherent authority to issue interpretive rules and rules of agency practice and procedure. Pierce, *Administrative Law* at 306 (4th ed. 2002). The compliance requirements set forth in this rule do not substantively alter or amend the obligations of the respective statutes. *JEM Broadcasting* v. *FCC,* 22 F3d 320 (DC Cir. 1994). While specific certification of compliance for the health care conscience protection laws is new, recipients of federal funding have long certified compliance with other applicable federal laws, including civil rights laws. While this needed change in procedures may prompt a minor increase in the costs of compliance for some entities, that does not alter the procedural nature of the rule. *Hurson* v. *Glickman,* 229 F3d 277 (DC Cir. 2000).

Furthermore, provisions of the rule which do no more than define terms are reasonably drawn from the existing statutes. *Hoctor* v. *Dept. of Agriculture,* 82 F3d 165 (7th Cir. 1996). Particularly as Congress intended the conscience protections to apply broadly across institutions and individuals, the Department has ample authority to issue these interpretive provisions.

*Comment:* Several Comments raised the question of how this regulation may conflict with rules governing other Department programs. Some expressed concerns that the rule was inconsistent with program requirements of the Medicaid, Community Health Center, and Title X Family Planning programs, as well as the treatment requirements under the Emergency Medical Training and Active Labor Act (EMTALA). Specifically, Comments assert that this regulation is inconsistent with the requirement that institutions provide care in an emergency, a requirement that includes no exception for religious or moral objections to the needed service, and that the regulatory requirements for family planning clinics under Title X of the Public Health Service Act require Title X projects to offer pregnant women non-directive counseling, and referrals upon request for prenatal care and delivery, infant care, foster care or adoption, and abortion.

*Response:* The Department does not operate its programs in conflict with the existing federal protections being further implemented by this rule. The Department believes that many Commenters are confused as to the programmatic requirements of various Departmental programs, and suggests that concerned parties seek clarification from individual program offices as appropriate. Similarly, the Department believes that Commenters mistakenly confuse certain legal requirements on institutions or health care entities as requirements on individual providers. With respect to emergency treatment, the obligations of EMTALA are imposed on hospital under 1867 of the Social Security Act only if they elect to operate an emergency room and are also limited to the capabilities of the particular hospital. The requirement under EMTALA that such hospitals treat and stabilize patients who present in an emergency is not in conflict with the Church Amendments' requirement that certain recipients of Department funds not force any individual to participate in a health service program that they object to based on a religious belief or moral conviction. While this and other hypothetical situations were raised in the Comments, the Department is not aware of any instance where a facility required to provide emergency care under EMTALA was unable to do so because its entire staff objected to the service on religious or moral grounds. With regards to the Title X program, Commenters are correct that the current regulatory requirement that grantees must provide counseling and referrals for abortion upon request (42 CFR 59.5(a)(5)) is inconsistent with the health care provider conscience protection statutory provisions and this regulation. The Office of Population Affairs, which administers the Title X program, is aware of this conflict with the statutory requirements and, as such, would not enforce this Title X regulatory requirement on objecting grantees or applicants.

*Comment:* Multiple Comments questioned the balance between provisions in the Department's proposed rule and requested clarification on EMTALA requirements and how they will be upheld if the Department's proposed rule is promulgated.

*Response:* The Department notes that this Comment would only be relevant where a hospital, as opposed to an individual, has an objection to performing abortions that are necessary to stabilize the mother, as that term has been interpreted in the context of EMTALA. The Department is unaware of any hospital that has such a policy. Furthermore, the laws this regulation supports have existed alongside

EMTALA for many years. Thus, we do not anticipate any actual conflict between EMTALA and this regulation.

*Comment:* Some Comments expressed concern that this rule could interfere with existing state laws that regulate contraceptive coverage mandates in insurance policies, access to emergency contraception, and access to birth control at pharmacies. Commenters were also concerned that this regulation would impact a State's ability to enforce these laws and upset the balance that state and local laws already strike between the religious freedom of health care providers and a patient's need to access health care services.

*Response:* As mentioned above, this rule was issued to help define the rights and responsibilities created by the existing federal health care provider conscience protection provisions, clarify the scope of the existing protections, require certain recipients of Department funds to certify compliance with these requirements, and define certain terms for the purposes of this rule. This rule does not change federal policy regarding the conscience rights of health care providers, or create new rights, but simply seeks to ensure that recipients of Department funds are aware of the existing conditions that apply to the receipt of these funds. As such, States should already be aware of these existing protections, and should ensure that they do not take actions that would violate these established federal protections. By accepting federal funds, States accept the conditions that the Congress has imposed on the receipt of those funds. In this case, Congress has seen fit to include broad conscience protections for health care entities that apply to a wide array of Department activities. As this rule implements existing law, if States wish to adopt or enforce policies that seek to ensure that patients have proper access to health care services, they would be expected to do so, but they should avoid policies that interfere with federally protected rights, or risk the loss of federal funds. While the Department is aware that some States may have laws that, if enforced, depending on the factual circumstances, might violate these federally protected rights, the Department is not aware of any particular instance where a State has done so in an inappropriate fashion. The Department's objective is to protect the conscience rights established in federal law, not to penalize States that adopt laws that, if enforced against an objecting individual or entity, could violate federal law. The Department is committed to working cooperatively with States to help ensure that they do not violate the federal protections.

*Comment:* Several Comments claimed that the proposed rule is covered under existing federal laws, which makes the new proposed rule unnecessary.

*Response:* The Department agrees that the provider conscience regulation's purpose is to implement existing federal laws by providing definitions to clarify the scope of those laws and to adopt certification mechanisms that will be used to increase awareness of, and compliance with, those laws. For reasons stated above, the Department disagrees that the rule is unnecessary.

*Comment:* Several Comments noted that the rule supports the First Amendment right of freedom of religion.

*Response:* The Department agrees. It is clear that Congress intended these statutes—the Church Amendment in particular—to further protect, in part, the First Amendment right to free exercise of one's religion in the context of healthcare provided by recipients of Departmental funds.

*Comment:* Commenters claimed that the rule, if promulgated, would violate the ''constitutionally protected right to choose.''

*Response:* We disagree. The Supreme Court has read the Constitution to include rights to privacy and bodily integrity broad enough to protect a woman's choice to procure an abortion. The case law enshrining this interpretation of the Constitution does not create or identify a corresponding duty on the part of any provider to be involved in the procedure in any way. In contrast, many protections, including principles established in court cases [4] and ethical principles found in State and federal laws,[5] are in place to ensure that no such duty is imposed on providers. The regulations implementing the Church Amendments, PHS Act § 245, and the Weldon Amendment merely interpret these federal health care conscience protection provisions and encourage compliance.

*Comment:* Comments stated that Congress upheld the access-to-care rights of pregnant women in the Education Appropriations Act beginning in 1997. The Comments declared that the proposed rule would contradict 42 CFR 59.5(a)(5), which states women are to receive ''neutral, factual information and nondirective counseling, and referral upon request,'' regarding prenatal care and delivery, as well as adoption and termination options.

*Response:* The Department is unsure which provision in the Education Appropriations Act the Commenter was referencing, and cannot respond except to say that we are unaware of any federal law that imposes a positive duty on doctors to provide services to which the provider objects.

This rule is consistent with 42 CFR 59.5 with respect to an individual provider's right to refuse to counsel or refer for abortion, as explained in the preamble to the final rule that promulgated that requirement:

> The corollary suggestion, that the requirement to provide options counseling should not apply to employees of a grantee who object to providing such counseling on moral or religious grounds, is likewise rejected. In addition to the foregoing considerations, such a requirement is not necessary: Under 42 U.S.C. 300a–7(d), grantees may not require individual employees who have such objections to provide such counseling. However, in such cases the grantees must make other arrangements to ensure that the service is available to Title X clients who desire it. 65 FR 41270, 41274 (2000).

As is always the case, requirements and prohibitions contained in a regulation cannot be enforced in derogation of conflicting statutes. Thus, under section 245 of the Public Health Service Act and the Weldon Amendment, the Department cannot and does not enforce 42 CFR 59.5(a)(5) against an otherwise eligible grantee or applicant who objects to the requirement to counsel on or refer for, abortion. See *Nat'l Family Planning & Reprod. Health Ass'n* v. *Gonzales,* 468 F.3d 826, 828 (DC Cir. 2006) (''* * * the government notes, and plaintiff doesn't contest, that in the event of conflict the regulation must yield to a valid statute.'').

*Comment:* A number of Comments stated that the proposed rule is unnecessary in part because of the National Research Act, which created protection within biomedical and behavioral research organizations and formed a commission to ensure these rights are protected.

*Response:* The Department disagrees. The Department has identified several instances that suggest that providers, employers, and employees are unaware of the protections found in federal law. Hundreds of Comments have confirmed this lack of awareness. This rule is an

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[4] ''If [a] hospital's refusal to perform sterilization [or, by implication, abortion] infringes upon any constitutionally cognizable right to privacy, such infringement is outweighed by the need to protect the freedom of religion of denominational hospitals 'with religious or moral scruples against sterilizations and abortions.''' *Taylor* v. *St. Vincent's Hospital,* 523 F.2d 75, 77 (9th Cir. 1975) (citations omitted).

[5] See, *e.g.,* S.D. Codified Laws § 36–11–70 (2003); Miss. Code Ann. § 41–107–5 (2004).

important step in ensuring knowledge of, and compliance with, the provider conscience provisions found in these statutes.

*Comment:* One Commenter argued that the regulation was needed and there are no court rulings, including *Roe* v. *Wade* and *Planned Parenthood* v. *Casey*, 505 U.S. 833 (1992), that compel an individual or institutional health care provider to participate in the provision of abortions, so the regulation does not contradict the cases.

*Response:* The Department agrees. Although these cases interpret the Constitution to include a right to abortion, they do not create an affirmative duty on the part of any provider to perform or participate in the provision of such an abortion.

*Comment:* A Commenter cited the Supreme Court case of *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), that addressed the privacy of a married couple to engage in the use of birth control versus the State's law which declared contraception illegal.

*Response:* The Department notes that the Supreme Court in *Griswold* affirmed a married couple's right to use contraception as against a State law that prohibited such access. It did not impose upon any provider an affirmative duty to prescribe or dispense contraception.

*Comment:* One Commenter stated that *Shelton* v. *University of Medicine and Dentistry of New Jersey*, 223 F.3d 220 (3d Cir. 2000), clearly shows that in times of emergency professional ethical obligations to care for the sick and injured outweigh their conscience.

*Response:* The Department disagrees with this reading of *Shelton*. The sole issue in that case was ''whether a state hospital reasonably accommodated the religious beliefs and practices of a staff nurse who refused to participate in what she believed to be abortions.'' *Shelton* v. *University of Med. & Dentistry, 223 F.3d 220, 222 (3d Cir. 2000)*. Her employer offered her a lateral transfer, which she refused. The court held that this offer of a lateral transfer was a reasonable accommodation under the Civil Rights Act of 1964. The court said nothing of ethical obligations to care for the sick and injured outweighing conscience.

*Comment:* One Commenter argued that the rule does not make clear that the providers' religious objection has to be to the activity or procedure, not to the patient and stated that in a recent decision (*North Coast Women's Care Medical Group* v. *Benítez*, 44 Cal. 4th 1145 (2008)), the California Supreme Court ruled that doctors are barred from refusing medical care to homosexuals based on the doctors' religious beliefs about homosexuals.

*Response:* In *Benítez,* the California Supreme Court was interpreting State, not federal, law. The Court's analysis is inapplicable to this situation. Further, the Department believes the statutes and this rule are sufficiently clear as to applicability.

*Comment:* One Commenter suggested that the proposed rule violates a White House directive that executive departments and agencies submit all proposed rules by June 1, 2008, except in ''extraordinary circumstances.'' The Commenter stated the Department should explain those extraordinary circumstances or withdraw its proposal.

*Response:* The memorandum issued by the Chief of Staff to the President was solely for purposes of management and coordination of the Executive Branch, conferred no rights on anyone outside the Executive Branch, did not create any legal requirements, and by its own terms authorized the exercise of discretion and exceptions to timing guidelines where appropriate. The Department has solicited and carefully evaluated public Comment as required by the Administrative Procedure Act. Nothing in applicable law precluded issuance of the proposed rule, just as nothing in applicable law precludes the issuance of this final rule.

*Comment:* Some Comments requested that the 30-day Comment period be extended.

*Response:* We decline to extend the 30-day Comment period. The purpose of extending the Comment period would be to provide additional opportunity to Comment on the proposed rule. We note that, as demonstrated by the volume of Comments received by the Department, Commenters had ample opportunity to submit Comments and did so. The Department received Comments discussing a wide range of issues, including potential impact of the proposed rule, from stakeholders including hospitals, health care providers, professional associations, trade groups, advocacy organizations, private citizens, and others. The Department has had sufficient opportunity to weigh the issues posed by public Comments, including the impact of the proposed rule and its interaction with State and federal laws, and has taken such Comments into account in issuing this final rule.

*Comment:* One Commenter stated that the interests protected in the regulation are only specific concerns of providers in particular situations or locations, and the only thing needed to remedy the conflict is to change the situation or location to accommodate the employee.

*Response:* The Department agrees that employers should strive for accommodation of religious beliefs, moral convictions, or convictions against involvement in abortions or sterilizations. However, the Department believes that regulations are necessary to ensure that employers opt to accommodate their employees' objections rather than to engage in intimidation or discrimination.

*Comment:* One Comment asserted that HHS's concern about the development of an environment in which individuals from diverse backgrounds are discouraged from entering health care professions contrasts with the accreditation requirements of The Liaison Committee on Medical Education (LCME) and The Accreditation Council for Graduate Medical Education (ACGME). That is, these organizations have standards that are ''designed to ensure that the education of physicians provides an environment that embraces a diversity of views and values for both health care providers and patients.''

*Response:* The Department disagrees. Although the requirements are certainly useful as future physicians are educated, the Department thinks it would be uncontroversial to suggest that over time, as physicians and other professionals are trained and begin practicing medicine, their attitudes and demeanor may change. Thus, these regulations are needed to protect against coercion and discrimination across the span of a professional's education and career.

*Comment:* One Commenter claimed that the regulation would require the American Medical Association to rewrite its code of ethics.

*Response:* As noted before, this regulation simply enforces federal law. The American Medical Association code of ethics—which, in any event, does not appear to conflict with federal law—is not binding law, so it may not matter if there is a conflict. Insofar as problems may arise as a result of conflict between any code of ethics and federal law, the proper solution is to rewrite the relevant code of ethics.

*Comment:* One Commenter recommended that the Department set up a process by which providers ensure patients receive care from another provider when they have objections to the requested procedure.

*Response:* While the Department suspects that such referrals may be how many providers will handle these types of situations, it declines to impose such a requirement in the rule, since such a requirement would constitute ''making arrangements for'', ''referring for'', or

''assisting in the performance'' of an abortion or other objectionable procedure in violation of the health care provider conscience protection statutes.

**III. Legal Authority**

On the basis of the following statutory authority, the Secretary promulgates these regulations, requiring certification of compliance with anti-discrimination statutes.

5 U.S.C. 301 empowers the head of an Executive department to prescribe regulations ''for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.''

The Church Amendments, 42 U.S.C. 300a–7 (2000), prohibit recipients of Department funding under the PHS Act and several other statutes from discriminating against employees and others who participate in health service programs or research activities funded in whole or part by the Department who refuse to perform certain medical services, including sterilization, abortion, or research activities because of religious or moral beliefs. Specifically, section 300a–7(c)(1)(A) and (B) provides that recipients may not discriminate in the employment of or the extension of staff privileges to any health care professional because he refused, because of his religious beliefs or moral convictions, to perform or assist in the performance of any sterilization or abortion procedures. Section 300a–7(d) provides that no individual shall be required to perform or assist in the performance of *any* health service program or research activity funded in whole or part by the Department contrary to his religious beliefs or moral convictions.[6]

PHS Act § 245, 42 U.S.C. 238n (1996), prohibits the Federal government and any State or local government that receives federal financial assistance from discriminating against any health care entity (including both individual and institutional providers) on the basis that, among other things, the entity refuses to (1) receive training in abortion; (2) provide abortion training; (3) perform abortions; (4) provide referral for such abortions; and (5) provide referrals for abortion training. 42 U.S.C. 238n(a).

The Weldon Amendment, Consolidated Appropriations Act, 2008, Public Law 110–161, § 508(d), 121 Stat. 1844, 2209 (2008), prohibits a federal agency or program, or any State or local government from receiving Department funds if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.

These statutory provisions require that the Department and recipients of Department funds refrain from discriminating against institutional and individual health care entities for their participation or refusal to participate in certain medical services or research activities funded by the federal government. The Department has authority to promulgate regulations to enforce these prohibitions. Finally, the Department also has the legal authority to require that recipients certify their compliance with these proposed requirements and to require their sub-recipients to likewise certify their compliance with these proposed requirements.

We respond to the Comment on the Department's legal authority to promulgate these regulations in section H (General Comments) of the Comments section above.

**IV. Section-by-Section Description of the Final Rule**

*Section 88.1 Purpose*

*Proposed Rule:* In the proposed rule, the ''Purpose'' section set forth the objective that this final rule provides for the implementation and enforcement of federal nondiscrimination statutes protecting the conscience rights of health care entities. It also states that the statutory provisions and regulations contained in this Part are to be interpreted and implemented broadly to effectuate these protections.

The Department received no Comments on this section.

*Final Rule:* The Department adopts this provision as recommended in the proposed rule without modification.

*Section 88.2 Definitions*

Assist in the Performance

*Proposed Rule:* The Department, in considering how to interpret the term ''assist in the performance,'' sought to provide broad protection for individuals. At the same time, the Department sought to guard against potential abuses of these protections by limiting the definition of ''assist in the performance'' to only those individuals who have a reasonable connection to the procedure, health service or health service program, or research activity to which they object.

Therefore, the Department proposed to interpret this term broadly, as encompassing individuals who are members of the workforce of the Department-funded entity performing the objectionable procedure. When applying the term ''assist in the performance'' to members of an entity's workforce, the Department proposed that the term be limited to participation in any activity with a reasonable connection to the objectionable procedure, including referrals, training, and other arrangements for the procedure, health service, or research activity. For example, an operating room nurse would assist in the performance of surgical procedures; an employee whose task it is to clean the instruments used in a particular procedure would also be considered to assist in the performance of the particular procedure under the proposed rule.

The Department responds to Comments on the proposed definition of this term above.

[6] Section 300a–7(c)(1) provides that ''[n]o entity which receives a grant, contract, loan, or loan guarantee under the [Act] * * * may (A) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or (B) * * * in the extension of staff or other privileges to any physician or other health care personnel * * * because he refused to perform or assist in the performance of * * * [an] abortion'' on the grounds that doing so ''would be contrary to his religious beliefs or moral convictions.'' 42 U.S.C. 300a–7(c)(1). Section 300a–7(c)(2) provides that ''[n]o entity which receives * * * a grant or contract for biomedical or behavioral research under any program administered by [HHS]'' may discriminate in the employment of or the extension of staff privileges to any health care professional ''because he refused to perform or assist in the performance of'' ''any lawful health service'' based on religious belief or moral conviction. 42 U.S.C. 300a–7(c)(2). Section 300a–7(d) provides that ''[n]o individual [may] be required to perform or assist in the performance of any part of a health service program * * * funded in whole or in part under a program administered by the Secretary of Health and Human Services'' if doing so ''would be contrary to his religious beliefs or moral convictions.'' 42 U.S.C. 300a–7(d). Section 300a–7(e) prohibits any entity that receives funding under the PHS Act from denying admission to, or otherwise discriminating against, ''any applicant (including for internships and residencies) for training or study because of the applicant's reluctance * * * to counsel, suggest, recommend, assist, or in any way participate in the performance of abortions * * * contrary to or consistent with the applicant's religious beliefs or moral convictions.'' 42 U.S.C. 300a–7(e). In addition, section 300a–7(b) provides in part that ''[t]he receipt of any grant, contract, loan, or loan guarantee under the [PHS Act] * * * by any individual or entity does not authorize any court or any public official or other public authority to require'' (1) the individual to perform or assist in an abortion if it would be contrary to his/her religious beliefs or moral convictions; or (2) the entity to make its facilities available for abortions, if the performance of abortions in the facilities is prohibited by the entity on the basis of religious beliefs or moral convictions, or provide personnel for the performance of abortions if it would be contrary to the religious beliefs or moral convictions of such personnel. 42 U.S.C. 300a–7(b).

*Final Rule:* The Department adopts the above definition as proposed.

Health Care Entity/Entity

*Proposed Rule:* While both PHS Act § 245 and the Weldon Amendment provide examples of specific types of protected individuals and health care organizations, neither statute provides an exhaustive list of such health care entities. PHS Act § 245 defines ''health care entity'' as ''includ[ing] an individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions.'' As a matter of statutory construction as well as long-standing Departmental interpretation, the definition of ''health care entity'' in PHS Act § 245 also encompasses institutional entities, such as hospitals and other entities. The Weldon Amendment defines the term ''health care entity'' as ''includ[ing] an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan.'' The Church Amendment does not define the term ''entity,'' and does not use the term ''health care entity.''

In keeping with the definitions in PHS Act § 245 and the Weldon Amendment, the Department proposed to define ''health care entity'' to include the specifically mentioned types of individuals and organizations from the two statutes, as well as other types of entities referenced in the Church Amendments.

The Department responds to Comments on the proposed definition of this term above.

*Final Rule:* The Department adopts the proposed definition without modification. It is important to note that the Department does not intend for this to be a comprehensive list of relevant types of individuals and organizations for purposes of the regulation, but merely a list of examples.

Health Service/Health Service Program

*Proposed Rule:* One of the provisions in the Church Amendments uses the term ''health service,'' another uses the term ''health service program.'' The Church Amendments do not define these terms, nor does the Public Health Service Act define ''health service program.'' In developing an appropriate definition for ''health service program,'' the proposed rule looked at the Social Security Act. Section 1128B(f)(1) of the Social Security Act, 42 U.S.C. 1320a–7b(f)(1), defines a similar term, ''federal health care program'', as ''any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government.''

Building on this broad definition, it was proposed that the term ''health service program'' should be understood to include an activity related in any way to providing medicine, health care, or any other service related to health or wellness, including programs where the Department provides care directly (*e.g.*, Indian Health Service); programs where grants pay for the provision of health services (*e.g.*, Administration for Children and Families programs such as the Unaccompanied Refugee Minor and the Division of Unaccompanied Children Services programs and HRSA programs such as community health centers); programs where the Department reimburses another entity that provides care (*e.g.*, Medicare); and health benefit programs where federal funds are used to provide access to health coverage (*e.g.*, SCHIP, Medicaid, and Medicare Advantage).

The Department responds to Comments on the proposed definition of this term above.

*Final Rule:* Upon further reflection, the Department has determined that the meaning of the term ''health service'' is self-evident, and so we do not adopt a definition for ''health service'' in this final rule.

*Final Rule:* The Department adopts the above definition without modification.

Individual

*Proposed Rule:* For the purposes of the new proposed part, the proposed rule defined ''individual'' to mean a member of the workforce (see definition of ''workforce'' below) of an entity or health care entity. One conscience clause of the Church Amendments, 42 U.S.C. 300a–7(d), provides that ''[n]o *individual* shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health, Education and Welfare [Secretary of Health and Human Services] if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions.'' (Emphasis added.)

The Department responds to Comments on the proposed definition of this term above.

*Final Rule:* The Department adopts the above definition as proposed.

Instrument

*Proposed Rule:* The proposed rule uses the term ''instrument'' to mean the variety of means by which the Department conveys funding and resources to organizations, including: grants, cooperative agreements, contracts, grants under a contract, and memoranda of understanding. The proposed definition of ''instrument'' was intended to include all means by which the Department conveys funding and resources.

No Comments were received on the definition of this term.

*Final Rule:* The Department adopts the above definition without modification.

Recipient

*Proposed Rule:* The proposed rule defined this term to mean any entity that receives Department funds directly.

The Department responds to Comments on the proposed definition of this term above.

*Final Rule:* The Department adopts this definition as proposed.

Sub-recipient

*Proposed Rule:* The proposed rule defined this term to mean any entity that receives Department funds indirectly through a recipient or sub-recipient.

The Department responds to Comments on the proposed definition of this term above.

*Final Rule:* The Department adopts this definition as proposed.

Workforce

*Proposed Rule:* In the proposed rule we defined the term ''workforce'' as including employees, volunteers, trainees, and other persons whose conduct, in the performance of work for an entity, is under the control or authority of such entity, whether or not they are paid by the Department-funded entity. The definition was drawn from the ''Administrative Data Standards and Related Requirements'' rules implementing the Health Insurance Portability and Accountability Act (HIPAA), 45 CFR parts 160, 162, and 164 (2006) at 45 CFR 160.103. In keeping with this definition, persons and organizations under contract with an entity, if they are under the control or authority of the entity, would be considered members of the entity's workforce.

The Department responds to Comments on the proposed definition of this term above.

*Final Rule:* In response to public Comments on this issue, we have provided an exclusive definition of the

term ''workforce'' by changing ''includes'' to ''means'' in the definition. In defining both ''individual'' and ''workforce,'' the Department promulgates definitions that provide a reasonable scope for the natural persons protected by 42 U.S.C. 300a–7(d) and the corresponding provisions of these regulations. By limiting the scope of persons protected by these regulations to those who are under the control or authority of an entity that implements a health service program or research activity funded in whole or in part under a program administered by the Department, we provide the bright line necessary for Department-funded entities subject to the applicable Church Amendment provisions to set policies or otherwise take steps to secure conscience protections within the workplace and, thus, to comply with the Church Amendment and these regulations.

As indicated in the proposed rule—and consistent with the scope of the Church Amendments, which include physicians and other health care providers that have privileges with an entity receiving funding from the Department—we intended the concept of ''workforce'' to include physicians and other health care providers who have privileges at the entity funded by the Department. After publication of the proposed rule, it came to the Department's attention that the language of the ''workforce'' definition may not be clear on this issue. Accordingly, to ensure clarity on this point, we are revising the definition of ''workforce'' by adding at the end ''or health care providers holding privileges with the entity''.

*Section 88.3 Applicability*

*Proposed Rule:* The ''Applicability'' section of the proposed rule directs individuals and entities receiving funds from the Department to the appropriate sections of proposed section 88.4 that set forth the relevant requirements, drawn from the three statutes that form the basis of this regulation, that are applicable to them and also directed to the provisions regarding certifications that the various recipients of federal monies must provide.

*Final Rule:* In this final rule, we have included a technical correction in section 88.3 clarifying that educational institutions, teaching hospitals, and programs for the training of health care professionals or health care workers shall comply with section 88.4(c)(2), which prohibits discrimination against or denial of admission to applicants ''because of reluctance or willingness to counsel, suggest, recommend, assist, or in any way participate in the performance of abortions or sterilizations contrary to or consistent with the applicant's religious beliefs or moral convictions'' in accordance with PHS Act § 245. 42 U.S.C. 300a–7(e). Apart from this change, we have adopted this provision as recommended in the proposed rule.

*Section 88.4 Requirements and Prohibitions*

*Proposed Rule:* The ''Requirements and Prohibitions'' section in the proposed rule explains the obligations that the Church Amendments, PHS Act § 245, and the Weldon Amendment impose on entities which receive funding from the Department, depending on the type of entity and the program or statute under which the funding is received. These provisions are taken from the relevant statutory language and make up the elements of the certification provided by the entities. The proposed rule states that we intend for the requirements and prohibitions to be interpreted using the definitions contained in section 88.2.

*Final Rule:* The final rule adopts this provision without change.

*Section 88.5 Written Certification of Compliance*

*Proposed Rule:* In the ''Written Certification of Compliance'' section of the proposed rule, the Department proposed to require certain recipients and sub-recipients of Department funds to certify compliance with the Church Amendments, PHS Act § 245, and the Weldon Amendment, as applicable, and to provide for the affected recipients and sub-recipients requirements for collecting, maintaining, and submitting written certifications.

We are concerned that there is a lack of knowledge on the part of States, local governments, and the health care industry of the rights of health care entities created by, and the corresponding obligations imposed on the recipients of certain federal funding by, the nondiscrimination provisions. Under the proposed rule, recipients of federal funds would be required to submit their certifications directly to the Department as part of the instrument or in a separate writing signed by the recipients' officer or other person authorized to bind the recipient. They would also be required to collect and maintain certifications by sub-recipients who receive Department funds through them.

The proposed regulation would require that entities certify in writing that they will operate in compliance with the Church Amendments, PHS Act § 245, and the Weldon Amendment as applicable. Certification provides a demonstrable way of ensuring that the recipients of such funding know of, and attest that they will comply with, the applicable nondiscrimination provisions. Sub-recipients of federal funds—entities that will receive federal funds indirectly through another entity (a recipient or other sub-recipient)—would be required to provide certification as set out in the ''Sub-recipient'' subsection of the ''Certification of Compliance'' section, and submit them to the recipients through which they receive Department funds for maintenance. Although it would be collected and maintained by the recipient, this certification by sub-recipients would be a certification addressed to the Department, not to the recipients collecting the certification. Recipients would be expected to comply with requirements for retention of and access to records set forth in 45 CFR 74.53.

While all recipients and sub-recipients of Department funds are required to comply with the Church Amendments, PHS Act § 245, and the Weldon Amendment, as applicable, section 88.5(e), as proposed, would contain several important exceptions to the proposed requirement to provide the written certification, including individual physicians, physician offices, other health care practitioners, and other participants in Part B of the Medicare program; (2) physicians, physician offices, or other health care practitioners participating in Part C of the Medicare program, when such individuals or organizations are sub-recipients of Department funds through a Medicare Advantage plan; and (3) sub-recipients of State Medicaid programs (*i.e.*, any entity that is paid for services by the State Medicaid program).

While other providers participating in the Medicare program as well as State Medicaid programs would be required to submit written certification of compliance to the Department, the large number of entities included in the categories of providers listed above (*e.g.*, individual physicians, physician offices, other health care practitioners, and sub-recipients of State Medicaid programs) would have posed significant implementation hurdles for Departmental components and programs. Furthermore, the Department believed that, due primarily to their generally smaller size, the excepted categories of recipients and sub-recipients of Department funds in the above categories would be less likely to encounter the types of issues sought to be addressed in this regulation.

However, we noted in the proposed rule that excepted providers may become subject to the proposed written certification requirement by receiving Department funds under a separate agency or program. For example, under the proposed rule, a physician office participating in Medicare Part B may become subject to the proposed written certification requirement by receiving Department funds to conduct clinical research. We noted, however, that the State Medicaid programs would be responsible for ensuring the compliance of their sub-recipients as part of ensuring that the State Medicaid program is operated consistent with applicable nondiscrimination provisions.

*Final Rule:* Partly in Response to suggestions received in Response to solicitation of public Comment on this issue (see the Department Responses to the Comments on the proposed certification requirement above), HHS has determined to make further exceptions to the certification requirements in section 88.5 in the final rule. Exceptions from the written certification requirement are included for Departmental grant programs whose purpose is unrelated to health care provision, including economic assistance, and which do not involve medical research or the involvement of health care providers, and which are unlikely to involve referral for provision of health care. These programs often involve funding to States and other governments for non-health care purposes, and/or cash assistance or vouchers, rather than direct services by a funded entity, to individuals. These programs are unlikely to involve Department funds being used for medical research, the participation of health care providers or referral to health care providers. As a consequence, these programs are also unlikely to encounter the circumstances contemplated by this regulation, and therefore the assurance of compliance represented by a certification is not considered necessary by the Department for such programs. Programs excepted under this provision include certain current programs administered by the Administration for Children and Families, including Low-Income Home Energy Assistance Program, Assets for Independence, the Child Care and Development Fund, Job Opportunities for Low-Income Individuals, Mentoring Children of Prisoners, and programs overseen by the Office of Child Support Enforcement, as well as certain current programs administered by the Administration on Aging. Finally, an exception to the written certification requirement of section 88.5 has been included for Indian Tribes and Tribal Organizations when contracting with the Indian Health Service under the Indian Self-Determination and Education Assistance Act.

As stated in the proposed rule, individual Department components have been tasked with determining how best to implement the written certification requirements set out in this regulation in a way that ensures efficient program operation. To this end, Department components have been given discretion to phase in the written certification requirement by no later than the beginning of the next federal fiscal year following the effective date of the regulation.

Finally, we have reorganized the wording of the written certifications in section 88.5 for purposes of clarity and to more closely track the language of the health care conscience protection laws. Recipients are expected to comply with the records retention and access requirements in 45 CFR 74.53, 45 CFR 92.42, 45 CFR 96.30, and any other applicable requirements.

*Section 88.6 Complaint Handling and Investigating*

*Proposed Rule:* This section did not appear in the proposed rule.

*Final Rule:* We have included a new section 88.6 to clarify, as was stated in the preamble to the proposed rule, that the HHS Office for Civil Rights (OCR) has been designated to receive complaints of discrimination and coercion based on the health care conscience protection statutes and this regulation. OCR will coordinate handling of complaints with the staff of the Departmental programs from which the entity, with respect to which a complaint has been filed, receives funding (*i.e.*, Department funding component).

## IV. Analysis of Economic Impacts

*Executive Order 12866—Regulatory Planning and Review*

HHS has examined the economic implications of this final rule as required by Executive Order 12866. Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). Executive Order 12866 classifies a rule as significant if it meets any one of a number of specified conditions, including: having an annual effect on the economy of $100 million, adversely affecting a sector of the economy in a material way, adversely affecting competition, or adversely affecting jobs. A regulation is also considered a significant regulatory action if it raises novel legal or policy issues. HHS has determined that, although this final rule is not economically significant, it is a significant regulatory action as defined by Executive Order 12866.

*Comment:* One Comment stated that HHS did not provide an adequate cost-benefit analysis as required by E.O. 12866. The Comment pointed out that the Department concluded that the rule is a significant regulatory action but did not undertake a more formal analysis.

*Response:* HHS disagrees. Our conclusion, based on the analysis of impacts of the proposed rule, was that the rule was not economically significant. Therefore, the assessment of potential costs and benefits provided was sufficient to meet the requirements of the Executive Order.

*Comment:* Two Comments stated HHS's analysis was inadequate in that it did not consider the costs of additional health care or other impacts on patients and employers because various definitions had been broadened. Another Comment stated that HHS did not asses the effects on public health resulting from a decrease in access to care.

*Response:* HHS disagrees. As stated previously, the Department does not agree that the interpretation of the terms used in this rule have been broadened or that the scope of the laws were expanded. Nor does HHS agree that this rule would cause changes in staffing or other processes beyond those changes entities have already incurred in order to comply with existing statutes. This final rule does not limit patient access to health care, but rather implements existing federal laws. Thus, we have not changed our analysis in Response to this Comment.

An underlying assumption of this regulation is that the health care industry, including entities receiving Department funds, will benefit from more diverse and inclusive workforces by informing health care workers of their rights and fostering an environment in which individuals from many different faiths and philosophical backgrounds are encouraged to participate. As a result, we cannot accurately account for all of the regulation's future benefits, but the Department is confident that the future benefits will exceed the costs of complying with the regulation.

*Comment:* One Comment suggested that the number of affected entities suggests that the benefits will not exceed the costs of complying with the regulation. The Commenter provided no clarification and no data to support this statement.

*Response:* The Department has not revised its analysis in Response to this Comment.

The statutes mandating the requirements for protecting health care workers as discussed in this rule have been in effect for a number of years. Therefore, the regulatory burden associated with this rule is largely associated with the incremental costs of certifying to the Federal government and the cost of collecting and maintaining records of certification statements from sub-recipients. We estimate the universe and number of entities that would be required to certify to be 571,947 (see Table I). This estimate has been revised from the proposal to reflect new exceptions to the certification requirement for recipients of ACF, AOA, and IHS funds. We do not distinguish between recipients and sub-recipients of HHS funding. Each entity could be a recipient, a sub-recipient, or both.

TABLE—AFFECTED ENTITIES

| Health care entity | Number of entities |
|---|---|
| Hospitals (less than 100 beds) [7] | 2,403 |
| Hospitals (100–200 beds) [17] | 1,129 |
| Hospitals (200–500 beds) [17] | 1,160 |
| Hospitals (more than 500 beds) [17] | 244 |
| Nursing Homes (less than 50 beds) [8] | 2,388 |
| Nursing Homes (50–99 beds) [18] | 5,819 |
| Nursing Homes (99–199 beds) [18] | 6,877 |
| Nursing Homes (more than 200 beds) [18] | 1,037 |
| Physicians Offices [9] | 234,200 |
| Offices of Other Health Care Practitioners [18] [10] | 115,378 |
| Outpatient Care Centers [11] [19] | 26,901 |
| Medical and Diagnostic Laboratories [19] | 11,856 |
| Home Health Care Services [19] | 20,184 |
| Pharmacies (chain and independent) [12] | 58,109 |
| Dental Schools [13] | 56 |
| Medical Schools (Allopathic) [17] | 125 |
| Medical Schools (Osteopathic) [17] | 20 |
| Nursing Schools (Licensed practical) [14] | 1,138 |
| Nursing Schools (Baccalaureate) [22] | 550 |
| Nursing Schools (Associate degree) [22] | 885 |
| Nursing Schools (Diploma) [22] | 78 |
| Occupational Therapy Schools [17] | 142 |
| Optometry Schools [17] | 17 |
| Pharmacy Schools [17] | 92 |
| Podiatry Schools [17] | 7 |
| Public Health Schools [17] | 37 |
| Residency Programs (accredited) [15] | 8,494 |
| Health Insurance Carriers and 3rd-Party Administrators [16] | 4,578 |
| Grant awards [17] | 63,741 |
| Contractors [18] | 4,245 |
| State and territorial governments | 57 |
| Total | 571,947 |

The Department envisions three sub-categories of potential costs for recipients and sub-recipients of Department funds: (1) Direct costs associated with the act of certification; (2) Direct costs associated with collecting and maintaining certifications made by sub-recipients; and (3) indirect costs associated with certification.

In the analysis to the proposed rule, we explained that indirect costs associated with the certification requirement might include costs for such actions as staffing/scheduling changes and internal reviews to assess compliance. We further explained that there is insufficient data to estimate the number of funding recipients not

[7] Health, United States, 2007. U.S. Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics. Nov. 2007.

[8] Nursing Home Data Compendium, 2007 edition. U.S. Dept. of Health and Human Services, Centers for Medicaid and Medicare Services.

[9] See HIPAA Administrative Simplification NPRM: Modification to Medical Data Code Set Standards Toto Adopt ICD–10–CM and ICD–10–PCS; Proposed Rule, 73 FR 49796–49872, August 22, 2008.

[10] From the NAICS Code 6213—Office of Other Health Care Practitioners (including Chiropractors, Optometrists, non-Physician Mental Health Practitioners, Physical Occupational and Speech Therapists, Podiatrists, and all other Miscellaneous Health Care Practitioners.

[11] From the NAICS Code 6214—Outpatient Care Centers (including Family Planning Centers, Outpatient Mental Health and Substance Abuse Centers, Other Outpatient Care Centers, HMO Medical Centers, Kidney Dialysis Centers, Freestanding Ambulatory Surgical and Emergency Centers, and all Other Outpatient Care Centers.

[12] 2005 NCPA-Pfizer Digest: Total, Prescription Sales Increase At Nation's Independent Pharmacies. National Community Pharmacies Association Press Release, May 12, 2005.

[13] Dental Education At-A-Glance, 2004. American Dental Education Association. Available at: *http://www.adea.org/CEPR/Documents/2004_Dental_Ed_At_A_Glance.pdf.*

[14] National Center for Health Workforce Analysis: U.S. Health Workforce Personnel Factbook. U.S. Dept. of Health and Human Services, Health Resources and Services Administration.

[15] Number of Accredited Programs by Academic Year (7/1/2007–6/30/2008). Accreditation Council for Graduate Medical Education. Available at: *http://www.acgme.org/adspublic/reports/accredited_programs.asp.*

[16] U.S. Department of Labor, Bureau of Labor Statistics, National Occupational Employment and Wage Estimates, May 2007.

[17] HHS Grants Statistics, 2007. Available at *http://www.hhs.gov/grantsnet.*

[18] General Services Administration (estimated).

currently compliant with the Church Amendments, PHS Act § 245, or the Weldon Amendment. We received no Comments indicating that there were any funding recipients not currently compliant. Therefore, we continue to assume that, because together these three federal statutes have been in existence for many years, the incremental indirect costs of certification will be minimal for Department funding recipients.

*Comment:* Four Commenters argued against our administrative cost estimates associated with the certification process. These Comments stated that the analysis of the proposed rule did not sufficiently account for the cost of collecting, maintaining, and submitting written certifications. However, the Comments provided no new information or data.

*Response:* HHS disagrees. In determining the costs associated with collecting and maintaining the certification, we reviewed the analysis and regulatory costs associated with or conducted for several other similar certification requirements for HHS programs. The Comments did not provide any new information or data nor did they suggest any activities for which we did not already account in the analysis. Thus, we have not changed the analysis in Response to these Comments.

The direct cost of certification is the cost of reviewing the certification language, reviewing relevant entity policies and procedures, and reviewing files before signing. We estimate that each of the 571,947 entities will spend an average of 30 minutes on these activities. Although some entities may need to sign a certification statement more than once, we assume that the entity will only carefully review the language, procedures and their files before signing the initial statement each year. We assume the cost of signing subsequent statements to be small. Some existing HHS certification forms specify the certification statement should be signed by the CEO, CFO, direct owner, or Chairman of the Board. According to Bureau of Labor Statistics wage data, the mean hourly wage for occupation code 11–1011, Chief Executives, is $72.77. We estimate the loaded rate to be $145.54. Thus, the cost associated with the act of certification is $41.6 million (571,947 × .5 × $145.54).

The direct cost of collecting and maintaining certifications made by sub-recipients is estimated as the labor cost. We assume that each of the 63,741 grant awardees and 4,245 contractors doing business with HHS have at least one sub-recipient. We also assume that, on average, each grant awardee and contractor will spend one hour collecting and maintaining certifications made by sub-recipients. The mean hourly wage for office and administrative support occupations, occupation code 43–0000, is $15.00, or $30 loaded. Thus the cost of collecting and maintaining records is estimated to be $2 million (67,986 entities × 1 hour × $30).

*Comment:* One Comment suggested the analysis should consider the legal fees likely to flow from litigation over the proposed regulations.

*Response:* HHS disagrees. In assessing the costs and benefits of regulations, the government assumes compliance. Thus, the amount of litigation is assumed to be minimal and very difficult to predict.

The total quantifiable costs of the regulation are estimated to be $43.6 million each year.

*Congressional Review Act*

The Congressional Review Act defines a ''major rule'' as ''any rule that the Administrator of the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget finds has resulted in or is likely to result in—(A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.'' 5 U.S.C. 804(2). Based on OMB's review of the rule under Executive Order 12866, the Administrator of OIRA has determined that this rule is not a major rule for purposes of the Congressional Review Act. This finding of the Administrator is not subject to judicial review. 5 U.S.C. 805.

*Regulatory Flexibility Act*

HHS has examined the economic implications of this final rule as required by the Regulatory Flexibility Act (5 U.S.C. 601–612). If a rule has a significant economic impact on a substantial number of small entities, the Regulatory Flexibility Act requires agencies to analyze regulatory options that would lessen the economic effect of the rule on small entities. This will not impose significant costs on small entities. Therefore, the Secretary certifies that this rule will not result in a significant impact on a substantial number of small entities.

*Comment:* One Comment suggested HHS should assess the impact on small entities who will incur costs to hire new staff and make staffing changes to accommodate objections by workforce members.

*Response:* HHS acknowledges that there may be indirect costs associated with the certification requirement including costs for such actions as staffing/scheduling changes and internal reviews to assess compliance. As stated in the proposed rule, there continues to be insufficient data to estimate the number of funding recipients not currently compliant with the Church Amendments, PHS Act § 245, or the Weldon Amendment. Because together these three federal statutes have been in existence for many years, we expect the incremental and indirect costs of certification to be minimal for Department funding recipients. HHS received no Comments on this assumption. Therefore, we continue to conclude that these indirect costs of certification will be minimal.

*Unfunded Mandates Reform Act of 1995*

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires cost-benefit and other analyses before any rulemaking if the rule would include a ''Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any 1 year.'' The current inflation-adjusted statutory threshold is about $115 million. HHS has determined that this final rule would not constitute a significant rule under the Unfunded Mandates Reform Act.

*Federalism*

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a final rule that imposes substantial direct requirement costs on state and local governments, preempts State law, or otherwise has federalism implications.

All three statutes implemented through this regulation—the Church Amendments, PHS Act § 245, and the Weldon Amendment—impose restrictions on States, local governments, and public entities receiving funds from the Department, including under certain Department-implemented statutes. Insofar as these regulations impact State and local governments in addition to those impacts caused by the statutory provisions, they do so only to the extent that States and local governments are required to submit certifications of compliance with the statutes and this

regulation, as applicable. Since we expect the recipients of Department funds to comply with existing federal law, we anticipate the impact on States and local governments of the certification requirement to be negligible.

The Department received Comments from a number of States, State officials, or components of State governments on the proposed rule. The Department considered those Comments in finalizing the rule.

*Assessment of Federal Regulation and Policies on Families*

Section 654 of the Treasury and General Government Appropriations Act of 1999 requires federal departments and agencies to determine whether a proposed policy or regulation could affect family well-being. If the determination is affirmative, then the Department or agency must prepare an impact assessment to address criteria specified in the law.

*Comment:* Several Comments disagreed with the Department's assertion in the proposed rule that the regulation will not have an impact on family well-being. Another Commenter stated that the Treasury and General Government Appropriations Act of 1999 requires the Department to determine if the proposed rule would affect family well-being. The Commenter stated that if family well-being is affected, the Department must provide an impact assessment of these effects. The Commenter also stated that the proposed rule does not adequately address the impact on family well-being.

*Response:* The Department disagrees. This final rule defines certain key terms, ensures that recipients of Department funds know about their legal obligations under existing federal health care provider conscience protection provisions, and requires written certification by certain recipients that they will comply with such provisions, as applicable. As stated above, the rule does not expand the scope of existing federal health care conscience protection laws, nor does it create new barriers to health care access that might have an impact on family well-being. The Department finds that this rule does not affect family well-being within the meaning of meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999 (Pub. L. 105–277, 112 Stat. 2681).

**V. Paperwork Reduction Act of 1995**

HHS received Comments on the burden associated with the written certification requirements contained in sections 88.5(a), (c) and (d) of this final rule and are therefore soliciting Comments on the information collection requirements associated with this rule, consistent with the Paperwork Reduction Act of 1995.

To obtain or retain federal funding for various activities, the Department requires the certification of all recipients and sub-recipients of Department funding. The certification and associated documents are necessary to ensure that recipients and sub-recipients of federal funds comply with federal anti-discrimination law.

Likely respondents to this certification requirement include all entities required to certify as estimated in the EO 12866 analysis listed above, which provides a high estimate of 571,947 recipients and sub-recipients. As outlined above, it will take an estimated 30 minutes for each recipient and sub-recipient to review the relevant language and provide the relevant certifications as well as, in the case of recipients, to collect and maintain certifications by sub-recipients, as applicable. The Department therefore estimates the annual aggregate burden to collect the information to be as follows:

The Department is seeking public Comments on the proposed data collection associated with this final rule through a 60-day **Federal Register** notice. Interested persons are invited to send Comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

This final rule becomes effective 30 days after publication. However, affected parties do not have to comply with the information collection requirements in the final rule until the Department of Health and Human Services publishes in the **Federal Register** the control numbers assigned by the Office of Management and Budget (OMB). Publication of the control numbers notifies the public that OMB has approved these information collection requirements under the Paperwork Reduction Act of 1995.

**List of Subjects in 45 CFR Part 88**

Abortion, Civil rights, Colleges and universities, Employment, Government contracts, Government employees, Grant programs, Grants administration, Health care, Health insurance, Health professions, Hospitals, Insurance companies, Laboratories, Medicaid, Medical and dental schools, Medical research, Medicare, Mental health programs, Nursing homes, Public health, Religious discrimination, Religious liberties, Reporting and recordkeeping requirements, Rights of conscience, Scientists, State and local governments, Sterilization, Students.

■ Therefore, under the Church Amendments, 42 U.S.C. 300a–7, Public Health Service Act § 245, 42 U.S.C. 238n, the Weldon Amendment, Consolidated Appropriations Act, 2008, Public Law 110–161, Div. G, § 508(d), 121 Stat. 1844, 2209, and 5 U.S.C. 301, and for the reasons set forth in the preamble, the Department of Health and Human Services is amending 45 CFR Subtitle A, Subchapter A by adding Part 88 to read as follows:

## PART 88—ENSURING THAT DEPARTMENT OF HEALTH AND HUMAN SERVICES FUNDS DO NOT SUPPORT COERCIVE OR DISCRIMINATORY POLICIES OR PRACTICES

Sec.



**Authority:** 42 U.S.C. 300a–7, 42 U.S.C. 238n, Public Law 110–161, Div. G, § 508(d), 121 Stat. 1884, 2209, 31, 42 U.S.C. 1395w–22(j)(3)(B), 42 U.S.C. 1396u–2(b)(3), and 5 U.S.C. 301.

### § 88.1 Purpose.

The purpose of this Part is to provide for the implementation and enforcement of the Church Amendments, 42 U.S.C. 300a–7, section 245 of the Public Health Service Act, 42 U.S.C. 238n, and the Weldon Amendment, Consolidated Appropriations Act, 2008, Public Law 110–161, Div. G, § 508(d), 121 Stat. 1844, 2209 (collectively referred to as the federal healthcare conscience protection statutes). These statutory provisions protect the rights of health care entities/entities, both individuals and institutions, to refuse to perform health care services and research activities to which they may object for religious, moral, ethical, or other

reasons. Consistent with this objective to protect the conscience rights of health care entities/entities, the provisions in the Church Amendments, section 245 of the Public Health Service Act and the Weldon Amendment, and the implementing regulations contained in this Part are to be interpreted and implemented broadly to effectuate their protective purposes.

**§ 88.2 Definitions.**

For the purposes of this part:

*Assist in the Performance* means to participate in any activity with a reasonable connection to a procedure, health service or health service program, or research activity, so long as the individual involved is a part of the workforce of a Department-funded entity. This includes counseling, referral, training, and other arrangements for the procedure, health service, or research activity.

*Entity* includes an individual physician or other health care professional, health care personnel, a participant in a program of training in the health professions, an applicant for training or study in the health professions, a post graduate physician training program, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, laboratory or any other kind of health care organization or facility. It may also include components of State or local governments.

*Health Care Entity* includes an individual physician or other health care professional, health care personnel, a participant in a program of training in the health professions, an applicant for training or study in the health professions, a post graduate physician training program, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, laboratory or any other kind of health care organization or facility. It may also include components of State or local governments.

*Health Service Program* includes any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded, in whole or in part, by the Department. It may also include components of State or local governments.

*Individual* means a member of the workforce of an entity/health care entity.

*Instrument* is the means by which federal funds are conveyed to a recipient, and includes grants, cooperative agreements, contracts, grants under a contract, memoranda of understanding, and any other funding or employment instrument or contract.

*Recipient* means an organization or individual receiving funds directly from the Department or component of the Department to carry out a project or program. The term includes State and local governments, public and private institutions of higher education, public and private hospitals, commercial organizations, and other quasi-public and private nonprofit organizations such as, but not limited to, community action agencies, research institutes, educational associations, and health centers. The term may include foreign or international organizations (such as agencies of the United Nations) which are recipients, sub-recipients, or contractors or subcontractors of recipients or sub-recipients at the discretion of the Department awarding agency.

*Sub-recipient* means an organization or individual receiving funds indirectly from the Department or component of the Department through a recipient or another sub-recipient to carry out a project or program. The term includes State and local governments, public and private institutions of higher education, public and private hospitals, commercial organizations, and other quasi-public and private nonprofit organizations such as, but not limited to, community action agencies, research institutes, educational associations, and health centers. The term may include foreign or international organizations (such as agencies of the United Nations) which are recipients, sub-recipients, or contractors or subcontractors of recipients or sub-recipients at the discretion of the Department awarding agency.

*Workforce* means employees, volunteers, trainees, contractors, and other persons whose conduct, in the performance of work for a Department-funded entity, is under the control or authority of such entity, whether or not they are paid by the Department-funded entity, or health care providers holding privileges with the entity.

**§ 88.3 Applicability.**

(a) The Department of Health and Human Services is required to comply with sections §§ 88.4(a), (b)(1), and (d)(1) of this part.

(b) Any State or local government that receives federal funds appropriated through the appropriations act for the Department of Health and Human Services is required to comply with §§ 88.4(b)(1) and 88.5 of this part.

(c) Any entity that receives federal funds appropriated through the appropriations act for the Department of Health and Human Services to implement any part of any federal program is required to comply with §§ 88.4(b)(2) and 88.5 of this part.

(d) Any State or local government that receives federal financial assistance is required to comply with §§ 88.4(a) and 88.5 of this part.

(e) Any State or local government, any part of any State or local government, or any other public entity must comply with § 88.4(e) of this part.

(f)(1) Any entity, including a State or local government, that receives a grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Assistance and Bill of Rights Act of 2000, must comply with §§ 88.4(c)(1) and 88.5 of this part.

(2) In addition to complying with the provisions set forth in § 88.4(c)(1) of this part, any such entity that is an educational institution, teaching hospital, or program for the training of health care professionals or health care workers shall also comply with § 88.4(c)(2) of this part.

(g)(1) Any entity, including a State or local government, that carries out any part of any health service program or research activity funded in whole or in part under a program administered by the Secretary of Health and Human Services must comply with §§ 88.4(d)(1) and 88.5 of this part.

(2) In addition to complying with the provisions set forth in (g)(1) of this section, any such entity that receives grants or contracts for biomedical or behavioral research under any program administered by the Secretary of Health and Human Services shall also comply with §§ 88.4(d)(2) of this part.

**§ 88.4 Requirements and prohibitions.**

(a) Entities to whom this paragraph (a) applies shall not:

(1) Subject any institutional or individual health care entity to discrimination for refusing:

(i) To undergo training in the performance of abortions, or to require, provide, refer for, or make arrangements for training in the performance of abortions;

(ii) To perform, refer for, or make other arrangements for, abortions; or

(iii) To refer for abortions;

(2) Subject any institutional or individual health care entity to discrimination for attending or having attended a post-graduate physician training program, or any other program of training in the health professions, that does not or did not require attendees to perform induced abortions or require, provide, or refer for training

in the performance of induced abortions, or make arrangements for the provision of such training;

(3) For the purposes of granting a legal status to a health care entity (including a license or certificate), or providing such entity with financial assistance, services or benefits, fail to deem accredited any postgraduate physician training program that would be accredited but for the accrediting agency's reliance upon an accreditation standard or standards that require an entity to perform an induced abortion or require, provide, or refer for training in the performance of induced abortions, or make arrangements for such training, regardless of whether such standard provides exceptions or exemptions;

(b)(1) Any entity to whom this paragraph (b)(1) applies shall not subject any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for, abortion.

(2) Entities to whom this paragraph (b)(2) applies shall not subject any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortion, as part of the federal program for which it receives funding.

(c) Entities to whom this paragraph (c) applies shall not:

(1) Discriminate against any physician or other health care professional in the employment, promotion, termination, or extension of staff or other privileges because he performed or assisted in the performance, or refused to perform or assist in the performance of a lawful sterilization procedure or abortion on the grounds that doing so would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions concerning abortions or sterilization procedures themselves;

(2) Discriminate against or deny admission to any applicant for training or study because of reluctance or willingness to counsel, suggest, recommend, assist, or in any way participate in the performance of abortions or sterilizations contrary to or consistent with the applicant's religious beliefs or moral convictions.

(d) Entities to whom this paragraph (d) applies shall not:

(1) Require any individual to perform or assist in the performance of any part of a health service program or research activity funded by the Department if such service or activity would be contrary to his religious beliefs or moral convictions.

(2) Discriminate in the employment, promotion, termination, or the extension of staff or other privileges to any physician or other health care personnel because he performed, assisted in the performance, refused to perform, or refused to assist in the performance of any lawful health service or research activity on the grounds that his performance or assistance in performance of such service or activity would be contrary to his religious beliefs or moral convictions, or because of the religious beliefs or moral convictions concerning such activity themselves.

(e) Entities to whom this paragraph (e) applies shall not, on the basis that the individual or entity has received a grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Assistance and Bill of Rights Act of 2000, require:

(1) Such individual to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions, or

(2) Such entity to:

(i) Make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions, or

(ii) provide any personnel for the performance or assistance in the performance of any sterilization procedure or abortion if the performance or assistance in the performance of such procedure or abortion by such personnel would be contrary to the religious beliefs or moral convictions of such personnel.

### § 88.5 Written certification of compliance.

(a) *Certification Requirement.* Except as provided in paragraph (e) of this section, recipients shall include the written certifications as set forth in paragraph (c)(4) of this section in the application for the grant, cooperative agreement, contract, grant under a contract, memorandum of understanding or other funding or employment instrument or contract, as applicable. Except as provided in paragraph (e) of this section, sub-recipients must provide the Certification of Compliance as set out in paragraph (d)(3) of this section, submitted as part of the sub-recipient's original agreement with the recipient in the execution of its grant, cooperative agreement, contract, grant under a contract, memorandum of understanding or other funding instrument or contract, or in a separate writing, signed by the sub-recipient's officer or other person authorized to bind the sub-recipient. All certifications shall be addressed directly to the Department; recipients are required to submit their certifications directly to the Department. Recipients and sub-recipients shall be required to be in full compliance with all applicable certification requirements by no later than the beginning of the federal fiscal year following the effective date of this regulation.

(b) *Notification of Certification Requirement.* The Department shall notify recipients of funding of the certification requirement at the time of award through the Request for Proposal, Request for Agreement, Provider Agreement, contract, guidance, or other public announcement of the availability of funding. Recipients shall not construe anything in this paragraph to mean that an entity or organization is in any way exempt from providing the certification in the event the Department should fail to provide notification.

(c) *Certification by recipients.* (1) Except as provided in paragraph (e) of this section, all recipients through any instrument must provide the Certification of Compliance as set out in paragraph (c)(4) of this section, submitted as part of the recipient's application for the grant, cooperative agreement, contract, grant under a contract, memorandum of understanding or other funding instrument or contract or in a separate writing signed by the recipients' officer or other person authorized to bind the recipient.

(2) Recipients must file with the Department a renewed certification upon any renewal, extension, amendment, or modification of the grant, cooperative agreement, contract, grant under a contract, memorandum of understanding or other funding or employment instrument or contract that extends the term of such instrument or adds additional funds to it. Recipients that are already recipients as of the effective date of this regulation must file a certification upon any extension, amendment, or modification of the grant, cooperative agreement, contract, grant under a contract, memorandum of understanding or other funding instrument or contract that extends the term of such instrument or adds additional funds to it.

(3) Recipients shall require certifications and re-certifications by all sub-recipients that receive funding through their association with the

recipient. Recipients shall require these certifications and re-certifications as often as recipients are required to sign or amend the instrument, for as long as the relationship between the recipient and the sub-recipient lasts. Recipients shall collect and maintain sub-recipient certifications for as long as the relationship between the recipient and the sub-recipient lasts, and for a reasonable time after the relationship ends, for the purpose of investigations, litigation, or other purposes.

(4) Except as provided in paragraph (e) of this section, all recipients shall provide the following certification:

''As the duly authorized representative of the recipient I certify that the recipient of funds made available through this [instrument] will not [check all that are appropriate]:

__[if recipient is a state or local government receiving federal funds appropriated through the appropriations act for the U.S. Department of Health and Human Services] subject any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for, abortion.

__[if recipient is an entity receiving federal funds appropriated through the appropriations act for the U.S. Department of Health and Human Services to implement any part of any federal program] subject any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortion as part of the federal program for which it receives funding.

__[if recipient is a State or local government that receives federal financial assistance]

(1) Subject any institutional or individual health care entity to discrimination for refusing: (a) To undergo training in the performance of abortions, or to require, provide, refer for, or make arrangements for training in the performance of abortions; (b) to perform, refer for, or make other arrangements for, abortions; or (c) to refer for abortions.

(2) subject any institutional or individual health care entity to discrimination for attending or having attended a post-graduate physician training program, or any other program of training in the health professions, that does not or did not require attendees to perform induced abortions or require, provide, or refer for training in the performance of induced abortions, or make arrangements for the provision of such training.

(3) for the purposes of granting a legal status to a health care entity (including a license or certificate), or providing such entity with financial assistance, services or benefits, fail to deem accredited any postgraduate physician training program that would be accredited but for the accrediting agency's reliance upon an accreditation standard or standards that require an entity to perform an induced abortion or require, provide, or refer for training in the performance of induced abortions, or make arrangements for such training, regardless of whether such standard provides exceptions or exemptions.

__[if recipient is a State or local government, any part of any State or local government, or any other public entity] on the basis that the individual or entity has received a grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Assistance and Bill of Rights Act of 2000, require such individual to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions, or such entity to make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions, or provide any personnel for the performance or assistance in the performance of any sterilization procedure or abortion if the performance or assistance in the performance of such procedure or abortion by such personnel would be contrary to the religious beliefs or moral convictions of such personnel.

__[if recipient is any entity (including a state or local government) that receives a grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Assistance and Bill of Rights Act of 2000] discriminate against any physician or other health care professional in the employment, promotion, termination, or extension of staff or other privileges because he performed or assisted in the performance, or refused to perform or assist in the performance of a lawful sterilization procedure or abortion on the grounds that doing so would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions concerning abortions or sterilization procedures themselves.

__[if recipient is any entity (including a state or local government) that receives a grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Assistance and Bill of Rights Act of 2000 that is an educational institution, teaching hospital, or program for the training of health care professionals or health care workers] discriminate against or deny admission to any applicant for training or study because of reluctance or willingness to counsel, suggest, recommend, assist, or in any way participate in the performance of abortions or sterilizations contrary to or consistent with the applicant's religious beliefs or moral convictions.

__[if recipient is an entity, including a State or local government, that carries out any part of any health service program or research activity funded in whole or in part under a program administered by the U.S. Secretary of Health and Human Services] require any individual to perform or assist in the performance of any part of a health service program or research activity funded by the U.S. Department of Health and Human Services if such service or activity would be contrary to his religious beliefs or moral convictions.

__[if recipient is an entity that receives grants or contracts for biomedical or behavioral research under any program administered by the U.S. Secretary of Health and Human Services] discriminate in the employment, promotion, termination, or the extension of staff or other privileges to any physician or other health care personnel because he performed, assisted in the performance, refused to perform, or refused to assist in the performance of any lawful health service or research activity on the grounds that his performance or assistance in performance of such service or activity would be contrary to his religious beliefs or moral convictions, or because of the religious beliefs or moral convictions concerning such activity themselves.''

__[All recipients] I further certify that the recipient acknowledges that any violation of these certifications may result in termination by the Department of any grant, cooperative agreement, contract, grant under a contract, memorandum of understanding or other funding or employment instrument or contract prior to the end of its term and recovery of appropriated funds expended prior to termination, and may be used as such at the Department's discretion. I further certify that, except as provided in 45 CFR 88.5(e), the recipient will include this certification requirement in any [instrument] to a sub-recipient of funds made available under this instrument, and will require, except as provided in 45 CFR 88.5(e), such sub-recipient to provide the same certification that the recipient organization or entity provided. I further certify the recipient organization will collect and maintain sub-recipient certifications for as long as the relationship between the recipient and the sub-recipient lasts, and for a reasonable time after the relationship ends, for the purpose of investigations, litigation, or other purposes.''

(d) *Certification by Sub-recipients.* (1) Except as provided in paragraph (e) of this section, organizations or entities that are sub-recipients of the organization or entity providing the initial Certification of Compliance must submit to the recipient for maintenance by the recipient through which the sub-recipient receives Department funds Certification of Compliance as set out in paragraph (d)(3) of this section, as part of the grant, cooperative agreement,

contract, grant under a contract, memorandum of understanding or other funding instrument or contract between the recipient and the sub-recipient or in a separate writing signed by the sub-recipients' officer or other person authorized to bind the sub-recipient.

(2) Except as provided in paragraph (e) of this section, sub-recipients of funds shall renew certification to the recipient through which it receives Department funds upon any renewal, extension, amendment, or modification of the grant, cooperative agreement, contract, grant under a contract, memorandum of understanding or other funding or employment instrument or contract that extends the term of such instrument or adds additional funds to it. Sub-recipients shall submit such renewals to the recipient entities through which they receive Department funding. Entities that are already sub-recipients as of the effective date of this regulation must certify upon any extension, amendment, or modification of the grant, cooperative agreement, contract, grant under a contract, memorandum of understanding or other funding instrument or contract that extends the term of such instrument or adds additional funds to it, and shall submit such certifications to the recipient entity through which they receive Department funding.

(3) Except as provided in paragraph (e) of this section, all sub-recipients of Department funds shall provide the following certification:

''As the duly authorized representative of the sub-recipient I certify that the sub-recipient of funds made available through this [instrument] will not [check all that are appropriate]:

__[if sub-recipient is a State or local government receiving federal funds appropriated through the appropriations act for the U.S. Department of Health and Human Services] subject any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for, abortion.

__[if sub-recipient is an entity receiving federal funds appropriated through the appropriations act for the U.S. Department of Health and Human Services to implement any part of any federal program] subject any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortion as part of the federal program for which it receives funding.

__[if sub-recipient is a State or local government that receives federal financial assistance]

(1) Subject any institutional or individual health care entity to discrimination for refusing: (a) To undergo training in the performance of abortions, or to require, provide, refer for, or make arrangements for training in the performance of abortions; (b) to perform, refer for, or make other arrangements for, abortions; or (c) to refer for abortions.

(2) subject any institutional or individual health care entity to discrimination for attending or having attended a post-graduate physician training program, or any other program of training in the health professions, that does not or did not require attendees to perform induced abortions or require, provide, or refer for training in the performance of induced abortions, or make arrangements for the provision of such training.

(3) for the purposes of granting a legal status to a health care entity (including a license or certificate), or providing such entity with financial assistance, services or benefits, the recipient will not fail to deem accredited any postgraduate physician training program that would be accredited but for the accrediting agency's reliance upon an accreditation standard or standards that require an entity to perform an induced abortion or require, provide, or refer for training in the performance of induced abortions, or make arrangements for such training, regardless of whether such standard provides exceptions or exemptions.

__[if sub-recipient is a State or local government, any part of any State or local government, or any other public entity] on the basis that the individual or entity has received a grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Assistance and Bill of Rights Act of 2000, require such individual to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions, or such entity to make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions, or provide any personnel for the performance or assistance in the performance of any sterilization procedure or abortion if the performance or assistance in the performance of such procedure or abortion by such personnel would be contrary to the religious beliefs or moral convictions of such personnel.

__[if sub-recipient is any entity (including a state or local government) that receives these funds through a recipient which received them through a grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Assistance and Bill of Rights Act of 2000] discriminate against any physician or other health care professional in the employment, promotion, termination, or extension of staff or other privileges because he performed or assisted in the performance, or refused to perform or assist in the performance of a lawful sterilization procedure or abortion on the grounds that doing so would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions concerning abortions or sterilization procedures themselves.

__[if sub-recipient is any entity (including a State or local government) that receives these funds through a recipient which received them through a grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Assistance and Bill of Rights Act of 2000 that is an educational institution, teaching hospital, or program for the training of health care professionals or health care workers] discriminate against or deny admission to any applicant for training or study because of reluctance or willingness to counsel, suggest, recommend, assist, or in any way participate in the performance of abortions or sterilizations contrary to or consistent with the applicant's religious beliefs or moral convictions.

__[if sub-recipient is an entity (including a State or local government) that carries out any part of any health service program or research activity funded in whole or in part under a program administered by the U.S. Secretary of Health and Human Services] require any individual to perform or assist in the performance of any part of a health service program or research activity funded by the U.S. Department of Health & Human Services if such service or activity would be contrary to his religious beliefs or moral convictions.

__[if sub-recipient is an entity that these funds through a recipient which received them through receives grants or contracts for biomedical or behavioral research under any program administered by the U.S. Secretary of Health and Human Services] discriminate in the employment, promotion, termination, or the extension of staff or other privileges to any physician or other health care personnel because he performed, assisted in the performance, refused to perform, or refused to assist in the performance of any lawful health service or research activity on the grounds that his performance or assistance in performance of such service or activity would be contrary to his religious beliefs or moral convictions, or because of the religious beliefs or moral convictions concerning such activity themselves.''

__[All sub-recipients] I further certify that the sub-recipient acknowledges that these certifications by the sub-recipient of funds are certifications made directly to the Department and that any violation of these certifications may result in termination by the Department of the recipient's grant, cooperative agreement, contract, grant

under a contract, memorandum of understanding or other funding or employment instrument or contract prior to the end of its term and recovery of appropriated funds expended prior to termination, and may be used as such at the Department's discretion. I further certify that the sub-recipient will submit all certifications to the recipient entity through which it received Department funds.''

(e) *Exceptions.* Provided that such individuals or organizations are not recipients or sub-recipients of Department funds through another instrument, program, or mechanism, other than those set forth in paragraph (e)(1) through (e)(6) of this section, the following individuals or organizations shall not be required to comply with the written certification requirements set forth in this section:

(1) A physician, as defined in 42 U.S.C. 1395(r), physician office, or other health care practitioner participating in Part B of the Medicare program;

(2) A physician, as defined in 42 U.S.C. 1395(r), physician office, or other health care practitioner which participates in Part C of the Medicare program, when such individuals or organizations are sub-recipients of Department funds through a Medicare Advantage plan;

(3) A sub-recipient of Department funds through a State Medicaid program;

(4) A recipient or sub-recipient of Department funds awarded under certain grant programs currently administered by the Administration for Children and Families, whose purpose is either solely financial assistance unrelated to health care or which is otherwise unrelated to health care provision, and which, in addition, does not involve—

(i) Medical or behavioral research;

(ii) The involvement of health care providers;

(iii) Any significant likelihood of referral for the provision of health care;

(5) A recipient or sub-recipient of Department funds awarded under certain grant programs currently administered by the Administration on Aging, whose purpose is either solely financial assistance unrelated to health care or which is otherwise unrelated to health care provision, and which, in addition, does not involve—

(i) Medical or behavioral research;

(ii) The involvement of health care providers;

(iii) Any significant likelihood of referral for the provision of health care; and

(6) Indian Tribes and Tribal Organizations when contracting with the Indian Health Service under the Indian Self-Determination and Education Assistance Act.

**§ 88.6 Complaint handling and investigating.**

The Office for Civil Rights (OCR) of the Department of Health and Human Services has been designated to receive complaints of discrimination and coercion based on the health care conscience protection statutes and this regulation. OCR will coordinate handling of complaints with the staff of the Departmental programs from which the entity, with respect to which a complaint has been filed, receives funding (i.e., Department funding component).

Dated: December 3, 2008.

**Michael O. Leavitt,**

*Secretary.*

[FR Doc. E8–30134 Filed 12–18–08; 8:45 am]

BILLING CODE 4150–28–P

Federal Register

Friday,
December 19, 2008

## Part VII

# Department of Homeland Security

**8 CFR Parts 204, 214 and 215**

**Changes to Requirements Affecting H–2B Nonimmigrants and Their Employers; Final Rule**

**DEPARTMENT OF HOMELAND SECURITY**

**8 CFR Parts 204, 214 and 215**

**[CIS No. 2432–07; Docket No. USCIS–2007–0058]**

**RIN 1615–AB67**

## Changes to Requirements Affecting H–2B Nonimmigrants and Their Employers

**AGENCY:** U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, DHS.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends Department of Homeland Security (DHS) regulations regarding temporary nonagricultural workers, and their U.S. employers, within the H–2B nonimmigrant classification. The final rule removes certain limitations on H–2B employers and adopts streamlining measures in order to facilitate the lawful employment of foreign temporary nonagricultural workers. The final rule also addresses concerns regarding the integrity of the H–2B program and sets forth several conditions to prevent fraud and protect laborers' rights. The final rule will benefit U.S. businesses by facilitating a timely flow of legal workers while ensuring the integrity of the program.

The rule generally removes the requirement for H–2B petitioners to state on petitions the names of prospective H–2B workers who are outside the United States and reduces the existing obligatory waiting period from 6 months to 3 months for an H–2B worker who has reached his or her maximum three-year period of stay in H–2B nonimmigrant status before such person may seek an extension of nonimmigrant stay, change of status, or readmission to the United States in any H or L nonimmigrant status. The rule provides a more flexible definition of ''temporary services or labor,'' which is generally defined as a period of one year but could be for a specific one-time need of up to 3 years.

To better ensure the integrity of the H–2B program, this rule eliminates DHS's current practice of adjudicating H–2B petitions where the Secretary of Labor or the Governor of Guam has not granted a temporary labor certification. The rule also prohibits H–2B petitioners from requesting an employment start date on the Form I–129, Petition for a Nonimmigrant Worker, that is different than the date of need listed on the approved temporary labor certification. The final rule requires H–2B petitioners to notify DHS when the H–2B worker fails to report for work, is terminated prior to the completion of the work for which he was hired, or absconds from the worksite. This rule also precludes employers from passing the cost of recruiter fees charged by a petitioner, agent, facilitator, recruiter, or similar employment service to prospective H–2B workers as a condition of an offer of H–2B employment. Under this rule, employers and H–2B workers may agree that certain transportation costs and government-imposed fees be borne by H–2B workers, if the passing of such costs to these workers is not prohibited under the Fair Labor Standards Act or any other statute. Moreover, the rule enforces the existing penalties at section 214(c)(14) of the Immigration and Nationality Act (INA) in the case of an employer who fails to meet any of the conditions of the H–2B petition, or who willfully misrepresented a material fact in the H–2B petition. Employers who fail to meet the H–2B conditions or who willfully make material misrepresentations on an H–2B petition may, under the statute, be precluded from approval for a period of up to 5 years of any H (except H–1B1), L, O, or P–1 nonimmigrant visa petition, or any immigrant visa petition described in section 204 of the INA, they may file with DHS.

This rule also provides that DHS will publish in a notice in the **Federal Register** a list of countries that the Secretary of Homeland Security has designated, with the concurrence of the Secretary of State, as eligible for its nationals to participate in the H–2B program. Finally, this rule establishes a pilot exit control program for certain H–2B workers, by requiring them to report their departure at designated ports of entry. U.S. Customs and Border Protection (CBP) will publish a notice in the **Federal Register** describing the procedures and requirements for participation in this pilot program.

**DATES:** This rule is effective January 18, 2009.

**FOR FURTHER INFORMATION CONTACT:** Hiroko Witherow, Service Center Operations, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., Washington, DC 20529–2060, telephone (202) 272–8410.

**SUPPLEMENTARY INFORMATION:** This supplementary information section is organized as follows:

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## I. Background

### *A. Proposed Rule*

The H–2B nonimmigrant classification applies to aliens seeking to perform nonagricultural labor or services of a temporary nature in the United States. Immigration and Nationality Act (the Act or INA) sec. 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b); *see* 8 CFR 214.1(a)(2) (designation for H–2B classification). The H–2B program is most frequently used by businesses in seasonal industries that have a difficult time locating temporary workers. DHS is aware, however, that the current H–2B program regulations do not effectively accommodate the needs of U.S. employers and alien workers who use, or want to use, the H–2B program. Therefore, on August 20, 2008, DHS published a notice of proposed rulemaking seeking to amend its H–2B regulations. 73 FR 49109. On May 20, 2008, the Department of Labor (DOL) also published a notice of proposed rulemaking to amend its regulations regarding the temporary labor certification process and enforcement for temporary employment in occupations other than agriculture or registered nursing in the United States. 73 FR 29942.

Some of the changes that DHS proposed in its rule included provisions that:

- Relax the limitations on naming beneficiaries on the H–2B petition, if such beneficiaries are outside of the United States;
- Require DHS to deny or revoke any H–2B petition if DHS determines that the petitioner knows, or reasonably should know, that the alien beneficiary paid, or agreed to pay, any fee or other form of compensation to the petitioner, the petitioner's agent, or to any facilitator, recruiter, or similar employment service, in connection with the H–2B employment;
- Require H–2B petitioners: (a) To attest that they will not materially change the facts as represented on the Form I–129 and the approved temporary labor certification; (b) to attest that they have not received and do not intend to

receive any fee, compensation, or any other form of remuneration from prospective H–2B workers; and (c) to identify any facilitator, recruiter, or other similar employment service that the petitioner used to locate foreign workers;

• Require H–2B petitioners to provide written notification to DHS within 48 hours if: (a) An H–2B worker fails to report to work within 5 days of the date of the employment start date on the H–2B petition or within 5 days of the start date established by his or her employer, whichever is later; (b) the nonagricultural labor or services for which H–2B workers were hired is completed more than 30 days early; or (c) an H–2B worker absconds from the worksite or is terminated prior to the completion of the nonagricultural labor or services for which he or she was hired;

• Clarify that any violation of a condition of H–2B nonimmigrant status, within the previous 5 years, will preclude an alien from being accorded H–2B nonimmigrant status, unless the alien can establish that such violation occurred through no fault of the alien;

• Discontinue DHS's current practice of accepting and adjudicating an H–2B petition that lacks an approved temporary labor certification from DOL;

• Preclude the employer from using a different employment start date on the H–2B petition than the date of need stated on the temporary labor certification approved by DOL;

• Preclude DHS from approving H–2B petitions filed on behalf of beneficiaries from countries determined by DHS to consistently deny or unreasonably delay the prompt return of their citizens, subjects, nationals, or residents;

• Set forth the minimum period spent outside of the United States that will stop the H–2B worker from accruing time towards the 3-year overall limit on H–2B status;

• Reduce the period that an individual who has held H–2B status for a total of 3 years must remain outside of the United States before he or she may be granted H–2B nonimmigrant status again from 6 to 3 months;

• Amend the current definition of ''temporary services or labor'' by defining them to be services or labor that will be needed by the employer for a limited period of time, *i.e.*, where the job will end in the near, definable future; and

• Authorize the establishment of a temporary worker exit program on a pilot basis that would require certain H–2B workers to register with DHS at the time of departure from the United States.

DHS provided a 30-day comment period in the proposed rule, which ended on September 19, 2008. During this comment period, DHS received 119 comments. DHS received comments from a broad spectrum of individuals and organizations, including: Business owners in the hospitality industry; landscape companies; agents that work with H–2B employers; job placement companies; trade associations; labor organizations; an H–2B worker; Chambers of Commerce; a political group; private attorneys; state government agencies; an independent office to a federal government agency; members of Congress; and other interested organizations and individuals.

DHS considered the comments received and all other materials contained in the docket in preparing this final rule. The final rule does not address comments seeking changes in regulations unrelated to, or not addressed by, the proposed rule; changes in procedures of other components within DHS or other agencies; or the resolution of any other issues not within the scope of the rulemaking or the authority of DHS.

All comments and other docket materials may be viewed at the Federal Docket Management System (FDMS) at *http://www.regulations.gov,* docket number USCIS–2007–0058.

*B. Discussion of the Final Rule*

The final rule adopts many of the changes set forth in the proposed rule. The rationale for the proposed rule and the reasoning provided in the preamble remain valid, and DHS adopts such reasoning in support of the promulgation of this final rule. Based on the public comments received in response to the proposed rule, however, DHS has modified some of the proposed changes for the final rule.

1. Payment of Fees by Aliens To Obtain H–2B Employment

To address some commenters' concerns about the proposed provisions related to the payment of fees by beneficiaries to obtain H–2B employment, the final rule makes several changes.

First, the final rule offers petitioners a means by which to avoid denial or revocation (following notice to the petitioner) of the H–2B petition in cases where DHS determines that the petitioner knows or should reasonably know that the worker has paid or agreed to pay prohibited fees as a condition of an offer of H–2B employment. In cases where prohibited fees were collected prior to the petition filing date and in cases where prohibited fees were collected by the labor recruiter or agent after petition filing, DHS will not deny or revoke the petition if the petitioner demonstrates that:

• The beneficiary has been reimbursed in full for fees paid or,

• The agreement for the beneficiary to pay such fees has been terminated, if the fees have not yet been paid. New 8 CFR 214.2(h)(6)(i)(B)(*1*) and (*2*).

Additionally, as an alternative to reimbursement where the prohibition is violated by the recruiter or agent after the petition is filed, the petitioner may avoid denial or revocation of the petition by notifying DHS of the improper payments, or agreement to make such payments, within two work days of learning of them. New 8 CFR 214.2(h)(6)(i)(B)(*4*). Where the beneficiary has paid the petitioner the prohibited fees after the filing of the H–2B petition, the petition will be denied or revoked. New 8 CFR 214.2(h)(6)(i)(B)(*3*). If DHS revokes or denies an H–2B petition as a result of the collection of prohibited fees, then, as a condition of approval of future H–2B petitions filed within one year of the denial or revocation, the petitioner must demonstrate that the beneficiary of the denied or revoked petition from whom prohibited fees were collected has been reimbursed or that the beneficiary cannot be located despite the petitioner's reasonable efforts. New 8 CFR 214.2(h)(6)(i)(D).

Further, the final rule does not include the proposed requirement that the petitioner make a separate attestation regarding the reliance upon employment services to locate H–2B workers and the acceptance or knowledge of the beneficiary's payment of prohibited recruitment fees. DHS is not including a separate attestation requirement in the final rule, because it has determined that would increase petitioners' administrative burdens and be duplicative. DHS will instead amend the Form I–129 to include the attestation requirement.

2. H–2B No-Show, Termination, or Abscondment Notification Requirements

The final rule requires petitioners to provide notification to DHS, within two work days, beginning on a date and in a manner specified in a notice published in the **Federal Register**, in the following instances: (a) When an H–2B worker fails to report to work within 5 work days of the employment start date on the H–2B petition; (b) when the temporary labor or services for which H–2B workers were hired is completed more than 30 days earlier than the date

specified by the petitioner in its H–2B petition; or (c) when the H–2B worker absconds from the worksite or is terminated prior to the completion of the temporary nonagricultural labor or services for which he or she was hired. 8 CFR 214.2(h)(6)(i)(E). The final rule clarifies that the H–2B worker must report to work within 5 ''work days'' of the employment start date, rather than the proposed 5 days. The H–2B petitioner must report a violation to DHS within two work days, rather than the proposed 48 hours. The final rule adopts the term ''work days'' to ensure that the reporting deadlines are clear to H–2B petitioners. ''Work day,'' in general, means the period between the time on any particular day when such employee commences his or her principal activity or activities and the time on that day at which he or she ceases such principal activity or activities. Also, for purposes of clarity, the final rule amends 8 CFR 214.2(h)(11)(i)(A) to cross-reference the notification provision.

In addition, the final rule does not include the proposal that the employer may establish an employment start date that is different from the start date stated on the H–2B petition for purposes of determining when the notification requirement is triggered where the H–2B worker fails to report for work. *See* new 8 CFR 214.2(h)(6)(i)(F)(*1*). This ability to change the employment start date is inconsistent with the requirement from the proposed rule, adopted by this final rule, that the employment start date must be the same as the date of need stated on the temporary labor certification approved by the Secretary of Labor, and therefore, cannot be changed thereafter by the petitioner. The final rule corrects this inconsistency.

3. Petition Filing Period

This final rule modifies the current regulations governing the filing period for H petitions to provide for a separate filing period for H–2B petitions. *See* 8 CFR 214.2(h)(9)(i)(B). This procedural change is necessary to ensure parity between DHS and related DOL regulations. Under the new DOL regulations, an employer cannot start recruiting (initiate advertising) for the nonagricultural positions any earlier than 120 days ahead of the date of stated employment need. However, under current DHS regulations, an employer must file an H–2B petition along with a DOL-approved temporary labor certification, yet may file the petition up to 6 months ahead of the date of actual employment need. 8 CFR 214.2(h)(9)(i)(B). This final rule adopts the proposed requirement that an H–2B petition identify an employment start date that is the same as the date of employment need stated on the approved temporary labor certification. New 8 CFR 214.2(h)(6)(iv)(D). Considering this requirement, it would be procedurally impossible for a petitioner to file an H–2B petition any sooner than the earliest date upon which it is able to start recruiting for a nonagricultural position. Therefore, this final rule modifies 8 CFR 214.2(h)(9)(i)(B) to provide that an employer may not file, and USCIS may not approve, an H–2B petition more than 120 days before the date of the employer's actual need for the beneficiary's temporary nonagricultural worker services, as identified on the temporary labor certification.

4. Naming Beneficiaries Exempt From the Numerical Limits

The final rule retains the proposal to allow certain H–2B petitioners to specify only the number of positions sought, without naming individual H–2B workers, unless they are already in the United States. A few commenters were concerned about how the provision allowing petitioners to include unnamed beneficiaries in the H–2B petition would be impacted by a possible reauthorization of the ''returning worker'' provisions. New 8 CFR 214.2(h)(2)(iii) and 8 CFR 214.2(h)(6)(vi)(C). The returning worker provisions expired September 30, 2007. INA sec. 214(g)(9), 8 U.S.C. 1184(g)(9) (2007). Under these provisions, H–2B aliens who were already counted towards the H–2B numerical limit during one of the 3 fiscal years preceding the fiscal year of the requested employment start date were not counted again against the numerical limit. While the returning worker provisions have expired, their future reauthorization is possible. To ensure that DHS is able to implement any future reauthorization of these provisions, this final rule provides DHS the flexibility to collect information needed about the alien beneficiary to establish eligibility as a returning worker.

5. Numerical Limits and Petition Extensions or Extension of an Alien's Stay

The final rule adopts the proposed modifications to 8 CFR 214.2(h)(8)(ii)(A), which provide for the application of the annual numerical limitations on H nonimmigrant classifications. However, the proposed rule inadvertently omitted a sentence that is in the current regulations. This sentence provides that requests for petition extension or extension of an alien's stay may not be counted towards the annual numerical limits on H nonimmigrant classifications. DHS acknowledges this error made in the proposed rule and retains the sentence in the provision. *See* new 8 CFR 214.2(h)(8)(ii)(A).

6. Effect of Violations of H–2B Status

The final rule does not adopt the proposed addition of a new provision that would have precluded an alien from being accorded H–2B status if USCIS finds that the alien has, at any time during the past 5 years, violated any of the terms or conditions of the current or previously accorded H–2B status, other than through no fault of the alien. Several commenters opposed the addition of the proposed provision. DHS has determined that it is not necessary to add the proposed provision to the regulations at this time given the remaining improvements that this rule makes to the H–2B program. DHS may revisit this issue in a future rulemaking if necessary to further enhance the integrity of the H–2B program. DHS notes, however, that the fact that the proposed provision is not adopted in the final rule does not change existing requirements for change of status, extension of stay, or any other immigration benefit requiring proper maintenance of status, nor would it preclude a consular officer from exercising his or her authority with respect to the issuance or validity of visas under the immigration laws.

7. Permitting H–2B Petitions for Nationals of Participating Countries

The final rule modifies the proposal to preclude DHS from approving an H–2B petition filed on behalf of aliens from countries that consistently deny or unreasonable delay the prompt return of their citizens, subjects, nationals, or residents who are subject to a final order of removal from the United States. Instead of publishing a list of countries that refuse repatriation, DHS will publish in a notice in the **Federal Register** a list of countries that the Secretary of Homeland Security has designated, with the concurrence of the Secretary of State, as eligible for its nationals to participate in the H–2B program. In designating countries to allow the participation of their nationals in the H–2B program, DHS, with the concurrence of the Department of State, will take into account factors including, but not limited to, the following: (1) The country's cooperation with respect to the issuance of travel documents for citizens, subjects, nationals, and

residents of that country who are subject to a final order of removal; (2) the number of final and unexecuted orders of removal against citizens, subjects, nationals, and residents of that country; (3) the number of orders of removal executed against citizens, subjects, nationals, and residents of that country; and (4) such other factors as may serve the U.S. interest. Initially, the list will be composed of countries that are important for the operation of the H–2B program and are cooperative in the repatriation of their nationals. The countries included on the list are the countries whose nationals contributed the vast majority of the total beneficiaries of the H–2B program during the last three fiscal years. Additional details on how this list will be administered are included in the discussion in response to comments received on this proposed provision below.

8. Employment Start Date

The final rule retains the provision in the proposed rule prohibiting the employer from requesting an employment start date on Form I–129 that is different from the date of need listed on the accompanying approved temporary labor certification. *See* new 8 CFR 214.2(h)(6)(iv)(D). As noted below, to ease the initial difficulties in administering this provision, it will take effect starting with the filing period for the first half of fiscal year (FY) 2010.

9. Conforming Amendments and Non-Substantive Changes

The final rule includes non-substantive structural or wording changes from the proposed rule for purposes of clarity and readability.

## II. Public Comments on the Proposed Rule

### *A. Summary of Comments*

DHS received 119 comments on the proposed rule. Most commenters generally supported the streamlining measures in the proposed rule, such as: Removing the requirement to name the beneficiaries who are outside of the United States; reducing the required time abroad once an H–2B worker has reached the maximum period of stay before filing for an extension, change of status, or readmission to the United States in the H or L nonimmigrant status; and clarification of the process for substituting beneficiaries. Many commenters, however, were opposed to several changes that they believe will create additional burdens on and costs to U.S. businesses. They suggested that some of the proposed changes would prevent certain U.S. businesses from utilizing the H–2B program, such as: Prohibiting the current practice of approving H–2B petitions that are filed with denied temporary labor certifications; prohibiting a change of the employment start date on the Form I–129 from what is stated on the approved temporary labor certification; providing DHS with the authority to deny or revoke on notice any H–2B petition if it determines that the petitioner knows or reasonably should know that the alien beneficiary has paid or has agreed to pay any fee to the petitioner or the petitioner's agent, or to any facilitator, recruiter, or similar employment service, in connection with obtaining the H–2B employment; and requiring petitioners to notify DHS of H–2B workers' no-show, early completion of work, termination, or abscondment. Many commenters also were concerned about the proposal to preclude DHS from approving a petition filed on behalf of one or more aliens from countries that the Secretary of Homeland Security has found to have consistently refused to accept or unreasonably delayed the prompt return of their citizens, subjects, nationals, or residents who are subject to a final order of removal from the United States. Commenters also objected to the proposed amendment to the definition of ''temporary services or labor.''

The concerns of the commenters are addressed below organized by subject area.

### *B. General Comments*

1. Comments About the Congressionally Mandated Numerical Limit for the H–2B Program

*Comment:* The majority of commenters stated that the biggest problem with the H–2B program is the lack of Congressional action to increase the numerical limit or to reauthorize the returning worker provisions. They believed that all the proposals that DHS suggested would not be necessary if the numerical limit were lifted. Many U.S. businesses also expressed their frustration with the fact that they are not able to use the program because the program is oversubscribed.

*Response:* DHS is fully aware that the H–2B program is oversubscribed. However, as many commenters pointed out, the numerical limit and the authorization of the returning worker provisions are a matter entirely within the discretion of Congress and cannot be altered by DHS. DHS has thus made no change to the final rule to reflect these comments. Additionally, the value of and necessity for the streamlining and other improvements to the H–2B program included in this final rule would not be vitiated by any change in the number of H–2B workers Congress allows to be admitted each year.

2. Protections for U.S. Workers

*Comment:* DHS received some comments that urged the withdrawal of the proposed rule, questioning the need for the H–2B program and the need to streamline the program at a time when the nation is experiencing such a high unemployment rate.

*Response:* DHS disagrees that the proposed rule should be withdrawn. DHS is aware of its responsibility to help maintain the careful balance between protecting U.S. workers from adverse affect and administering nonimmigrant programs designed to invite foreign workers to the United States. The Department of Labor's temporary labor certification process, which requires employers to perform a labor market test, is the principal means by which U.S. workers are protected from adverse affect due to foreign competition for temporary jobs with U.S. employers. Only if the labor market test establishes the unavailability of U.S. workers and that there is no adverse affect will DOL approve the H–2B employer's application for temporary labor certification. The final rule contains two major revisions to the regulations designed to further protect U.S. workers while at the same time provide a streamlined petitioning process: (1) Precluding DHS from approving H–2B petitions filed without an approved temporary labor certification issued by DOL, thus avoiding the current need for DHS in certain cases to delve into the merits of the sufficiency of the employer's market test; and (2) prohibiting employers from changing the employment start date identified on the Form I–129 from that identified on the DOL-approved temporary labor certification. Both of these changes help strengthen the integrity of the DOL temporary labor certification process Furthermore, the streamlining measures provided in the proposed rule (which allows employers to file for unnamed beneficiaries outside of the United States and more easily substitute workers who are already in the United States) occur toward the end of the H–2B process, only after the DOL has certified that U.S. workers are not available and will not be harmed by the employment of workers using the H–2B program.

3. Lack of Enforcement Against the Employment of Unauthorized Aliens

*Comment:* A few commenters criticized this proposed rule for imposing stiffer requirements and increased costs on employers who are trying to hire a legal workforce through the H–2B program, while at the same time failing to provide a sound method for strong enforcement against employers that hire unauthorized aliens.

*Response:* DHS recognizes these concerns; however, compliance measures included in this rulemaking are necessary to ensure the integrity of the H–2B program and to protect workers' rights. The purpose of this rule is to strengthen the integrity and efficiency of the H–2B program so that employers will be encouraged to obtain temporary workers through the program, rather than resort to unlawful means.

*C. Specific Comments*

1. Allowing Unnamed Beneficiaries

*Comment:* Twenty-seven out of 36 commenters supported the proposal to allow H–2B petitioners to specify only the number of positions sought and not name the individual alien(s), except where the alien is already present in the United States. They agreed that the proposal would give employers far greater flexibility to recruit workers who are interested and available to start on the date needed but were unsure of how this proposal would be affected by a possible re-authorization of the returning worker provisions.

*Response:* Based on the support from the commenters, the final rule adopts the proposal to allow certain unnamed beneficiaries on the H–2B petition. New 8 CFR 214.2(h)(2)(iii). As discussed below, there is also a change concerning the naming of beneficiaries from countries that have not been designated as participating countries. In response to comments, however, the final rule provides the flexibility to require H–2B petitioners to name beneficiaries, if located outside the United States, in the event that Congress re-authorizes the returning worker provisions or enacts similar legislation exempting certain H nonimmigrants from the numerical limits. The adjudication of an H–2B petition for such workers would require DHS to identify eligible aliens and verify their previous status. Inclusion in this rule of the requirement to name affected workers in H–2B petitions, even though not currently applicable, would facilitate implementation of the returning worker provisions or similar amendments should they be enacted.

The final rule retains the requirement that the petition include the names of those beneficiaries who are present in the United States. The granting of an H–2B petition on behalf of beneficiaries in the United States will serve to either confer a new immigration status or extend the status of a particular alien immediately upon approval. Since such an approval, unlike a nonimmigrant admission from outside the country, does not afford, as in the case of alien beneficiaries abroad, the United States Government the opportunity to first inspect and/or interview the H–2B beneficiary (either by the State Department at a consular office abroad or by CBP at a U.S. port of entry) before the granting of H–2B nonimmigrant status to the alien, it is essential that DHS have the names of the beneficiaries already present in the United States.

*Comment:* Some commenters suggested that DHS will need to establish a mechanism for calculating the number of new workers, as opposed to the number of returning workers when the returning worker provisions are reauthorized. Another commenter stated that this provision should be extended further to capture returning workers.

*Response:* As stated above, the final rule gives DHS the flexibility to require the names of ''returning worker'' as that term is currently defined in section 214(g)(9)(A) of the INA, 8 U.S.C. 1184(g)(9)(A), whether or not such workers would be in the United States, should Congress choose to enact special provisions once again exempting such H–2B returning workers from the numerical limits. Although Congress has not, to date, extended section 214(g)(9) to cover H–2B returning workers beyond fiscal year 2007, or enacted similar legislation to cover such persons beyond that date, the final rule would ensure an accurate count of workers exempt from the cap if Congress were to enact such legislation.

*Comment:* Several commenters opposed this provision allowing unnamed beneficiaries, because it will make it easier for some employers to inflate the number of workers they need, and that as a result, employers requesting the legitimate number of workers would be unable to secure a legal workforce through the H–2B program.

*Response:* DHS disagrees with these commenters' concerns. Prior to filing an H–2B petition with DHS, a prospective employer must obtain a temporary labor certification from DOL. When it deems necessary, DOL will verify the employer's need for the number of temporary workers requested at the time it adjudicates the temporary labor certification application or thereafter on a post audit basis. Once an employer obtains an approved temporary labor certification and files an H–2B petition with DHS, DHS evaluates whether there is an actual need for the work itself and whether there is a genuine job offer. This evaluation would include verifying, based on the petition and accompanying documentation, whether the employer, as a matter of fact, has a need for the number of temporary workers described on the approved temporary labor certification. In short, both DHS and DOL must ensure compliance with the statutory requirements for the H–2B classification, including shared responsibility for assessing the temporary nature of the services or labor to be performed. INA sec. 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b); INA sec. 214(c)(1), 8 U.S.C. 1184(c)(1); 8 CFR 103.2(b)(1); 20 CFR 655.6. DHS may request additional evidence from the petitioner in those cases where questions arise regarding the legitimate number of H–2B workers requested on the H–2B petition.

*Comment:* One commenter further asked how the unnamed beneficiaries will be tracked to ensure that they will not exceed the 3-year limit on H–2B status.

*Response:* The final rule removes the requirement to name beneficiaries, but only if they are outside of the United States or H–2B returning workers. Upon approval of the H–2B petition, these prospective beneficiaries must generally undergo a visa interview at a U.S. consulate, unless they are visa exempt (*e.g.*, Canadians). All individuals seeking admission to the United States must undergo inspection by a U.S. Customs and Border Protection officer upon arrival at a U.S. port of entry. During this visa application and/or admission process, the necessary screening will be conducted to ensure that the H–2B worker will not be granted any benefit exceeding the 3-year ceiling.

*Comment:* One commenter further asked how the unnamed beneficiaries will be tracked in case the petitioner must request substitutions of beneficiaries.

*Response:* DHS tracks the number of H–2B workers approved for the H–2B employer. As a result, DHS will know how many substitutions the petitioner has requested.

2. Post H–2B Waiting Period

*Comment:* Sixteen out of 22 commenters supported the proposed rule suggesting the reduction of the waiting period from 6 months to 3

months for an H–2B worker who has reached the 3-year maximum period of stay on H–2B nonimmigrant status prior to seeking an application for extension of nonimmigrant stay, change of status, or readmission to the United States in H–2B status or other nonimmigrant status under section 101(a)(15)(H) or (L) of the INA, 8 U.S.C. 1101(a)(15)(H) or (L). These commenters supported this proposal stating that it will make the H–2B process more efficient for the users.

*Response:* DHS finds that the adoption of this proposal will reduce the amount of time employers would be required to be without the services of needed workers while not offending the fundamentally temporary nature of employment under the H–2B program. Accordingly, the final rule adopts the proposed reduction in waiting time without change. New 8 CFR 214.2(h)(13)(iv).

*Comment:* Several commenters argued that the post-H–2B waiting period provisions contained in the proposed rule may harm domestic workers in seasonal industries that may slow down or come to a stop during the winter months. A commenter suggested that this change gives an advantage to employers in the construction markets, as it gives them the ability to address their hiring needs with H–2B workers throughout the seasons, which in turn, reduces the incentives to train and recruit domestic workers. Another commenter stated that this proposed rule offends the fundamentally temporary nature of employment under the H–2B program.

*Response:* DHS disagrees that a reduction in the waiting period will result in the displacement of domestic workers. The law requires H–2B employers to obtain a temporary labor certification certifying that there are insufficient U.S. workers who are able, willing, qualified, and available to perform the nonagricultural temporary labor or services required by the employer, and that the H–2B employment will not adversely affect the wages and working conditions of similarly employed U.S. workers. Whether the prospective worker is a first-time H–2B worker or an H–2B worker who has previously worked in the United States but is eligible to receive H–2B status anew, the requirement that the unavailability of U.S. workers be established, as determined by DOL, remains unchanged by this rule. When filing the application for temporary labor certification with DOL, H–2B employers are required to establish that the temporary job for which the H–2B workers are sought is not permanent and ongoing.

*Comment:* Those who opposed this provision expressed concern that it will allow employers to create a long-term workforce comprising H–2B workers who reside in the U.S. for 3 years and then take a relatively short trip to their home country before re-entering to resume employment.

*Response:* USCIS disagrees that this provision will undermine the U.S. workforce. The H–2B program requires employers to obtain temporary labor certification from DOL to cover the period of employment need. This process requires a labor market test, which certifies that no U.S. workers are available for employment or will be harmed by the employment of nonimmigrant workers.

3. Prohibiting H–2B Petitions or Admissions for Nationals of Countries That Consistently Refuse or Delay Repatriation

*Comment:* Five out of 14 commenters supported the proposal to include a new provision at 8 CFR 214.2(h)(6)(i)(E) precluding DHS from approving an H–2B petition filed on behalf of one or more aliens from a country that the Secretary of Homeland Security has found to have consistently refused to accept or unreasonably delayed the prompt return of its citizens, subjects, nationals, or residents. They thought that this would be a fair and logical provision. One commenter supported this provision, stating that it will help limit the problem of H–2B workers who overstay their visas.

*Response:* After reviewing all comments, DHS has modified this proposal in the final rule for the reasons and in the manner discussed below.

Instead of publishing a list of countries that consistently deny or unreasonably delay the prompt return of their citizens, subjects, nationals, or residents who are subject to a final removal order, DHS is publishing in a notice in the **Federal Register** a list of countries that the Secretary of Homeland Security has designated, with the concurrence of the Secretary of State, as eligible for its nationals to participate in the H–2B temporary nonagricultural worker program. DHS is making this modification to the rule in consideration of public comments received recommending DHS rework the proposal in order to make the process more positive and to encourage countries to improve cooperation in the repatriation of their nationals.

In designating countries to allow the participation of their nationals in the H–2B program, DHS, with the concurrence of the Department of State, will take into account factors including, but not limited to, the following: (1) The country's cooperation with respect to the issuance of travel documents for citizens, subjects, nationals, and residents of that country who are subject to a final order of removal; (2) the number of final and unexecuted orders of removal against citizens, subjects, nationals, and residents of that country; (3) the number of orders of removal executed against citizens, subjects, nationals, and residents of that country; and (4) such other factors as may serve the U.S. interest.

Designation of countries on the list of eligible countries will be valid for one year from publication. The designation shall be without effect at the end of that one-year period. The Secretary, with the concurrence of the Secretary of State, expects to publish a new list prior to the expiration of the previous designation by publication of a notice in the **Federal Register**, considering a variety of factors including, but not limited to the four described above.

Initially, the list will be composed of countries that are important for the operation of the H–2A and H–2B programs and are cooperative in the repatriation of their nationals. The countries included on the list are the countries whose nationals contributed the vast majority of the total beneficiaries of the H–2B program during the last three fiscal years.

The Secretary of Homeland Security may allow a national from a country not on the list to be named as a beneficiary on an H–2B petition and to participate in the H–2B program based on a determination that such participation is in the U.S. interest. The Secretary's determination of such a U.S. interest will take into account a variety of factors, including but not limited to consideration of: (1) Evidence from the petitioner demonstrating that a worker with the required skills is not available either from among U.S. workers or from among workers from a country currently on the list of eligible countries for participation in the program; (2) evidence that the beneficiary has been admitted to the United States previously in H–2B status; (3) the potential for abuse, fraud, or other harm to the integrity of the H–2B visa program through the potential admission of a beneficiary from a country not currently on the list of eligible countries for participation in the program; and (4) such other factors as may serve the U.S. interest. Therefore, DHS is requiring petitioners for beneficiaries who are nationals of countries not designated as participating countries to name each beneficiary. New 8 CFR 214.2(h)(2)(iii). In addition, petitions for beneficiaries

from designated countries and undesignated countries are to be filed separately. 8 CFR 214.2(h)(2)(ii). These changes will permit DHS to more easily adjudicate H–2B petitions involving nationals of countries not named on the list by permitting DHS to properly evaluate the factors used to make a determination of U.S. interest, discussed above, without slowing the adjudication of petitions on behalf of nationals of designated countries.

As discussed in the proposed rule, DHS expects that the provisions in this rule intended to increase the flexibility of the H–2B program, complemented by the streamlining proposals the Department of Labor is making in its H–2B rule, will increase the appeal of the H–2B program with U.S. employers. While the statutory maximum number of H–2B workers will remain 66,000, the program is enhanced by countries accepting the return of their nationals.

This rule provides that petitions may only be filed and approved on behalf of beneficiaries who are nationals of a country that is included in the list of participating countries published by notice in the **Federal Register** or, in the case of an individual beneficiary, an alien whose participation in the H–2B program has been determined by the Secretary of Homeland Security to be in the U.S. interest. *See* new 8 CFR 214.2(h)(6)(i)(E). Likewise, in order to be admitted as an H–2B, aliens must be nationals of countries included on the list of participating countries or, in the case of an individual beneficiary, an alien whose participation in the H–2B program has been determined by the Secretary of Homeland Security to be in the U.S. interest. To ensure program integrity, such petitioners must state the nationality of all beneficiaries on the petition, even if there are beneficiaries from more than one country. *See* new 8 CFR 214.2(h)(2)(iii).

*Comment:* Several commenters argued that this provision would unnecessarily penalize potential H–2B workers who are seeking to improve their standard of living, due to the actions of their government. These commenters also stated that it is not fair to U.S. employers who will be denied willing and able workers.

*Response:* Though it appreciates these concerns, DHS notes that all nonimmigrants, including H–2B temporary workers, must abide by the terms and conditions of their nonimmigrant admission. This final rule will encourage countries to work collaboratively with the United States to ensure the timely return of their nationals who have been subject to a final order of removal, in order to ensure that the H–2B program will be available to other nationals of their countries in the future.

*Comment:* A few commenters also stated that they would not support any provisions that restrict eligibility to nationals of countries that provide the most cooperation to the United States in administering the program. They stated that such preference could harm the effectiveness of the H–2B program and adversely impact industries that rely heavily on workers from particular countries.

*Response:* DHS strongly believes the success of the program is enhanced by countries accepting the return of their nationals. However, as discussed in response to the comment above, this rule provides an alternative approach to address the repatriation problem. DHS will publish a list of participating countries based on factors which include, but are not limited to, the country's cooperation in the repatriation of its nationals, citizens, subjects, or residents who are subject to a final removal order. Therefore, the commenters' suggestion is not adopted.

*Comment:* One commenter objected to this proposal, stating that this provision may cause H–2B aliens from such countries who are already present in the United States (knowing that they would not be able to obtain an H–2B visa again) to overstay their visas if/when their requests for an extension are denied, with the full knowledge that they would not be eligible for any subsequent H–2B visa issuance, and therefore, if they overstayed, DHS would not have the means to remove them.

*Response:* Each alien is required to depart the United States once his or her authorized period of stay has expired. Additionally, this proposal, as modified in this final rule, will create an incentive for countries to better cooperate with the United States regarding the timely repatriation of aliens who are subject to a final order of removal.

*Comments:* Two commenters stated that this regulatory provision is unnecessary because the authority to deny visa issuance to nationals of these countries already exists in the statute.

*Response:* DHS finds that this change as modified in this final rule is needed in order to preclude DHS from approving a petition filed on behalf of one or more aliens from such countries at the start of the process. Adopting this change will save DHS from the unnecessary allotment of the limited number of H–2B visas to aliens who will be found by the Department of State to be ineligible for H–2B visas pursuant to INA section 243(d), 8 U.S.C. 1253(d).

*Comment:* A few commenters requested that a list of such countries should be provided to the public as it may impact some employers' ability to use the program.

*Response:* DHS will publish a notice in the **Federal Register** listing eligible countries and expects to publish a new list prior to the expiration of the previous designation.

4. Temporary Labor Certifications

a. Consideration of Petitions Lacking an Approved Temporary Labor Certification

*Comment:* Fifty-two out of 57 commenters objected to the elimination of DHS's current authority to adjudicate H–2B petitions where the Secretary of Labor or the Governor of Guam has not granted a temporary labor certification.

*Response:* After considering the commenters' objections, DHS nevertheless retains this proposal in this final rule, as discussed in the comments and responses below. 8 CFR 214.2(h)(6)(iv)(D), (E), (h)(6)(v)(C), and (D).

*Comment:* Some commenters suggested that the INA does not support this provision because the INA vests the authority for the admission of H–2B workers with DHS, not DOL, and only requires consultation with appropriate agencies of the Government.

*Response:* DHS is vested with the statutory authority to approve a petition for H–2B workers after consultation with DOL. INA sec. 214(c)(1), 8 U.S.C. 1184(c)(1). DHS, however, does not have the expertise needed to make any labor market determinations, independent of those already made by DOL. For this reason, DHS finds that it is in the best interests of U.S. workers and the public that DHS not approve H–2B petitions when DOL has denied an employer's application for temporary labor certification.

*Comment:* Many commenters were concerned that this provision has the potential do serious harm to employers by barring recourse for them when human errors occur in the temporary labor certification process. They suggested that DHS should not eliminate the fundamental right to appeal.

*Response:* In its final H–2B rule, DOL establishes an appeal process for an employer whose temporary labor certification is denied. DHS believes that this DOL provision addresses these commenters' concerns. Therefore, under this final rule, DHS removes the provisions allowing the approval of H–

2B petitions that are filed with denied temporary labor certifications.

*Comment:* A few commenters suggested that DHS should accept and process petitions for H–2B workers based upon an appealed temporary labor certification with the U.S. Department of Labor, whether the current statutory limitation on H–2B visas has been met or not.

*Response:* The final rule does not adopt this suggestion because DHS cannot accept H–2B petitions once the statutory limitation on H–2B visas has been reached. INA sec. 214(g)(1)(B) and 214(g)(10), 8 U.S.C. 1184(g)(1)(B) and 8 U.S.C. 1184(g)(10). Petitioners would derive no advantage by filing an H–2B petition with a pending DOL appeal, as there are no provisions authorizing DHS to set aside an H–2B visa number. Moreover, all applicants and petitioners must establish eligibility at the time of filing. 8 CFR 103.2(b)(1). USCIS has also determined that it would be an inappropriate intrusion into the DOL appeal process if DHS were to accept petitions before that process is complete.

b. Employment Start Date

*Comment:* Sixty-four out of 69 commenters opposed the proposal to prohibit H–2B petitioners from requesting an employment start date on the Form I–129 that is different from the date of need listed on the approved temporary labor certification. Many commenters stated that start dates have become problematic due to an unrealistic numeric cap imposed by Congress. Of those, the majority of commenters stated that this change would allow only employers who have a need for temporary H–2B workers beginning on October 1 or April 1 to obtain H–2B visas due to the fact that, in recent years, allocation of the 66,000 annual H–2B visas has become increasingly competitive, causing the numeric cap of 33,000 visas in each half of the fiscal year to be reached within a few weeks of each filing period. Employers, particularly small business owners, with seasonal needs beginning in later months expressed concern that this change will effectively leave them ''shut out'' of the H–2B visa program. Furthermore, a number of commenters stated that the only way the proposed regulation can be fair to all employers is if the 66,000 H–2B visas are allocated evenly each month.

Four commenters expressed support for this proposed change. One commenter who supported this change expressed concern that the practice of altering the employment start date for H–2B workers would result in depriving recently unemployed domestic workers of job opportunities.

*Response:* The final rule retains the provision prohibiting the employer from requesting an employment start date on Form I–129 that is different from the date of need listed on the accompanying approved temporary labor certification. *See* new 8 CFR 214.2(h)(6)(iv)(D). However, H–2B employers who have already started the labor certification process as of the date of publication of this rule and wish to change their stated employment start dates would be required to apply for new temporary labor certifications using a new employment start date to comply with this change. Further, DHS believes it would be confusing to employers if DHS implemented this new process to reject petitions that do not comply with this provision during the anticipated surge in the number of petitions for the second half of FY 2009. Therefore, DHS has determined that this provision will take effect for the FY 2010 filing and will not apply to H–2B petitions that are being filed for the second half of the FY 2009 cap.

DHS recognizes the concerns of the commenters that requiring the petition start date to reflect that of the temporary labor certification may have the effect of disadvantaging certain filers whose employment start date begins more than four months after the beginning of the first or second half of the fiscal year. Congress's intent in requiring the biannual allocation of the H–2B annual numerical limitation (*see* section 214(g)(10) of the INA, 8 U.S.C. 1184(g)(10)) was to provide relief to seasonal employers who might not otherwise be able to use the H–2B program. With respect to the comments urging that DHS change its method of allocating H–2B numbers to address this concern, we note, preliminarily that it is unclear whether Congress, in enacting section 214(g)(10) of the INA, 8 U.S.C. 1184(g)(10), contemplated further divisions of allocations during specific periods of the year (such as on a monthly or quarterly basis), or that such allocations would adequately address the problem identified by the commenters. However, DHS did not provide for any such allocation in its proposed rule. The public, therefore, has not had an adequate opportunity to express its views as to the desirability of changing to a monthly or other type of H–2B number allocation system, as suggested by these commenters. DHS recognizes, however, that even if certain seasonal employers might derive benefit from a change in the current allocation methodology, there nevertheless exists the possibility that, given the lack of sufficient numbers in previous years based on high demand for H–2B numbers, other seasonal employers would still face being cut.

In any event, there are strong arguments in favor of adopting the same employment start date requirement in this final rule. As noted in the **SUPPLEMENTARY INFORMATION** section of the proposed rule, the purpose of this requirement is to preclude certain petitioners from competing unfairly with other prospective employers for the limited number of H–2B visa numbers available by using a fictitious employment start date in order to be considered in the semi-annual allocation process. Additionally, the proposed rule is intended to ensure compliance with section 101(a)(15)(H)(ii)(b) of the INA, 8 U.S.C. 1101(a)(15)(H)(ii)(b), regarding unavailability of U.S. workers. Requiring that an employer adhere to the start date stated in the approved temporary labor certification will ensure that U.S. workers are able to make an informed decision as to their availability to fill the position in question on the actual employment start date. For these reasons, the final rule retains the same employment start date requirement. *See* new 8 CFR 214.2(h)(6)(iv)(D).

*Comment:* Many commenters expressed concern that the provision to prohibit the employer from changing the employment start date will have a severe negative effect on employers who have made every effort to comply with H–2B visa requirements. Under this provision, employers unable to obtain H–2B workers for the first half of the fiscal year (due to the numeric cap), will need to begin an entirely new recruitment process by filing a new temporary labor certification with DOL 120 days prior to the filing period for the second half of the fiscal year.

*Response:* The final rule retains the provision prohibiting the employer from requesting an employment start date on Form I–129 that is different from the date of need listed on the accompanying approved temporary labor certification. *See* new 8 CFR 214.2(h)(6)(iv)(D). DHS recognizes the efforts employers make to file H–2B petitions in a timely manner and the frustration experienced by the lack of available visa numbers. The commenters should be aware, however, that such unavailability of visa numbers is a result of the statutorily-imposed numerical limitations on the H–2B category and the heavy demand for such numbers by prospective employers rather than any action on the part of DHS. Moreover, in administering the H–2B program, DHS is under a mandate to ensure compliance with section

101(a)(15)(H)(ii)(b) of the INA, 8 U.S.C. 1101(a)(15)(ii)(b), which requires that willing U.S. workers be unavailable to fill the position in question. As discussed above, the only way DHS can satisfy itself that there has been a fair and accurate labor market test and that there is in fact a shortage of U.S. workers is by receiving a temporary labor certification from DOL covering the employment period set forth in the petition, including the same employment start date. Accordingly, if an employer is not able to obtain the needed number of H–2B workers in the first half of the fiscal year, and remains eligible to file a petition in the second half of the year, then that employer must submit a new approved temporary labor certification from DOL covering the new employment period.

*Comment:* Some commenters asked for clarification regarding the one exception to the prohibition on the change of the employment start date.

*Response:* The exception is described in new 8 CFR 214.2(h)(6)(viii)(B). The sole exception is designed to be used by employers when they need to substitute beneficiaries who were previously approved for consular processing but not admitted with aliens who are currently in the United States. As new 8 CFR 214.2(h)(6)(viii)(B) provides, such an amended petition must retain a period of employment within the same half of the fiscal year as the original petition.

*Comment:* Several commenters stated that employers need the flexibility to write a different start date in the petition when unforeseen circumstances occur. Although employers prefer that their petitions reflect the full period of need, since the allocation of the 66,000 annual H–2B visas has become increasingly competitive, the fact that employers can salvage at least part of the period of H–2B employment authorized on the temporary labor certification is important for companies. For example, if an H–2B employer is unable to receive the H–2B workers authorized by the Secretary of Labor at the start date specified on its temporary labor certification and there are no more H–2B visas available, the employer would need the flexibility to apply again for H–2B workers for the second half of the year. If denied an H–2B visa during the first filing period, the employer will unfairly have to restart the entire filing process from the beginning. Another commenter similarly responded that the ability of the program to cover graduated increases in workload is important and that it is imperative that employers be able to manage the start date of their H–2B employees.

*Response:* As the ability to change the date of employment on the Form I–129 from that of the temporary labor certification has been exploited, DHS finds that this change is needed to curtail abuses and ensure the integrity of the H–2B temporary worker program. While there may be rare instances when an employer would need flexibility to change the date of employment due to an unforeseen circumstance, DHS finds that, in practice, an increasingly disproportionate number of H–2B employers have changed the date of H–2B employment on the Form I–129 in order to gain an unfair advantage in obtaining H–2B visas from the limited pool of 66,000 available H–2B visas.

5. Payment of Fees by Beneficiaries To Obtain H–2B Employment

a. Grounds for Denial or Revocation on Notice

*Comment:* Forty-seven out of 57 commenters opposed the proposal to authorize the denial or revocation of an H–2B petition if DHS determines that the petitioner knows or should know that the alien beneficiary has paid or has agreed to pay any fee or other form of compensation, whether directly or indirectly, to the petitioner, to the petitioner's agent, or to any facilitator, recruiter, or similar employment service in connection with obtaining H–2B employment.

*Response:* After carefully considering these comments, for the reasons stated in the paragraphs below, the final rule retains the proposal. DHS has the authority to deny or revoke an H–2B petition (following notice and an opportunity to respond) if DHS determines that the petitioner has collected, or entered into an agreement to collect, a fee or compensation as a condition of obtaining the offer of H–2B employment, or that the petitioner knows or should know that the beneficiary has paid or agreed to pay any facilitator, recruiter, or similar employment service to obtain H–2B employment. *See* new 8 CFR 214.2(h)(6)(i)(B). However, the final rule includes provisions to allow H–2B employers to avoid denial or revocation if one of 3 exceptions applies: (1) Prior to the filing of the petition, the alien beneficiary has been reimbursed for any prohibited fees the alien paid; (2) before the filing of the petition and payment of any prohibited fees, the agreement for the alien to pay such fees has been terminated; or (3) where an agent or recruiter violates the prohibition on collecting or agreeing to collect a fee without the petitioner's knowledge or reason to know, the petitioner notifies DHS of the prohibited payments or agreement within two work days of learning of such payments or agreement. A petitioner will not be able to avoid denial or revocation of the petition if DHS determines that the beneficiary paid the petitioner the prohibited fees after the petition was filed. It is contemplated that a petitioner who avoids denial or revocation of a petition based on timely notification of a recruiter or agent violation will be on notice to take precautions to ensure that its workers will not be required to make such prohibited payments in the future.

DHS has determined that a prohibition on any payment made by a foreign worker in connection with the offer of H–2B employment is more restrictive than necessary to address the problem of worker exploitation by unscrupulous employers, recruiters, or facilitators imposing costs on workers as a condition of selection for the offer of H–2B employment. Accordingly, DHS has not included in the final rule the prohibition on payments made in connection with the offer of H–2B employment, but retains the prohibition on payments made to an employer, recruiter, facilitator, or other employment service by the foreign worker that are a condition of obtaining the offer of H–B employment.

*Comment:* Some commenters who supported this proposal recognized this provision as an important step to deter petition padding, visa selling, and human trafficking schemes that lead to the effective indenture of H–2B workers. Another commenter stated that, rather than attestation from employers, DHS should instead propose meaningful enforcement measures that will empower guest workers. This commenter further suggested that the violation of this provision should result in debarment from the H–2B and other visa programs.

*Response:* DHS has reached agreement with DOL regarding the delegation by DHS of statutory authority to DOL to establish an enforcement process to investigate compliance with the H–2B requirements and to remedy violations uncovered as a result by imposing fines or debarment. INA sec. 214(c)(14), 8 U.S.C. 1184(c)(14)(A). DHS and DOL have reached a mutually agreeable delegation of such enforcement authority. Appropriate debarment procedures will be instituted to implement new 8 CFR 204.5(o) and 214.1(k). Specifically, upon a debarment determination by DOL under 20 CFR 655.31, and exhaustion of an employer's administrative remedies provided under

DOL's H–2B regulations challenging such a DOL debarment determination, DHS may, under the authority provided DHS in section 214(a)(14)(A)(ii) of the INA, 8 U.S.C. 1184(a)(14)(A)(ii), deny both immigrant and nonimmigrant visa petitions for a period of one to five years, depending on the severity of the employer's violation leading to such DOL-debarment action. With regard to the H–2B program on Guam, it should be noted that, although the Governor of Guam, as opposed to DOL, continues to have the authority under 8 CFR 214.2(h)(6)(iii)(D) to establish procedures for administering the H–2B temporary labor certification program in the Territory of Guam, DHS retains its ultimate authority to invalidate a temporary labor certification issued by the Governor of Guam. 8 CFR 214.2(h)(6)(v)(H). Further, the authority of the Governor of Guam to issue temporary labor certifications in that territory does not in any way limit the authority of DHS to take any action it deems necessary under section 214(a)(14)(A)(i) or (ii) of the INA, 8 U.S.C. 1184(a)(14)(A)(i) or (ii).

*Comment:* One commenter, stating that small businesses can do little to curb malicious behavior/practice in foreign countries, requested that DHS change the legal standard so that an employer would only be liable for actually ''knowing'' that a worker paid a recruiter or labor contractor, which may decrease employer confusion and liability.

*Response:* DHS does not believe that including ''should know'' in addition to the ''knowing'' standard that was contained in the proposed rule imposes excessive risks of a violation or liability on the employer. The employer is responsible for initiating the recruitment process and chooses whom it will use to obtain foreign labor. The U.S. employer has control over whether to use recruiters and the terms and conditions of any recruitment arrangement, including the costs of such services. The employer can comply with this requirement by making reasonable arrangements and inquiries as to whether its employees have paid or will be required to pay a fee.

*Comment:* Many commenters argued that this proposal is unreasonable and that it does not afford any protections to the employer. They stated that overseas recruiters are engaged in actions beyond the employer's control and that the employer is not involved in, and has no knowledge of, any agreements made between an overseas recruiter and the temporary worker. Some commenters also raised concerns about workers who may abandon their employment after making a false claim about the payment of prohibited fees, resulting in reimbursement by the employer.

*Response:* DHS recognizes this concern and notes that it will serve notice of intent to revoke on a petitioner before revoking an H–2B petition. The employer will be provided with an opportunity to respond and submit documentation responding to the notice. To protect a petitioner who discovers, after the filing of the petition, that the alien worker paid or agreed to pay an employment service the prohibited fees, the final rule provides that the petitioner can avoid denial or revocation by notifying DHS within two work days of obtaining this knowledge as an alternative to reimbursing the alien or terminating the agreement. New 8 CFR 214.2(h)(6)(i)(B)(*4*). DHS will publish a notice in the **Federal Register** to describe the manner in which the notification must be provided.

DHS does not believe that it is appropriate to impose the same adverse consequence on petitioners who discover a post-filing violation by a labor recruiter that is imposed on more culpable petitioners who themselves violate the prohibition on collection of fees from H–2B workers, nor should petitioners have to pay for the recruiter's violation by reimbursing the alien. Petitioners should be encouraged to report information about post-filing wrongdoing by labor recruiters, even if reimbursement is not possible. In this way, DHS can help provide further protections to H–2B workers against unscrupulous recruiter practices.

Further, where the petitioner does not reimburse the beneficiary and DHS denies or revokes the H–2B petition, the final rule provides that a condition of approval of subsequent H–2B petitions filed within one year of the denial or revocation is reimbursement to the beneficiary of the denied or revoked petition or a demonstration that the petitioner could not locate the beneficiary despite reasonable efforts to do so. New 8 CFR 214.2(h)(6)(i)(D)(*1*). This requirement is intended to balance the commenters' concerns that an H–2B alien worker should not be required to pay fees as a condition of the offer of obtaining H–2B employment with the legitimate concern that petitioners who run afoul of new 8 CFR 214.2(h)(6)(i)(B) but have attempted in good faith to remedy their noncompliance continue to have access to the H–2B program. The question of whether a petitioner will be able to demonstrate to DHS that it has exercised reasonable efforts to locate the alien worker will depend on the specific facts and circumstances presented. In this regard, DHS will take into consideration the amount of time and effort the petitioner expended in attempting to locate the beneficiary and will require, at a minimum, that the petitioner have attempted to locate the worker at all of the alien's known addresses. The final rule also clarifies that the one-year condition on petition approval will apply anew each time an H–2B petition is denied or revoked on the basis of new 8 CFR 214.2(h)(6)(i)(D)(*2*).

*Comment:* A few commenters suggested that DHS should target its foreign worker abuse provisions toward foreign labor contractors and recruiters that are responsible for the abuses of the H–2B program. Another commenter suggested that DHS work with the Department of State to develop a list of good and bad foreign recruiters and foreign labor contractors so that those that have been found to engage in undesirable practices with regard to H–2B workers would not be allowed to continue recruiting workers from abroad.

*Response:* DHS has no authority to enforce the labor laws of any foreign country nor can it specifically regulate the business practices of recruiters in any foreign country. Since no program for foreign recruiter accreditation was proposed, the establishment of such a program exceeds what can be provided for in this final rule. Also, DHS cannot limit the use of recruiters and facilitators for H–2B purposes to those that maintain an office in the United States and have a license to do business in the United States according to Federal and State laws. However, DHS finds merit in the suggestion and will discuss this matter with the Department of State in the future to determine the feasibility of monitoring foreign recruiters so as to be able to provide information on recruiters and their practices to the affected public.

*Comment:* Many commenters who objected to this proposal suggested that it increases the burden on U.S. employers and makes the cost of the program, which is already expensive, more prohibitive.

*Response:* While DHS understands that this rule requires employers to bear these costs, this provision is necessary to ensure that the actual wages specified on the temporary labor certification will, in fact, be paid to the H–2B worker, thereby ensuring the validity of the labor market test and compliance with section 101(a)(15)(H)(ii)(B) of the INA, 8 U.S.C. 1101(a)(15)(H)(ii)(B). The choice whether to use recruiters or facilitators and the terms and costs for such services is left entirely to the employer.

*Comment:* A number of commenters stated that they could not effectively run their businesses if they did not use their international agents and recruiters. Similarly, a few commenters objected, stating that there is no statutory authority in the INA for DHS to prohibit prospective workers from paying a recruiter or facilitator. They stated that it is a longstanding practice that foreign agents collect fees from those who wish to find work in the United States and who need assistance with their visa applications and/or the admission process, and in fact, such services have become essential with constant changes in the visa application procedures at U.S. consulates abroad. A few commenters expressed concerns that this provision will disadvantage workers who need help with the process (*e.g.*, who are illiterate, unable to use computers, etc.).

*Response:* DHS believes that these comments misinterpret the proposed change. The proposal would neither prohibit the use of such recruiters or facilitators during the recruitment or visa application process nor the collection of fees that have been paid by the petitioner. Instead, the proposal would prohibit the imposition of fees on prospective workers. It would not preclude the payment of any finder's or similar fee by the prospective employer to a recruiter or similar service, provided that such payment is not assessed directly or indirectly against the alien worker. Under section 214(a) of the INA, 8 U.S.C. 1184(a), DHS has plenary authority to determine the conditions of all nonimmigrants' admission to the United States, including H–2B workers. It is thus within the authority of DHS to bar the payment by prospective workers of recruitment-related fees as a condition of an alien worker's admission to this country in H–2B classification. This provision does not prevent disadvantaged workers from seeking assistance from accredited representatives duly recognized by DHS.

*Comment:* Several commenters asked DHS to distinguish between fees for recruitment, and DOL and DHS processes with fees, imposed by the employer or a third party, associated with helping prospective workers to complete visa application forms. They further stated that a fee of $60 should be allowed to be paid by the potential worker to gain assistance. A commenter suggested that DHS should initiate a reasonable cap on what fees can be charged to the prospective workers. Another commenter stated that the term ''indirect fees'' is of particular concern, as it is overly broad and will likely increase litigation.

*Response:* The types of fees that petitioners and recruiters will be prohibited from passing onto H–2B workers include recruitment fees, attorneys' fees, and fees for preparation of visa applications. The final rule does not provide a list of prohibited fees, so that the prohibition against impermissible fees remains general, covering any money paid by the beneficiary to a third party as a condition of the offer of H–2B employment. However, the final rule provides that prohibited fees do not include the lower of the fair market value of or actual costs for transportation to the United States, or payment of any government-specified fees required of persons seeking to travel to the United States, such as fees required by a foreign government for issuance of passports and by the U.S. Department of State for the issuance of visas, to the extent that the passing of such costs to the worker is not prohibited by statute. As such costs would have to be assumed by any alien intending to travel to the United States, DHS believes that each alien should be responsible for them, (except where the passing of such costs to the worker is prohibited by statute). New 8 CFR 214.2(h)(6)(i)(B)(*3*).

*Comment:* Some commenters found that this provision is unclear as to how, in practice, employers will be able to demonstrate reimbursement of any fees, compensation, or other remuneration not related to transportation costs or government-specific fees, particularly for H–2B workers who are only present in the United States for short periods of time and may work at remote worksites.

*Response:* DHS finds that there can be many ways that proof of payment can be established, regardless of the location of a worksite or the length of an employment, with evidence such as copies of receipts, signed contracts, etc. Where a worker is only present for a short period of time, the petitioner may be able to reach the alien by using the alien's known address abroad, etc. As such, DHS finds that any further clarification is unnecessary in the final rule.

*Comment:* One commenter stated that foreign workers should not be given more labor protections than U.S. workers. Since employers are not currently required to pay for U.S. employees' relocation costs or job search costs, they should not be expected to cover such costs for H–2B workers. Another commenter stated that it is not the place of DHS or DOL to dictate the terms and conditions of foreign worker recruitment.

*Response:* DHS has a responsibility not only to protect U.S. workers, but also the foreign workers who are admitted into the H–2B program. As discussed above, DHS will retain in this final rule a provision eliminating the current practice of approving, in certain circumstances, H–2B petitions that are filed with denied or non-determination temporary labor certifications. This significant change will ensure that no H–2B petition is ever approved without a certification from the Department of Labor that an employer has performed adequate recruitment for U.S. workers to fill the temporary positions. The H–2B temporary nonimmigrant program often is a place of last resort for U.S. employers who cannot find sufficient U.S. workers. As such, use of this program may incur additional burdens on the employer. As the agency granted the authority to oversee the H–2B visa program, it is the duty and responsibility of DHS to prevent and protect H–2B workers from improper labor practices and abuse. DHS finds that this provision is necessary in order to ensure that H–2B workers are not charged excessive fees.

*Comment:* One commenter suggested that the definition of the term ''agent'' be modified to exclude attorneys and other representatives as defined in 8 CFR 292.2, arguing that DHS should more directly target abusive recruiters, facilitators, or similar employment facilitators without unintentionally impacting the attorney-client relationship or inhibiting an employer's and H–2B worker's rights to seek counsel.

*Response:* DHS disagrees with the commenter's concern that, with respect to the collection of fees from H–2B workers, the current definition of ''agent'' should exclude attorneys and other representatives. This rule is intended to prohibit the collection of fees or other compensation from a prospective or actual H–2B worker by anyone or any entity as a condition of an offer or condition of H–2B employment. The rule is not intended to limit the employer's or H–2B worker's right to seek counsel, but would prohibit imposition of petitioner's agent/attorney fees on an alien. Furthermore, it is not intended to have any impact on the attorney-client relationship or on an alien's ability to secure his or her own counsel at his or her own volition and not as an express or implicit condition to securing the H–2B employment. DHS believes that it is appropriate to consider an attorney to be an agent, as it does in other

circumstances. 8 CFR 214.2(h)(2)(i)(F). When an attorney or other representative files a petition, it stands in the shoes of the employer and appropriately is charged with ensuring compliance with that the statements made in the petition, and the responsibilities assigned to petitioners and employers, including regarding the alien worker reimbursement provisions of the regulations.

b. Employer Attestation

*Comment:* Eight out of 13 commenters opposed the attestation requirement for H–2B petitioners. One commenter suggested that the employer's attestation should be added as part of the Form I–129. A few commenters were concerned about the undue burdens being placed on the H–2B employer by this additional requirement.

*Response:* DHS has carefully considered the attestation requirement and has determined that a separate attestation requirement is not necessary. A proposed separate attestation requirement in the regulations would be duplicative. However, an attestation relates to eligibility requirements that the petitioner must demonstrate on the H–2B petition that the petitioner must sign as being true and correct. DHS will amend the Form I–129 to include the attestation requirements to minimize the burdens on the H–2B petitioner.

*Comment:* Six commenters responded negatively to this proposal, questioning the effectiveness of the employer's attestation. A few commenters also stated that the employer's attestation would have only a marginal impact if DHS enters into an agreement to delegate auditing and enforcement of petitions to DOL. Another commenter suggested that a certain degree of employer attestation in the current regulations is seldom verified by DHS.

*Response:* DHS has reached agreement with DOL concerning the delegation of authority under section 214(c)(14) of the INA, 8 U.S.C. 1184(c)(14), to establish an enforcement process to investigate compliance with H–2B petition requirements, including violations of the requirements of the temporary labor certification process, and to impose certain administrative sanctions for violations disclosed by any resulting investigations. DHS notes that the attestations made by petitioners, under penalty of perjury, would not be rendered superfluous by the delegation of authority under section 214(c)(14) of the INA, 8 U.S.C. 1184(c), as the information would be of use to DHS in its own investigations of petition violations.

6. Denial of Petition and Revocation of Approval of Petition

*Comment:* DHS received seven comments on the proposal to amend 8 CFR 214.2(h)(10)(ii) and (h)(11)(iii)(A)(*2*) to provide for the denial or revocation of petitions on notice where statements on the petition (or temporary labor certification in the case of revocation) are untrue, inaccurate, fraudulent or misrepresented a material fact. Five out of seven comments opposed the provision. A couple of commenters recommended that the rule allow for an appeals process within DHS.

*Response:* After considering the comments, the final rule adopts the proposal. DHS already has in place procedures which provide petitioners with the opportunity to appeal the denial or revocation of a petition for this nonimmigrant classification. See 8 CFR 103.3(a)(1)(ii).

*Comment:* Commenters questioned DHS's authority to make determinations on whether the facts were inaccurate, fraudulent, or misrepresented on a previously approved temporary labor certification.

*Response:* In reviewing whether a petition is approvable, DHS reviews all of the necessary documentation that is required to be submitted with the petition, including the underlying temporary labor certification and any accompanying documentation. In so doing, DHS may examine elements that are presented not only on the petition, but on the temporary labor certification as well for consistency such as stated wages, the nature of the job offered, the location, and other factors common to both petition and temporary labor certification. It is not new to DHS to make determinations, often upon further inquiry, as to misrepresentations, material omissions, discrepancies and the like. While DHS will not go into the merits of the determination previously made by DOL, DHS is responsible for ensuring the integrity of the H–2B program, that the facts presented in the entire petition package are true and verifiable. Where it is established on notice and with opportunity to respond, that the statement of facts contained in the petition or on the application for a temporary labor certification was inaccurate, fraudulent, or misrepresented, DHS acts completely within its authority to deny or revoke a petition. In other words, DHS disagrees with the commenters that it must simply ignore misrepresentation or fraud solely because such appears more prevalently on the temporary labor certification document. It is inevitable that any material misrepresentations or fraud at any stage of the H–2B process will taint the entire process.

7. Employer Notifications to DHS of H–2B No-Shows, Terminations, or Abscondments

*Comment:* Eight out of 20 commenters objected to the requirement of notifying DHS in three instances within 48 hours for a variety of reasons as explained fully below.

*Response:* After careful consideration of the comments, the final rule adopts this provision with minor modifications. The final rule requires H–2B petitioners to notify DHS within two work days in the following instances: Where an H–2B worker fails to report to work within 5 work days of the date of the employment start date on the H–2B petition; where the nonagricultural labor or services for which H–2B workers were hired were completed more than 30 days early; or where an H–2B worker absconds from the worksite or is terminated prior to the completion of nonagricultural labor or services for which he or she was hired. New 8 CFR 214.2(h)(6)(i)(F)(*1*). The final rule clarifies that the H–2B worker must report to work within 5 ''work days'' of the employment start date, rather than the proposed 5 days. The H–2B employer must report a violation to DHS within two work days, rather than the proposed 48 hours. The final rule adopts the term ''work days'' to clarify the reporting deadlines for H–2B employers. As discussed previously, the final rule does not include the proposal that the employer may establish an employment start date that is different than the start date stated on the H–2B petition for purposes of determining when the notification requirement is triggered where the H–2B worker fails to report for work. This change from the proposed rule is necessary to be consistent with the requirement in this rule that petitioners retain the same employment start date on the H–2B petition as the date of employment need stated on the temporary labor certification approved by the Secretary of Labor.

*Comment:* Several commenters suggested that this provision represents a significant administrative burden on employers. They stated that a notification within 48 hours would be burdensome because it may be impossible for the employer to know with certainty that the H–2B worker absconded from the worksite.

*Response:* DHS disagrees with the commenters' concerns on these points, because the proposed rule defined the circumstances causing an H–2B worker

to be an absconder. An absconder is defined as a worker who has not reported to work for 5 consecutive work days without the consent of the employer. New 8 CFR 214.2(h)(6)(i)(F)(*2*). Therefore, the employer will know whether the H–2B worker has absconded, and whether the regulatory requirement to report this incident to DHS has been triggered. Once the H–2B worker is deemed to be an absconder in accordance with the regulatory definition of absconder, the employer has two additional work days to report this event to DHS.

*Comment:* Some commenters requested that DHS create a simple reporting method via the Internet and/or over the phone to comply with the notification requirements.

*Response:* A notice outlining the notification requirements will be published in the **Federal Register**. In that notice, DHS will provide a designated e-mail address and alternate mail address for employers to send notifications. DHS believes that establishing a dedicated e-mail address for notification purposes will reduce the burden on employers. As H–2B petitioners are required to retain evidence of notifications and make such evidence available for inspection by DHS officers for a one-year period, the final rule does not adopt the suggestion that notification be available by telephone, because that suggestion would interfere with the retention requirement.

*Comment:* One commenter asked how the employer is expected to handle the situation where an H–2B worker is hospitalized due to an accidental injury and is unable to communicate, then at a later date contacts the employer and returns to work upon completion of the treatment for the injury.

*Response:* In the event that an H–2B employer encounters a situation where it chooses to reinstate an absconded employee who has been reported, DHS strongly suggests that the employer notify DHS in the same manner as the original notification. The information will be updated accordingly; however, the employer should document such an incident to support a claim during any future inspection.

*Comment:* A few commenters were concerned that, together with the new provision to preclude a new grant of H–2B status where the alien worker violated the conditions of H–2B status within the 5 years prior to adjudication of the new H–2B petition, this notification is not fair to a worker who absconds but returns home promptly and to a worker who is reported as having absconded but really has left to pursue other H–2B employment.

*Response:* Once an employee absconds, there is no truly effective way for the employer or DHS to verify such employee's whereabouts. The employee could have left the country or could have been working for another employer. If the employee left the United States, he or she should have evidence to establish he or she departed the United States. If an employee is approved and does work for another U.S. employer, he or she should be able to present such documentation to DHS in case of an inspection. This provision is intended to ensure that all H–2B workers maintain legal immigration status. DHS has no intention of imposing adverse consequences on workers who leave the United States or start working for another employer as long as they do so legally.

*Comment:* A few commenters stated that it is a complex legal issue to determine an alien's status and the reporting requirements will force H–2B employers to make such a determination and thus potentially expose them to legal liability from the employees.

*Response:* DHS disagrees with the commenter because DHS does not expect an H–2B employer to make any determination on any alien worker's legal status outside of the requirements to verify employment eligibility pursuant to section 274A of the INA, 8 U.S.C. 1324a. Once DHS receives a notification from the employer that an alien has not shown up, has been terminated, or has absconded, DHS will review the notification, make a determination regarding the alien worker's status, and decide on any further action, as appropriate. DHS, not the employer, will make any determination regarding the alien worker's status.

*Comment:* One commenter suggested that DHS should allow standard arbitration language as part of the foreign worker placement process and the employee should be allowed to agree to mediation or arbitration of any issues. The employer should be relieved of further responsibility to the worker if he or she disappears without attempting arbitration.

*Response:* DHS does not specifically regulate the business practices between private parties under existing authorities. Thus, the final rule does not adopt this suggestion, as it is beyond the scope of this rulemaking.

*Comment:* One commenter recommended that DHS reconcile its requirements for employers to notify DHS of an H–2B worker no-show, termination, or abscondment with those proposed by DOL for their H–2B regulations.

*Response:* DHS shares the commenter's concerns that employers should not be confused by inconsistencies between the two agencies' reporting requirements. Therefore, in developing the final rule DHS has worked with DOL to ensure that the agencies' requirements for reporting H–2B employee no-shows, early terminations, and abscondments are consistent with each other.

*Comment:* There were several comments that pointed out the lack of resources at DHS and therefore the lack of enforcement. They suggested that, given the fact that DHS is unlikely to use its limited resources to pursue these reported alien workers, the notification requirements will accomplish little while imposing burdens on employers.

*Response:* DHS disagrees with the commenters' concerns. All notifications will be reviewed and enforcement actions will be taken, as appropriate.

*Comment:* One commenter opposed this provision, stating that H–2B employers will likely abuse the reporting process to threaten workers, such as workers who leave their jobs because of unlawful conditions, because promised work is not available to them, or because they have been injured on the job.

*Response:* The purpose of the reporting requirement is to enable DHS to keep track of H–2B workers while they are in the United States and take appropriate enforcement action where DHS determines that the H–2B workers have violated the terms and conditions of their nonimmigrant stay. The reporting requirement is not, however, intended to be used by employers as a threat against their alien workers to keep them in an abusive work situation. Allegations of improper reporting, abuse and/or intimidation are subject to investigation and enforcement action by DHS and other government agencies. If DHS determines that an employer is engaging in worker intimidation or other abuses, such employer will be, at a minimum, in violation of the terms and conditions of its H–2B petition and therefore subject to having its petition revoked on notice under 8 CFR 214.2(h)(11)(iii)(A)(3). For this reason, DHS disagrees with the commenter's concerns and will adopt the proposed provision.

8. Violations of H–2B Status

*Comment:* Four out of seven commenters opposed the proposal to add a new provision to the regulations (proposed 8 CFR 214.2(h)(6)(ix)) that would preclude a new grant of H–2B

status within five years of an alien worker's having violated the conditions of H–2B status, other than through no fault of his or her own. One commenter argued that DHS lacks the authority to impose additional or more restrictive grounds of inadmissibility on applicants. Another commenter stated that although DHS justifies the proposed 5-year bar for H–2B workers by comparing it to the existing bar in the H–2A agricultural temporary worker program, there are multiple disparities between the H–2A and H–2B programs. The commenter noted that the H–2B program does not require the H–2A program's Adverse Effect Wage Rate, worker's compensation insurance, free housing, free transportation, free tools, 75 percent work guarantee, 50 percent U.S.-worker hiring rule, and other benefits and protections, all of which could be promulgated by regulation in the H–2B program. Moreover, H–2A workers qualify for Legal Services Corporation (LSC)-funded legal representation whereas H–2B workers do not.

*Response:* DHS carefully considered the comments and has decided not to adopt the proposed provision to preclude a new grant of H–2B status where the alien worker violated the conditions of H–2B status, other than through no fault of his or her own, within the 5 years prior to adjudication of the new H–2B petition by DHS. In light of the comments opposing the proposal, DHS finds that the provisions it has adopted in this final rule that are intended to enforce the terms and conditions of an alien's admission and compliance with H–2B program requirements are sufficient at this time. However, DHS may consider the proposal in the future. Note that DHS's decision not to impose the 5-year bar does not alter existing requirements regarding maintenance of status.

*Comment:* A few commenters suggested that there should be a process whereby a worker can request a review and reinstatement based on previous experience where the workers were improperly detained and deported by U.S. Immigration and Customs Enforcement (ICE) while they were actually in status.

*Response:* ICE is charged with enforcing the laws against the employment of unauthorized aliens and with detaining and removing aliens. ICE's policies and authorities are outside of the scope of this rulemaking.

9. Temporary Worker Visa Exit Program Pilot

*Comment:* Five out of thirteen commenters expressed support for the proposal to add a new provision at 8 CFR 215.9 that establishes the Temporary Worker Visa Exit Program Pilot. The commenters are in favor of the Temporary Worker Visa Exit Program Pilot because it will improve the exit control system at the U.S. border and will also provide data that accurately reflects the number of H–2B workers that remain in the U.S. illegally.

*Response:* DHS carefully considered all of the comments and appreciates those that are in favor of the Temporary Worker Visa Exit Program Pilot and adopts the proposed provision at 8 CFR 215.9. Those comments that are not favorable or express concerns about the program are discussed more fully below.

*Comment:* Several commenters requested additional information regarding the Temporary Worker Visa Exit Program Pilot and the ports of entry that will participate in the program.

*Response:* CBP will publish a notice in the **Federal Register** to provide further details about the program pilot including the ports of entry that will participate in the pilot. The notice will also provide the biographic and biometric information that will need to be provided by those H–2B workers and the means by which they can provide the information upon departure.

*Comment:* Some commenters expressed concern that it is currently very difficult for H–2B workers to submit the Form I–94, Arrival-Departure Record, to CBP and have the CBP agent note they are leaving the United States. These commenters note that this is especially true if the H–2B workers leave the United States at a land port via bus. The commenters suggest that CBP make it a rule that all buses need to stop and allow the passengers to cancel their I–94 when they leave the United States.

*Response:* The Temporary Worker Visa Exit Program Pilot will facilitate the exit process by providing kiosks that allow for easy scanning of H–2B workers' travel documents and the deposit of their I–94. While the commenters' suggestion that CBP should require all buses that travel across the border to stop for immigration purposes is appreciated, the comment is beyond the scope of this rule.

*Comment:* Some commenters expressed concerns regarding the re-admission of H–2B workers who depart the United States during their term of admission in the United States.

*Response:* The implementation of the Temporary Worker Visa Exit Program Pilot does not change the documentary requirements or the terms of admission or re-admission to the United States after a brief departure for H–2B workers admitted under H–2B classifications. Additionally, the requirement that an H–2B worker depart through one of the participating ports of entry and present designated biographic and biometric information applies only to the alien's final departure, at the end of his or her authorized period of stay.

*Comment:* Several commenters expressed concern that, if there are insufficient ports of entry participating in the program (*e.g.*, there are no participating ports in the geographical vicinity of the H–2B employer), it will impose an undue burden on those H–2B workers that must depart through a port participating in the program.

*Response:* The Temporary Worker Visa Exit Program Pilot is being initiated at two ports of entry. Only those H–2B workers that enter the United States at one of the two ports participating in the program pilot will be required to depart from one of the participating ports. Moreover, most H–2B workers generally are admitted at the port of entry that is most convenient to their residence. Therefore, it would generally be expected that H–2B workers would depart from the port of entry that is most convenient to their residence in their home country. By initially conducting the program pilot at two ports, CBP is minimizing the impact of the program pilot while at the same time collecting the data and information necessary to make determinations regarding expansion of the program in the future.

*Comment:* One commenter suggested that when H–2B workers leave their employers early, DHS should be informed so that DHS can stay in contact with the H–2B workers and the Temporary Worker Visa Exit Program can know which H–2B workers have left the country.

*Response:* Pursuant to 8 CFR 214.2(h)(6)(i)(F), employers are required to notify DHS if an H–2B worker fails to report for work within 5 work days of the employment start date stated on the petition, absconds from the worksite, or is terminated prior to the completion of the services for which he or she was hired.

*Comment:* Some commenters questioned whether H–2B workers would be allowed to depart only through ports of entry participating in the program.

*Response:* Only those H–2B workers who enter the United States at one of the two ports participating in the program pilot will be required to depart at the end of their authorized period of stay from either one of the participating ports.

*Comment:* One commenter requested the opportunity to have stakeholder input through notice and comment on the implementation process for the Temporary Worker Visa Exit Program Pilot.

*Response:* DHS believes that stakeholders have been given the opportunity to provide input on the program pilot through this rulemaking.

*Comment:* One commenter expressed concern that H–2B workers will not receive sufficient notice of their responsibilities under the Temporary Worker Visa Exit Program Pilot.

*Response:* DHS agrees that H–2B workers must be given sufficient notice of their responsibilities under the program. Accordingly, CBP will publish a **Federal Register** notice that will provide further details about the program pilot including the ports of entry that will participate in the pilot. The notice will also provide the biographic and biometric information that will need to be provided by those H–2B workers and the means by which they can provide the information upon departure. Additionally, upon admission into the United States, CBP will explain their obligations under this program, which is to register their final departure from the United States before or upon expiration of their work authorization. This explanation will include both verbal instructions and written walk-away materials (in both English and Spanish) to fully explain the pilot program to the participants.

*Comment:* One commenter expressed concern that the Temporary Worker Visa Exit Program Pilot will facilitate illegal immigration. Specifically, the commenter expresses concern that unless biographic and biometric information are collected at arrival, departure procedures will not be effective.

*Response:* The Temporary Worker Visa Exit Program Pilot will increase the ability of CBP to monitor the departure of workers admitted on H–2B visas. Currently, as part of the arrival process for most aliens, H–2B workers must submit both biographical (passport/visa) and biometric (fingerprints) information. The pilot program is designed to positively record the departure of H–2B workers by utilizing the biographic and biometric information submitted at the time of entry and departure. Thus, the pilot program is designed to reduce, not facilitate, illegal immigration.

*Comment:* One commenter expressed concern that the proposed rule does not state the consequences for H–2B workers who fail to comply with the exit requirements. The commenter further states that if non-compliance with the pilot program requirements results in H–2B workers being denied H–2B status in the future, then the sanction would be unduly severe and would have a negative impact on employers who would be prevented from utilizing the services of H–2B workers in future years.

*Response:* DHS recognizes these concerns. As discussed above, the final rule does not include the proposed provision to preclude aliens from being granted H–2B status based on a prior violation of the conditions of H–2B status, other than through no fault of their own, within the 5 years prior to adjudication of the new H–2B petition by DHS.

10. Temporary Need

*Comment:* Seven out of 26 commenters supported the proposed rule amending the current definition of ''temporary services or labor.'' Under the proposed rule, a job would be defined as temporary where the employer needs a worker to fill a specific need that will end in the near definable future. The proposed rule would eliminate the ''extraordinary circumstances'' restriction for validity periods of more than one year and explicitly provided that such a validity period could last up to 3 years. A few commenters indicated that they supported these provisions without any additional changes.

*Response:* DHS appreciates the comments received from the public in favor of the modified and more flexible definition of ''temporary,'' which is generally defined as a period of duration of one year, but could be for a specific one-time need of up to 3 years. This more flexible definition of ''temporary'' will allow U.S. employers and eligible foreign workers the maximum flexibility allowed under this program to complete projects with a definable end that require H–2B workers when U.S. workers are otherwise unavailable. For this and the other reasons stated in the proposed rule, DHS is retaining the proposed rule's amendment to the current definition of ''temporary services or labor.'' While a petitioner need no longer demonstrate ''extraordinary circumstances'' to justify an H–2B petition validity period of longer than one year, the 3-year maximum validity period is not intended to be a default, but would be available only where the petitioner can demonstrate a specific and typically one-time need for the worker's services for that period of time. Under the final rule, the validity period of an H–2B petition will therefore be tied to the nature and period of the employer's temporary need and not to any specific period of time.

*Comment:* Several commenters stated that the amended definition of ''temporary services or labor,'' which could be for as long as 3 years based on a one-time need, will have a disproportionately adverse impact on domestic workers in the construction industry, which DHS singled out as the illustrative example justifying the changes. These commenters further stated that the requirement that employers must re-test the labor market each year does not represent a meaningful safeguard for current and future domestic construction workers, if DOL adopts the attestation-based system it proposed in their corresponding proposed rule. These commenters also proposed that DHS keep the H–2B program congruent with the H–2A program, which defines temporary to be a duration of generally one year or less.

*Response:* DHS recognizes these concerns regarding the amended definition of ''temporary services or labor,'' but notes the following. First, while a ''temporary period of time'' is defined in the proposed rule as a period of up to 3 years, H–2B status will not necessarily be granted for the maximum 3-year period in every case. Three years is the maximum period of time permissible, but not necessarily the actual period of time needed for the specific job described on the temporary labor certification and in the H–2B petition. Therefore, each application for temporary labor certification will be evaluated on a case-by-case basis, considering the nature and specific needs of the job to be performed to determine if it is temporary. In cases where the H–2B employer requires the services of H–2B workers for more than one year, the H–2B employer is required to each year apply for and receive an approved temporary labor certification from DOL that re-tests the labor market and contains an accurate and current prevailing wage determination. DOL only grants another temporary labor certification to enable an extension of stay for the H–2B workers if that labor market test has been satisfied, and there are no able and qualified U.S. workers available to fill the positions in question and the employment of the foreign workers will not adversely affect the wage and working conditions of similarly employed U.S. workers. Lastly, in response to the comment that DHS keep the H–2B program congruent with the H–2A program, there are many similarities between the H–2A and H–2B programs; however, the H–2A program is specifically geared towards

the agricultural industry. Typically, an agricultural growing season is, by its very nature, a duration of less than one year. By contrast, the H–2B program covers a broad spectrum of industries, each representing divergent circumstances. An H–2B petitioner might be able to provide verifiable evidence of a one-time need for workers to complete a particular project within a specific period of time not to exceed 3 years. Therefore, DHS will retain without change the definition of ''temporary,'' as stated in the proposed H–2B rule.

*Comment:* Several commenters stated that the period of time described in the proposed rule, longer than one year but shorter than the maximum 3-year period, would allow employers to bypass the former requirement that employers show extraordinary circumstances justifying a one-time need, and that it appears to coincide with the length of time required to complete most domestic construction projects.

*Response:* DHS appreciates the concerns raised; however, the amended definition of ''temporary,'' which is generally one year but could last as long as 3 years based on a one-time need, is not geared to any one industry, nor is it intended to change the basic requirement that an employer's need in fact be temporary—rather than permanent—in nature. While it is true, therefore, that a petitioner need not establish the existence of extraordinary circumstances justifying a one-time need of duration longer than one year, this amended definition of the term temporary is still tied to an employer's specific needs, and is not intended to create as a default a validity period of greater than one year in duration. Instead, this amended definition of ''temporary'' accounts for circumstances that may necessitate the need for H–2B temporary workers for a period of more than one year. As a further protection for U.S. workers, this regulation also requires that, in cases where the employer's need exceeds one year, the employer submit to DHS a petition extension request, together with a newly approved labor certification issued by DOL covering the requested extension period.

*Comment:* A few commenters inquired about how this rule could justify H–2B visas lasting up to a period of 3 years, noting that a job of 3 years is not temporary.

*Response:* This rule defines the term ''temporary service or labor'' to be employment for which there is a need lasting a finite, specific period, generally defined as one year, but possibly as long as 3 years if there is a specific one-time need. The employer must establish that the need for the employee will end in the near, definable future. H–2B petitions will be granted for the period authorized on the temporary labor certification. As noted, each petition must be evaluated on its own merits, on a case-by-case basis. In this regard, the regulation contemplates a double-check system to ensure that the job in question is in fact temporary in nature. First, when seeking a temporary labor certification with DOL, the employer must not only describe to DOL the nature, scope, and duration of the temporary job, but also justify the need for temporary workers to fill those jobs for which U.S. workers are not available. USCIS will approve the H–2B petition for the validity period endorsed by the DOL on the approved temporary labor certification. If the temporary labor certification is not endorsed for the full validity period requested by the employer on the H–2B petition, USCIS will require an extension petition to be filed with a current temporary labor certification covering the extended validity period.

Second, DHS retains the authority, even after DOL approves the temporary labor certification, to determine, at the time it adjudicates the H–2B petition, whether the petitioner's need is in fact temporary, that is, of a limited, finite nature. Similarly, DHS has the authority to revoke such a petition if it determines that the job is in fact not temporary in nature.

Finally, it is important to understand that the changes in this rule to the definition of ''temporary labor or services'' do not alter what have always been the outer limits of permissible H–2B employment; even under current regulations it would be possible to demonstrate a temporary need of more than one year and possibly up to 3 years in duration, provided extraordinary circumstances were demonstrated.

*Comment:* Two commenters opposed this provision, concerned that the change would allow employers in industries that in the past have relied heavily on the H–1B specialty occupation worker program (including the high-tech and construction industries) to now be eligible for the H–2B program (for types of employment for which the H–2B program was never intended) and overrun the limited supply of H–2B visas. One such commenter was concerned that H–1B employers and lawyers will seize upon this change and instantly ruin this program for employers in industries that have traditionally relied upon the H–2B visa program.

*Response:* While DHS appreciates the concerns regarding numerical limitations on the H–1B and H–2B nonimmigrant programs, DHS believes that the requirement that H–2B employers establish that both the nature of the employment and the job itself are temporary sufficiently reduces the likelihood that foreign workers who would otherwise apply for H–1B visas will consume all the H–2B visas. Many types of H–1B employment do not satisfy the first requirement that the job itself be temporary. DHS disagrees with the commenters that admission of greater numbers of higher skilled qualified workers in the H–2B classification would ''instantly ruin'' the program for traditional H–2B petitioners. First, other than providing that the H–2B category be available to temporary nonagricultural workers, Congress generally did not specify or limit the types of jobs which an alien might fill in H–2B classification. The H–2B category is available to both professional and nonprofessional workers, provided that such persons meet the other requirements for H–2B classification. That said, unlike the H–2B category, which requires that the employer's need be temporary in nature, the H–1B category allows petitioners to fill, on a temporary basis, specialty occupation positions that themselves are permanent in nature, that is, jobs for which the H–1B employer has a permanent need. For this reason, many persons who might qualify for H–1B classification would not be able to obtain H–2B status. Second, as an additional safeguard, Congress established numerical limitations on the total numbers of persons who may be granted H–2B status each year; those limitations do not favor any one industry over another. In short, in situations where the H–2B petitioner could in fact establish that its need for a worker is temporary in nature in a profession common to the H–1B classification (*e.g.*, programmer analyst), that the alien would in fact be coming to the United States as an H–2B temporarily, and that all other requirements for H–2B classification have been satisfied, there is nothing in existing law that would preclude DHS from approving an H–2B petition on such a person's behalf.

*Comment:* A few commenters expressed concern with requiring employers to retest the labor market for prevailing wage rates. These commenters indicated that this process was not only burdensome, but also time-consuming and expensive for employers, costing anywhere between

$500 and $1850. They also mentioned the concern that an H–2B worker employed on a multi-year visa might have to be fired if the labor test results in the employer being prevented from employing some or all of the previously approved H–2B workers (even if the U.S. Government approved such workers for H–2B classification erroneously). Finally, one commenter mentioned that re-testing the labor market for prevailing wage rates did not represent a meaningful safeguard for current and future construction workers if DOL were to adopt the attestation based system described in its proposed rule.

*Response:* The requirement for employers to retest the labor market provides the safeguards needed to ensure that the amended definition of temporary work, which is generally one year, but potentially up to 3 years if there is a specific one-time need, and does not adversely impact the U.S. job market. Notwithstanding the costs of retesting the labor market each year, this system is geared towards ensuring that the employer is offering the prevailing wage rate, which is an inherent requirement mandated by section 101(a)(15)(H)(ii)(b) of the INA, 8 U.S.C. 1101(a)(15)(H)(ii)(b), and therefore, a legitimate cost of participating in the H–2B program.

*Comment:* One commenter suggested that a new visa classification be created for skilled workers and workers who are coming to jobs that will last longer than one year to facilitate more specific and far reaching tests of the U.S. labor market, thereby ensuring that temporary foreign workers filling these longer term jobs are not displacing U.S. workers.

*Response:* DHS appreciates this suggestion for a new and more flexible visa classification, but only Congress has the authority to create new or to modify existing visa classifications. Absent a statutory amendment, DHS lacks the authority to create a classification for the types of workers referred to by the commenter. We note, however, that some of these workers might be eligible for H–2B classification under this rule, while others might be eligible for classification in other nonimmigrant visa categories.

*Comment:* One commenter asked whether DHS will count a 3-year visa against the cap for 3 consecutive years.

*Response:* This provision provides no change to the way that H–2B aliens are currently counted against the H–2B visa cap. An alien is counted against the cap when an initial H–2B petition for consular notification or change of status is filed on his or her behalf. H–2B aliens requesting an extension of stay, for up to their total period of stay of 3 years, are exempt from the numerical limitations.

11. Interruptions in Accrual Towards 3-Year Maximum Period of Stay

*Comment:* Two out of four commenters supported the proposed rule exempt certain periods of time spent outside the United States from being counted toward the 3-year maximum period of stay in H–2B nonimmigrant status.

*Response:* The final rule adopts the proposed revision, reducing the minimum period spent outside the United States that would be considered interruptive of accrual of time toward the 3-year limit, where the accumulated stay is 18 months or less, to 45 days. If the accumulated stay is longer than 18 months, the required interruptive period will be 2 months. *See* new 8 CFR 214.2(h)(13)(v).

*Comment:* Two commenters requested clarification of this proposal.

*Response:* An alien worker's total period of stay in H–2B nonimmigrant status may not exceed three years. 8 CFR 214.2(h)(15)(ii)(C). In order to clarify what constitutes continuous presence in H–2B status, DHS determined to apply the same standard to the H–2B status as is used for H–2A ''temporary agricultural worker'' nonimmigrant classification. In the H–2A nonimmigrant visa classification, certain periods of time spent outside the United States are deemed to ''stop the clock'' toward the accrual of the 3-year limit on the total period of stay in that status. 8 CFR 214.2(h)(5)(viii)(C). In other words, if an alien who has been in the United States in H–2A status for a certain period of time that counts towards his or her 3-year maximum period of stay, then leaves the United States for one of the ''interruptive'' periods proposed in this rule, that time spent outside of the United States will not count towards the exhaustion of that alien's 3-year maximum period of stay in the United States. DHS recently revised these periods for the H–2A classification to streamline the program. Similarly, for H–2B nonimmigrants, the minimum period spent outside the United States that would be considered interruptive of accrual of time toward the 3-year limit, where the accumulated period of time the worker has physically been present in the United States H–2B status is 18 months or less, is 45 days. If the accumulated period of time the worker has been physically present in the United States in H–2B status is longer than 18 months, the required interruptive period is two months.

12. Substitution of Beneficiaries

*Comment:* Seven out of 11 commenters supported the provisions allowing the substitution of beneficiaries who were previously approved with aliens either inside or outside of the United States. Some commenters indicated that they felt as though the provision would be very helpful and would provide employers greater flexibility to meet their staffing needs.

*Response:* DHS appreciates these comments and agrees that this would make the H–2B program more user-friendly. Accordingly, the final rule adopts this provision. To ensure the integrity of the congressionally-mandated H–2B semi-annual numerical limitations, the final rule contains the caveat that the amended petition filed on the substituted beneficiaries' behalf must retain a period of employment within the same half of the same fiscal year as the original petition. Otherwise, a new petition, together with a new temporary labor certification, must be filed in order to effect the substitution.

*Comment:* One commenter indicated that the fees should not be required for second or amended petitions.

*Response:* DHS understands the concern but does not adopt the commenters' suggestion, because there will be additional labor and material costs incurred by USCIS in processing and adjudicating petitions for substituted beneficiaries. Section 286(m) of the INA, 8 U.S.C. 1356(m), allows USCIS to recover the costs incurred in providing these services.

*Comment:* One commenter indicated that when seeking to substitute beneficiaries, the petitioner should be able to file on behalf of beneficiaries outside the United States and inside the United States on the same petition.

*Response:* It is not operationally feasible for DHS to adopt this suggestion, as petition approvals on behalf of aliens who will be seeking consular processing abroad and petition approvals on behalf of aliens who will be applying within the United States for a change of status or extension of stay are generated and documented differently, as separate and distinct actions. This suggestion would require USCIS to take two separate actions (consular notification for aliens abroad and adjudication of the alien's application for change of status/extension of stay for aliens in the United States) on one petition. DHS will not adopt the suggestion.

*Comment:* With respect to the issue of substitution, one commenter inquired whether once the first half cap is

reached, substituted workers would be counted against the cap, and whether an amended petition could be filed to allow substituted workers to be used during the second half of the fiscal year.

*Response:* The proposed rule specified that the amended petition to substitute workers must retain a period of employment within the same half of the fiscal year as the original petition. The purpose of this restriction is to ensure that employers who are substituting workers do not gain an unfair advantage with respect to obtaining cap numbers over others seeking H–2B numbers by gaining access to new workers during the second cap period, which is from April 1 through September 30 of each fiscal year. For example, if the employer, whose original petition was approved for an employment that starts on October 1, could not find all of the workers abroad, he or she is allowed to file an amended petition to substitute vacant positions with aliens who are already in the United States as long as the employment of the substituted worker starts prior to April 1 of the following year.

*Comment:* One commenter opposed the proposed rule, stating that its adoption would severely harm prospective H–2B workers who frequently spend tremendous resources and leave employment in their home countries in order to enter the H–2B program.

*Response:* DHS disagrees that adoption of the proposed rule will harm prospective H–2B workers abroad. The annual cap of 66,000 H–2B visas is reached earlier every year. The changes in this final rule will allow employers to maximize the number of approved H–2B workers available for employment regardless of their location. It will also allow H–2B workers to maximize their 3 years of H–2B visa eligibility, since employers can more easily apply for them. Further, DOL has provided protections, including the payment of return transportation, for aliens who are terminated.

13. Employer Sanctions

*Comment:* Ten out of 20 commenters expressed support concerning the employer sanctions provisions. Some commenters found this provision to be misguided because it would specifically target employers who hire workers legally through the H–2B program instead of employers who hire falsely documented workers and/or undocumented workers. One commenter suggested that, along with this provision, an appeals process should be established for employers found to be in violation. Of those opposed to this provision, most found that these regulations do not go far enough to protect H–2B workers against exploitation and abuse or to prevent employers and recruiters from violating immigration and labor laws. One commenter stated, in particular, that the rule does not provide protection for workers from retaliation by employers and recruiters who violate the law.

*Response:* After carefully considering the comments received on this provision, the final rule adopts the employer sanctions provisions. New 8 CFR 204.5(o) and 214.1(k). As such, DHS has delegated to the Department of Labor the authority to impose the administrative penalties described in section 214(c)(14)(A) of the INA, 8 U.S.C. 1184(c)(14)(A).

14. Miscellaneous Changes

DHS proposed to amend 8 CFR 214.2(h)(6)(iii)(B), 214.2(h)(6)(v)(E)(2)(iii), and 214.2(h)(6)(vii) to correct typographical errors. DHS also proposed to amend 8 CFR 214.2(h)(8)(ii)(A) to codify the current numerical counting procedures for the H–2B classification. No comments were received on these proposals, and they will be adopted as final without change.

## IV. Rulemaking Requirements

### *A. Unfunded Mandates Reform Act of 1995*

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

### *B. Small Business Regulatory Enforcement Fairness Act of 1996*

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

### *C. Executive Order 12866*

This rule has been designated as significant under Executive Order 12866. Thus, under section 6(a)(3)(C) of the Executive Order, USCIS is required to prepare an assessment of the benefits and costs anticipated to occur as a result of this regulatory action. A complete analysis of the costs and benefits of this rule is available in the docket for this rule at *http://www.regulations.gov* in rulemaking Docket No. USCIS–2007–0058.

1. Comments From the U.S. Small Business Administration (SBA), Office of Advocacy

In addition to the public comments received on the proposed rule, DHS received a comment from SBA, Office of Advocacy (Advocacy). The comment letter from Advocacy summarized the concerns that they heard from small business owners and representatives of the small business community. Advocacy's comments on the substance of the rule are addressed in the rule's preamble along with other comments received on the proposed rule, and their comments on the rule's estimated costs and benefits are summarized and addressed as follows:

*(i). DHS must disclose how it estimated the cost of $500 per employee for job placement fees, because the State Department has reported that applicants have paid foreign recruiters from $2000 to $20,000.*

The regulatory impact analysis for the final rule indicates that recruiting practices vary widely among employers and industries, and provides an explanation for how the estimate of $500 was determined. Also, as stated in the cost benefit analysis for the proposed rule, a detailed breakdown of what services were being provided in return for the $500 payment was not obtained, and none was provided in a comment on the rule. DHS included the entire $500 in its calculation of the costs of this change on employers so that the estimated costs would be at the highest point in the range of costs that would actually be imposed. Even using those liberal cost estimates, as shown below, the costs imposed by this rule do not result in a significant economic impact on the affected entities.

*(ii). DHS should quantify the costs to employers for the payment of the worker's indirect fees, such as attorney's fees, travel agent fees, and fees for assistance to prepare visa application forms. Advocacy indicated that the proposed rule stated that the prospective employer would be responsible for the payment of indirect fees, attorneys fees, travel agent fees, and fees for assistance to prepare visa application forms.*

The $500 estimated cost per employee that will result from this ban on fees is

intended to include incidental attorney's fees, travel agent fees, and fees for assistance to prepare visa application forms. Therefore they have been quantified. This provision will require an employer to ask the employee about any fees the employee may have paid. The fee allowable is dependent on: (a) What is paid after the employee establishes meaningful contact with the agent or recruiter and (b) whether the alien has an independent choice with respect to such payment. For example, if a Mexican national hears that a recruiter will be in Pueblo on Tuesday looking for landscapers he or she may, for example, pay bus fare to Pueblo, and the associated lodging and meals. However, once the Mexican national establishes meaningful contact with the recruiter, any fee that the recruiter makes the person pay (except for the limited exceptions specified) must be borne by the employer, otherwise that person is not eligible for H–2B status. Some of those fees, may, in fact be indirect fees that the recruiter is requiring as a condition for the recruitment. If the worker decides on his or her own to hire an attorney, for personal legal assistance unrelated to obtaining their H–2B job, or a travel agent for arrangement of personal travel, and the amounts paid are reasonable and not an obvious effort to get around this prohibition, or are not otherwise incurred at the behest or urging of the recruiter (such as an implied promise or other commitment to engage the alien if the alien presents himself or herself at a specific location or perform certain preliminary actions), then the employer need not reimburse the alien for such fees. Likewise, amounts for purely personal items or actions paid by the alien at the suggestion of the recruiter, such as, grooming or wearing freshly washed clothing, that might increase the worker's chances of getting the job, would not be required to be reimbursed. Ultimately, the determination of what may or may not be reimbursed to the employer is necessarily dependent on the specific facts surrounding the alien's engagement in or recruitment for the H–2B position.

*(iii). DHS should quantify the costs to employers to pay for transportation expenses for workers to return to their last place of foreign residence.*

DOL regulations make employers liable for return transportation if the employee is dismissed early by the employer. As stated above, this rule simply reinforces the DOL requirement. Even so, very few employers are expected to take the actions necessary to be subject to this sanction.

*(iv). DHS should attribute recordkeeping costs for employers that have to complete reasonable inquiries pursuant to the prohibition on fees.*

The final rule removes the separate attestation requirement that was proposed regarding use of employment services to locate H–2B workers, and knowledge of the beneficiary's payment of prohibited recruitment fees. DHS has determined that the attestation increased a petitioner's burdens, and duplicated information that petitioners must provide on the H–2B petition to establish benefit eligibility. In conjunction with the final rule, DHS has amended the H Supplement to Form I–129 to explicitly ask the employer if they used a recruiting firm, how much they paid the recruiting firm, the name of the recruiting firm, and if the beneficiary employee has paid a fee to anyone. This replaces the need to attest to any knowledge and provides space for employers to expressly indicate such knowledge. These questions will apply to petitions for both H–2A and H–2B workers. This method for obtaining this information is superior to asking the petitioner to attest to whether it knows or does not know about a fee. By asking the question, the employer may answer yes, no, or do not know, rather than attesting to that knowledge, and USCIS will have the name of the recruiter they used for future reference. As stated in the Paperwork Reduction Act section of this rule, USCIS estimates that the public reporting burden for each Form I–129 at 2 hours and 45 minutes per response is sufficient to encompass the questions added to the forms to address this requirement. Thus, the current OMB approved inventory of the costs imposed by this information collection includes sufficient leeway to account for these additional questions.

As for the burden for a firm to complete reasonable inquiries pursuant to the prohibition on fees, there are no additional costs. DHS agrees that this rule may require reasonable inquiries as part of the ''due diligence'' requirement imposed on prospective recruiters. However, after this rule takes effect, employers should notify recruiters upfront that no fees may be collected from a prospective recruit. Interviews and inquiries will provide opportunities for the employer to quite easily and quickly ask the employee, ''Did you pay anyone a fee to get this job (or interview).'' If the answer is yes, they may ask, ''Who and how much did you pay, what services were provided for the fee, and were you provided with an itemized bill?'' The answers may have significant ramifications for the employee by rendering him ineligible unless any fee he or she identifies is only for allowable transportation costs and/or government fees. The employer that is informed by its potential employee that a particular recruiter has charged fees should keep a record of such firms or agents and either continue to deal with those firms in the future or not. However, asking the straightforward question does not impose a substantial record keeping or information collection burden.

If an employer determines that its workers have been charged or will be charged a fee, they may incur costs in reimbursing such persons. If a fee payment is discovered prior to the commencement of the work, the employer may replace that worker with a worker who did not pay fees or reimburse those it intends to hire. In any event, it cannot be predicted in advance the amount a prospective employer might have to pay to go forward with planned work, as this will depend on how much the alien has paid or if the employer would seek other workers in lieu of those it originally intended to hire. In the end, though, it is the employer's responsibility to set the terms and conditions of any recruitment contract, and the employer will be in a position to require, as a condition of any such contract, that the domestic recruiter and agent working in the worker's home country do not charge any fee of prospective alien workers.

*(v). DHS should quantify the costs to employers for the opportunity costs of losing potential employees and scheduled contracts.*

This comment relates to workers lost by the employer as a result of the prohibition on employee-paid placement fees. The comment does not explain how such employees would be lost, could not be readily replaced, or how a contract may be lost by application of the no-fee requirement of this rule. As a result of this rule, an employer must consider the availability of an alternative employee and the costs of any delays if the employer determines the employee paid a fee that is larger than the employer wants to reimburse. The discovery that an employee paid a fee may be large enough to result in the employer choosing not to hire that employee and finding a replacement employee who paid no fee that must be reimbursed, if there is an adequate supply of replacement workers readily available. That is a business decision that is up to the employer. As stated above, the cost that an employer would expend per employee as a result of this ban on fees has been quantified as about $500.

Delays caused by an employer's discovery of such a fee payment by a prospective employee may result from the employer's decision to not incur that expense, but they do not result directly from this rule.

*(vi). DHS should quantify the costs and fees to notify DHS within 48 hours if: (1) An H–2B worker fails to report for work within 5 days after the employment start date, (2) the services for which H–2B workers were hired is completed more than 30 days early, (3) an H–2B worker leaves the worksite (for a period of 5 consecutive work days without the consent of the employer), or (4) an H–2B worker is terminated prior to the completion of the services for which he or she was hired.*

These costs have been quantified in the regulatory impact analysis of the final rule in the discussion of the paperwork reduction act impacts of this rule. DHS has estimated the costs of this new report to amount to $8,123 per year. This cost will be incurred only by a few employers that have employees abscond, so the cost per petition and per H–2B worker are not appropriate for comparison, because affected firms will not bear these costs equally.

*(vii). There are opportunity costs to employers that are debarred from the H–2B program for a notification failure.*

This rule does not provide that an employer that fails to report abscondment will be debarred. The costs of the absconder reporting requirement have been discussed above. The costs imposed as a result of violations of H–2B regulations petitions and to impose administrative penalties, fines, and debarment are enforcement provisions and not regulatory compliance costs. Should DOL determine that a petitioner substantially failed to meet any of the conditions of the H–2B petition or willfully misrepresented a material fact in such petition, then DHS may debar the petitioner. However, DHS and DOL have authority notwithstanding this rule to investigate violations of H–2B petitions and to impose administrative penalties including debarment An employer will want to consider that possibility before it decides to not report an abscondment or to not meet any other requirement of the H–2B program. An employer who was unable to hire an H–2B employee as a result of being debarred from participation in the program may be harmed, but only because of their failure to report the abscondment of an employee as required by this rule, not as a direct result of this rule. If the employer chooses to comply with the rule they would not incur any additional cost.

*(viii). DHS should quantify the additional costs to small business to pay a premium processing fee of $1000 for their application to be considered in time.*

USCIS' Premium Processing Program is a program by which certain petitioners and applicants may request USCIS to expedite handling of those petitions and applications and approve or deny them within 15 days. The comment assumes that, in order to be assured that they will receive one of the 66,000 limited slots for an H–2B employee, the petitioner must request premium processing for their petition because normal processing times are too lengthy to ensure they will obtain approval for the number of employees needed. This assumption is incorrect. It is true that most petitioners request premium processing for their petitions because they think that normal processing times are too long to ensure they will obtain approval for the number of employees needed. In fiscal year 2007, 10,481 of the 13,561 H–2B petitions filed, or 77 percent, were accompanied by Form I–907, Request for Premium Processing Service, and the required $1,000 fee. While processing times may improve as a result of this rule, the proportion of petitioners requesting premium processing is not expected to increase or decrease. USCIS average processing time for an H–2B petition is less than 60 days and most petitions are filed with USCIS more than 60 days, and often up to 120 days, before start of the employment. Premium processing is not required except for the time pressure that employers feel to have their petitions approved before other employers and before the number of annual H–2B workers approved reaches the 66,000 limitation imposed by law. That limitation is not imposed or addressed by this rule; thus, this rule does not require petitioners to request premium processing.

2. Comments From the Public on the Regulatory Cost Benefit Analysis

*(i) The add-on of incidental recruiting costs to employers is counterproductive and the estimates used to justify this move are not accurately documented.*

As commenters on the rule acknowledged, the documented abuses of H–2B workers are serious and must be addressed. In fact, DHS has now learned that some aliens have paid as much as $80,000 to recruiters and others in order to obtain H–2B employment in this country. Further, the practice of passing fees to the alien has resulted in a number of serious abuses, including, but not limited to, visa sales, petition padding, and extortionate practices directed at aliens and their family members. While it is true that DHS lacks jurisdiction to regulate the activities of recruiters and other facilitators abroad, DHS has, under section 214(a)(1) of the INA, 8 U.S.C. 1184(a)(1), the authority to determine, by regulation, the terms and conditions of H–2B nonimmigrant status and petition approval within the United States. It is inequitable to extract fees from economically disadvantaged foreign workers by passing on costs to an alien by reducing the alien's net wages. Recruiting costs may be factored into the initial wage offer and reflected in the temporary labor certification. Thus, these new requirements are not ''counterproductive.'' The estimates used in calculating the costs were the best available in light of the lack of detailed records on the practice.

*(ii) This rule imposes significant, unspecified and uncapped financial liability on employers making them liable for related indirect and other fees associated with H–2B employees' travel.*

DHS is unclear as to what uncertain and unspecified costs the comment is referring. This rule provides that an alien will not bear the cost to use a job placement service or prepare the H–2B petition. Any costs incurred by the employee because the recruiter requires it as a condition of employment will have to be borne by the employer. However, this rule will not require an employer to bear the cost if the alien chooses to hire a lawyer on his or her own volition. The employer will not have to pay what the employee paid for transportation or government fees, unless required to do so by statute.

*(iii) DHS does not calculate the cost of an employer having to do research on foreign labor recruiters so that employers are able to feel they met the standard of ''having reasonably known'' that their employees did not pay a recruiter.*

The prospective employer has a number of means of ascertaining whether the alien has paid or may be under an obligation to pay fees. It is the employer who chooses to contract with a recruiter or job placement service. That provides them with the ability to negotiate the terms and conditions of the contract, including a prohibition on workers paying fees. This may require switching from one foreign labor recruiter to another until one is found that does not charge alien's fees. There is no way to calculate the cost, if any, of that potentiality.

*(iv) The DHS analysis does not take into account the increased costs from having to file multiple temporary labor*

*certifications if an employer needs to change their employee's start date.*

This rule requires that the employment start date on the H–2B petition be the same as the dates on the temporary labor certification. An exception is made for the time needed to replace an unavailable worker. Some businesses stated that they list the actual date of need in their temporary labor certifications to DOL, but need to write a different start date in their DHS H–2B petitions when, for example, the H–2B cap is filled for the winter season and they need to re-apply for the summer season, or when employees arrive late due to delays at a foreign consulate or an illness. The commenters suggest that, by not allowing those employers to use a different start date, this rule adds the cost of obtaining a new DOL temporary labor certification when re-applying for a petition.

DHS recognizes that requiring the petition start date to be the same as that on the temporary labor certification may disadvantage filers whose employment start date begins more than four months after the beginning of the first or second half of the fiscal year. The fact that an employer may have to obtain a new temporary labor certification may be an indirect effect of this change, but it is not directly related. That result is, unfortunately, another by-product of the over subscription of the H–2B program. Nevertheless, this change ensures compliance with the law which requires the unavailability of U.S. workers. Requiring that an employer adhere to the start date stated in the temporary labor certification will ensure that U.S. workers were able to make an informed decision as to their availability to fill the position in question.

2. Summary of Final Rule Impacts

The impacts of the changes in this rule are summarized as follows:

The number of petitions filed by H–2B employers is expected to increase, but the annual volume of petitions processed will not change. More petitions will be returned without depositing their fee payment and reviewing the petition.

The average USCIS processing time for an H–2B petition of around 60 days will decrease as a result of petitioners not being required to name the individual alien on initial H–2B petitions. USCIS will not have to perform an Interagency Border Inspection System (IBIS) name check, removing the largest source of delays in the processing of H–2B petitions.

By eliminating the ''extraordinary circumstances'' restriction on periods longer than a year and providing that such a period could last up to 3 years, this proposed rule would benefit employers who need workers for a specific project that will take longer than one year to complete.

Because of the statutory maximum on the annual number of H–2B visas available, this rule will result in no increase in the availability of temporary seasonal workers. There may be some slight benefit from helping employers fill jobs and find workers in a more timely manner, but businesses will still be constrained by a limited labor supply.

The administrative improvements proposed in this rule are intended to make employers more likely to participate in the program. This is expected to cause some employers who currently hire seasonal workers who are not properly authorized to replace those workers with lawful workers.

By requiring an employer to notify USCIS quickly after the employer terminates an alien's employment, immigration authorities will be made more aware of the fact that an alien without legal immigration status may be in the United States, and determine his or her whereabouts for appropriate enforcement measures.

The fee impacts of this rule are neutral. Only those petitions received before the maximum annual number is reached are adjudicated and the fee check deposited. Petitions not received before the maximum annual number is reached are rejected. Because the total number of H–2B visas available per year will not increase under this final rule and the total number of workers requested already greatly exceeds the number of H–2B visas available, fees will not increase because there will be no increase in Form I–129 filings that are processed.

Most H–2B petitions filed, or about 77 percent, are accompanied by Form I–907, Request for Premium Processing Service, and the required $1,000 fee. While processing times may improve as a result of this rule, the proportion of petitioners requesting premium processing is not expected to increase or decrease.

*Paperwork Burden.* The administrative improvements proposed by this rule are expected to result in more petitions for H–2B workers being submitted to USCIS. Therefore, the aggregate burden imposed on the public may increase in relation to the additional respondents who will file a Form I–129 as a result of this rule's proposed changes. However, since the total number of workers requested already greatly exceeds the number of H–2B visas available, more petitions will not be processed and or approved.

*Effect of repatriation provision.* This rule will prohibit approval of an H–2B petition for a worker from a country that has not been designated, with the concurrence of the Secretary of State, as eligible for its nationals to participate in the H–2B program, unless DHS determines that participation of that worker in the H–2B program is in the U.S. interest. The actual impact of this proposed change is expected to be negligible, since very few H–2B workers are from countries DHS believes may see an impact from this provision. In addition, since the total number of workers requested exceeds the number of H–2B visas available, such small impacts as may occur would represent transfers from one country's workers to another.

*Costs of exit registration requirement.* U.S. Customs and Border Protection (CBP) will establish a new land-border exit system for H–2 temporary workers in San Luis, Arizona, or Douglas, Arizona. Aliens who entered through these ports must depart from either one of those ports and provide biometric information at one of the kiosks established for this purpose. CBP will collect biometrics under this pilot from all returning workers. This rule change will require an H–2B worker to incur opportunity costs of between thirty minutes and one hour as a result of having to go through the registration process. In its regulatory impact analysis prepared for this rule, DHS estimated that the total annual costs for the time required for aliens to comply what this exit registration process is around $2,424.

*Effects of proposed requirement for petitioners to reimburse workers for any fee or risk denial of their petition.* By requiring a petitioner to demonstrate that the alien has paid no fees or show they have reimbursed the alien for such fees, this rule would effectively ban the payment of such fees by the alien beneficiary with limited exceptions for certain transportation costs and government-imposed fees, if the passing of such transportation costs and government-imposed fees to the alien is not precluded by statute. Since the majority of H–2B employees are estimated to pay such fees, and such practices are expected to continue, this will result in a transfer of those costs to employers. DHS prepared an analysis of the costs of this rule in order to comply with the Regulatory Flexibility Act (RFA) and Executive Order 12866. In that analysis DHS estimated that the cost of this requirement could be as high as about $4,500 per employer, based on

the average number of employees sponsored by each employer, if all of their H–2B workers were found to have paid a fee, or $33 million total, in the unlikely event that all 66,000 H–2B employees per year, every year, pay such a fee.

*Absconder reporting.* This rule requires an employer to notify DHS within two work days if: (1) An H–2B worker fails to report for work within 5 days after the employment start date, (2) the services for which H–2B workers were hired is completed more than 30 days early, (3) an H–2B worker leaves the worksite (for a period of 5 consecutive work days without the consent of the employer), or (4) an H–2B worker is terminated prior to the completion of the services for which he or she was hired. Following publication of this rule, USCIS will publish a **Federal Register** Notice outlining the employer's requirements under this provision. DHS has estimated the total costs per year that will be imposed on the public for the absconder notification requirement are about $8,123.

This rule is expected to reduce costs for the government by terminating mandatory H–2B review. Employees handling these appeals will then be able to focus on eliminating application and petition backlogs for other benefits.

The exit pilot program being implemented in San Luis, Arizona, and Douglas, Arizona is expected to cost the Federal Government at least $27,201 for the DHS employees' time to carry out the registration process. These costs do not include the costs of setting up the biometrics collection kiosks and otherwise equipping these offices with the required staffing and technology, which may be additional.

*D. Regulatory Flexibility Act*

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), requires Federal agencies to conduct a regulatory flexibility analysis which describes the impact of a rule on small entities whenever an agency is publishing a notice of rulemaking. In accordance with the RFA, DHS certifies that this rule will not have a significant economic impact on a substantial number of small entities. The factual basis for that determination is as follows:

1. Number of Regulated Entities

In FY06, an estimated 15,000 Form I–129 petitions were received by USCIS for H–2B workers; approximately 14,000 of those petitions were approved. In fiscal year 2007, USCIS received 13,561 petitions and approved 14,355. For fiscal year 2008, USCIS received 7,739 H–2B petitions and approved 7,755. In fiscal year 2008, the mean and median number of H–2B worker beneficiaries requested per petition were 19 and 9 workers, respectively.

Since the current volume of petitions already meets the statutory annual maximum of 66,000, the number of petitions processed will not change and USCIS will have to reject a higher number of petitions without depositing their fee payment or reviewing the petition. USCIS expects processing volume to continue along these lines in the near future, barring a major change to underlying legislation. Thus, an estimated 7,700 H–2B petitions are expected to be accepted per year.[1]

2. Size Categories of Affected Entities

Typical petitioner. The actual average or median revenue of the typical H–2B employer is unknown. However, DHS considered what was considered small for the typical firm in the industries that use most H–2B workers according to the U.S. Small Business Administration (SBA) Small Business Size Regulations at 13 CFR part 121. The SBA regulations provide that the annual gross revenue threshold for firms in the Landscape Architectural Services (NAICS code 541320[2]) or a hotel industry (NAICS 721110) is $7.0 million. For Nursery and Tree Production (NAICS 111421) it is $750,000. For Construction, it is $33.5 million. Based on these definitions, the U.S. Census Bureau's 2002 Economic Census reported that approximately 99.9 percent of employers in the construction industry, 95 percent in the forestry and landscaping industry, and 90.8 percent of those in the accommodation and food services industry were small businesses.[3] Assuming that the proportion of small employers participating in the H–2B program is similar to the overall market, more than 90 percent of H–2B petitions are filed by firms which are classified as small businesses. Thus, this rule will have an impact on about 7,000 small entities.

3. Other Firms That May Be Affected by This Change

a. Employee Recruiters.

DHS has no reliable data on the number of firms that recruit H–2B employees, but DHS research in this area indicates that the majority of new, and many returning, H–2B employees have utilized such a service in their home countries. This rule does not prohibit firms from charging nonimmigrant workers for some services, such as: preparation of the worker's income tax return; certain transportation costs (except where the passing of such costs to the worker is prohibited by statute); lodging; food; clothing; translation services; or other services for which the value is generally known based on an existing market or can be readily quantified, and which are not charged as a condition of the employee being referred to a petitioner.[4]

b. Employer Agents.

The agent hired by the seasonal employer assists in completing applications and locating and processing worker applicants abroad. Agents usually charge a flat fee per employee to process the employer's DOL, the Department of State, and DHS certification, application, and petition. Some agents collect an initial retainer and then charge additional fees based on the number of workers, the application fees, the advertising costs required, and other expenses. The total charges an employer pays the agent per H–2B employee ranges from approximately $500 to $4,000, including travel expenses and all application and petition fees. The actual cost depends on the home country, the skills needed for the position, and the general complexity of the worker and employer's respective situations. DHS does not have any estimate of the number of employer agents who are active in the recruiting of H–2B employees. However, the relationship between employers and agents is not affected by this rule, except to the extent the agent may also be collecting a fee from the foreign worker.

4. Significance of Impact

DHS has determined that this rule will require affected employers to pay between $150 and $500 per employee because recruiter fees that are now being paid by employees will be shifted by recruiters from employees to employers.

[1] For this analysis it is assumed that a firm will request all of the foreign workers they need in a given year on one petition. As a result of this assumption, the number of firms affected in this case is assumed to equal the number of petitions filed in a year, although some firms may file multiple petitions.

[2] The North American Industry Classification System (NAICS) is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy. See, *http://www.census.gov/eos/www/naics/*.

[3] U.S. Department of Commerce, Economics and Statistics Administration, U.S. CENSUS BUREAU, at *http://www.census.gov/prod/ec02/ec0223sg1t.pdf*. Page 9.

[4] Notwithstanding that DOL may or may not prohibit such fees in some instances.

Also, the absconder notification requirements of this rule are estimated to cost $8,123 per year, for an average of $.12 per employee.

Guidelines suggested by the SBA Office of Advocacy provide that, to illustrate the impact could be significant, the cost of the proposed regulation may exceed 1 percent of the gross revenues of the entities in a particular sector or 5 percent of the labor costs of the entities in the sector.

In fiscal year 2008, the mean and median authorized duration of H–2B employment were 219 and 231 days, respectively. Thus, a new H–2B employee in 2008 worked an average of 31.3 weeks. Assuming that the typical employee worked an 8 hour work day and took two days per week off from work, the employee would have worked 156 days and accrued 1,251 hours. Using the U.S. Department of Labor hourly wage rate for an H–2B worker of $9.32 per hour,[5] plus a multiplier of 1.4 to account for fringe benefits and incidental expenses, the average hourly wage compensation costs equal $13.05. Multiplying the hourly compensation costs by the hours worked provides an average compensation cost for an H–2B employee for the period he or she is in the United States of about $16,326. If the employer is required to pay a recruiter or reimburse the employee $500 for fees paid, and if that employee absconds, requiring the employer to file a report, the added cost of $501 is only 3.1 percent of the $16,326 annual salary for only one H–2B worker. Since the cost increase per H–2B employee is less than 5 percent of the costs associated with hiring only one H–2B worker, the average cost increase imposed by this rule will not exceed 5 percent of the average labor costs of the entire sector.

Also, as stated above, guidelines provided by the SBA Office of Advocacy suggest that an added cost of more than one percent of the gross revenues of the affected entities in a particular sector may be a significant impact. USCIS believes that it is unlikely that an employer will incur costs of $4,501 due to this rulemaking, as it is the high end of the range of possible costs. Again, if each firm affected by this rule hires the average of 9 workers and all 9 are recruited by a firm that charges or causes the employer to reimburse all 9 employees $500, the additional cost of this rule could reach as high as $4,501 per employer. While the actual revenue of the typical H–2B employer is unknown, DHS believes that the companies that use the H–2B program are likely to be on the upper bounds of the small business size standards for annual gross cash receipts. If an employer hires 9 employees and incurs recruiting costs of $500 for every one of them, the $4,500 added cost represents only 0.6 percent of $750,000 (the standard for Nursery and Tree Production). To further illustrate, for $4,500 to exceed one percent of annual revenues, sales would have to be $450,000 per year or less. While most H–2B petitioners are small entities, DHS believes that a firm with annual sales below $450,000 would be very unlikely to hire 9 temporary seasonal employees and incur the $4,500 in added costs. Therefore, DHS believes that the costs of this rulemaking to small entities will not exceed one percent of annual revenues.

Therefore, using both average annual labor costs and the percentage of the affected entities' annual revenue stream as guidelines, USCIS concludes that this rule will not have a significant economic impact on a substantial number of small entities.

5. Impact on U.S.-Based Recruiting Firms

As outlined above, this rule affects recruiting firms' activities tangentially. Nonetheless, the effect of the fee prohibition on recruiting companies, staffing firms, or employment agents is not a new compliance requirement on regulated entities. Establishment of a non-immigrant temporary worker program was intended to alleviate seasonal labor shortages. Demand from employers for foreign workers makes the 66,000 H–2B slots significantly insufficient to meet the demand. This has created a market where the ''price'' for the scarce good, the nonimmigrant temporary worker visa, has increased. That employer demand and the demand from foreign workers to come to the U.S. have combined to result in a portion of the ''price'' being passed on to the workers. DHS views that trend and practice as undesirable and is attempting to take action in this rule to limit those costs. The formation of firms that recruit workers in foreign countries is an unintended consequence of nonimmigrant temporary worker programs since those firms are not the intended recipients of the benefits that are supposed to inure to participants in those programs. In any event, DHS does not believe the prohibition on charging aliens will cause a significant economic impact on the affected placement, recruiting, or staffing firms because they may, and are expected to, transfer those costs to the employers, as analyzed above.

6. Certification

For these reasons, DHS certifies that this rule will not have a significant economic impact on a substantial number of small entities.

*E. Executive Order 13132*

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

*F. Executive Order 12988*

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

*G. Paperwork Reduction Act*

This rule requires that a petitioner submit Form I–129, seeking to classify an alien as an H–2B nonimmigrant. This form has been previously approved for use by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA). The OMB control number for this collection is 1615–0009. This rule requires under 8 CFR 214.2(h)(6)(i)(F) that the petitioner notify DHS if:

- An H–2B worker fails to report for work;
- The services for which an H–2B worker is hired is completed 30 days early;
- An H–2B worker absconds from the worksite; or
- An H–2B worker is terminated prior to completion of services for which he or she is hired.

This notification requirement is considered an information collection covered under the PRA. Accordingly, this information collection has been submitted and approved by OMB under the PRA.

However, this rule requires that certain H–2B workers departing the United States participate in a temporary worker visa exit pilot program. This requirement will add to the number of respondents approved by OMB for the information collections in OMB control number 1600–0006, U.S. Visitor Immigrant Status and Indicator Technology (US–VISIT). DHS has submitted a request for a non-

[5] Average of the DOL required Level 1 salaries for a Landscaper in Memphis, a Food Server in DC, a Bellhop in Miami, a Tree Trimmer in Denver, and a Pesticide Applicator in Seattle. Available at: *http://www.dol.gov/compliance/topics/wages-foreign-workers.htm.*

substantive change to OMB to account for this requirement's added burden.

**List of Subjects**

*8 CFR Part 204*

Administrative practice and procedure, Immigration, Reporting and recordkeeping requirements.

*8 CFR Part 214*

Administrative practice and procedure, Aliens, Cultural exchange programs, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements.

*8 CFR Part 215*

Administrative practice and procedure, Aliens, Travel restrictions.

■ Accordingly, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

## PART 204—IMMIGRANT PETITIONS

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

**Authority:** 8 U.S.C. 1101, 1103, 1151, 1153, 1154, 1182, 1184, 1186a, 1255, 1641; 8 CFR part 2.

■ 2. Section 204.5 is amended by adding paragraph (o) to read as follows:

**§ 204.5 Petitions for employment-based immigrants.**

* * * * *

(o) *Denial of petitions under section 204 of the Act based on a finding by the Department of Labor.* Upon debarment by the Department of Labor pursuant to 20 CFR 655.31, USCIS may deny any employment-based immigrant petition filed by that petitioner for a period of at least 1 year but not more than 5 years. The time period of such bar to petition approval shall be based on the severity of the violation or violations. The decision to deny petitions, the time period for the bar to petitions, and the reasons for the time period will be explained in a written notice to the petitioner.

## PART 214—NONIMMIGRANT CLASSES

■ 3. The authority citation for part 214 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1185 (pursuant to Executive Order 13323, published January 2, 2004), 1186a, 1187, 1221, 1281, 1282, 1301–1305; 1372; 1379; 1731–32; sec. 14006, Public Law 108–287; sec. 643, Public Law 104–208; 110 Stat. 3009–708; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901, note, and 1931, note, respectively.

■ 4. Section 214.1 is amended by adding paragraph (k) to read as follows:

**§ 214.1 Requirements for admission, extension, and maintenance of status.**

* * * * *

(k) *Denial of petitions under section 214(c) of the Act based on a finding by the Department of Labor.* Upon debarment by the Department of Labor pursuant to 20 CFR 655.31, USCIS may deny any petition filed by that petitioner for nonimmigrant status under section 101(a)(15)(H) (except for status under sections 101(a)(15)(H)(i)(b1)), (L), (O), and (P)(i) of the Act) for a period of at least 1 year but not more than 5 years. The length of the period shall be based on the severity of the violation or violations. The decision to deny petitions, the time period for the bar to petitions, and the reasons for the time period will be explained in a written notice to the petitioner.

■ 5. Section 214.2 is amended by:
■ a. Revising paragraph (h)(1)(ii)(D);
■ b. Adding a new sentence to the end of paragraph (h)(2)(ii);
■ c. Revising paragraph (h)(2)(iii);
■ d. Redesignating paragraph (h)(2)(iv) as paragraph (h)(6)(viii), and by reserving paragraph (h)(2)(iv);
■ e. Revising paragraph (h)(6)(i);
■ f. Revising paragraph (h)(6)(ii)(B) introductory text;
■ g. Revising the word ''amendable'' to read ''amenable'' in the second sentence in paragraph (h)(6)(iii)(B);
■ h. Adding the word ''favorable'' immediately after the phrase ''has obtained a'' in paragraph (h)(6)(iii)(C);
■ i. Adding the word ''favorable'' immediately after the phrase ''After obtaining a'' in paragraph (h)(6)(iii)(E);
■ j. Revising paragraph (h)(6)(iv)(A);
■ k. Revising paragraph (h)(6)(iv)(D);
■ l. Removing paragraph (h)(6)(iv)(E);
■ m. Revising paragraph (h)(6)(v)(A);
■ n. Removing and reserving paragraphs (h)(6)(v)(C) and (D);
■ o. Adding the word ''States'' immediately before ''and'' in the first sentence in paragraph (h)(6)(v)(E)(*2*)(*iii*);
■ p. Revising paragraph (h)(6)(vi)(A);
■ q. Removing and reserving paragraph (h)(6)(vi)(B);
■ r. Revising paragraph (h)(6)(vi)(C);
■ s. Removing the period at the end of paragraph (h)(6)(vi)(D), and adding a ''; or'' in its place;
■ t. Revising the word ''or'' to read ''to'' in the first sentence in paragraph (h)(6)(vii);
■ u. Revising newly designated paragraph (h)(6)(viii);
■ v. Adding new paragraph (h)(6)(ix);
■ w. Revising paragraph (h)(8)(ii)(A);
■ x. Revising paragraph (h)(9)(i)(B);
■ y. Revising paragraph (h)(9)(iii)(B)(*1*);
■ z. Revising paragraph (h)(10)(ii);
■ aa. Adding a new sentence to the end of paragraph (h)(11)(i)(A);
■ bb. Revising paragraph (h)(11)(iii)(A)(*2*);
■ cc. Revising paragraph (h)(13)(i)(B);
■ dd. Revising paragraph (h)(13)(iv); and by
■ ee. Revising paragraph (h)(13)(v).

The revisions read as follows:

**§ 214.2 Special requirements for admission, extension, and maintenance of status.**

* * * * *

(h) * * *

(1) * * *

(ii) * * *

(D) An H–2B classification applies to an alien who is coming temporarily to the United States to perform nonagricultural work of a temporary or seasonal nature, if there are not sufficient workers who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such services or labor. This classification does not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession. The temporary or permanent nature of the services or labor described on the approved temporary labor certification are subject to review by USCIS. This classification requires a temporary labor certification issued by the Secretary of Labor or the Governor of Guam prior to the filing of a petition with USCIS.

* * * * *

(2) * * *

(ii) * * * H–2A and H–2B petitions for workers from countries not designated in accordance with paragraph (h)(6)(i)(E) of this section should be filed separately.

(iii) *Naming beneficiaries.* H–1B, H–1C, and H–3 petitions must include the name of each beneficiary. Except as provided in this paragraph (h), all H–2A and H–2B petitions must include the name of each beneficiary who is currently in the United States, but need not name any beneficiary who is not currently in the United States. Unnamed beneficiaries must be shown on the petition by total number. USCIS may require the petitioner to name H–2B beneficiaries where the name is needed to establish eligibility for H–2B nonimmigrant status. If all of the beneficiaries covered by an H–2A or H–2B temporary labor certification have not been identified at the time a petition is filed, multiple petitions for subsequent beneficiaries may be filed at different times but must include a copy

of the same temporary labor certification. Each petition must reference all previously filed petitions associated with that temporary labor certification. All H–2A and H–2B petitions on behalf of workers who are not from a country that has been designated as a participating country in accordance with paragraphs (h)(5)(i)(F)(*1*) or (h)(6)(i)(E)(*1*) of this section must name all the workers in the petition who fall within these categories. All H–2A and H–2B petitions must state the nationality of all beneficiaries, whether or not named, even if there are beneficiaries from more than one country.

(iv) [Reserved]

* * * * *

(6) * * *

(i) *Petition.* (A) *H–2B nonagricultural temporary worker.* An H–2B nonagricultural temporary worker is an alien who is coming temporarily to the United States to perform temporary services or labor without displacing qualified United States workers available to perform such services or labor and whose employment is not adversely affecting the wages and working conditions of United States workers.

(B) *Denial or revocation of petition upon a determination that fees were collected from alien beneficiaries.* As a condition of approval of an H–2B petition, no job placement fee or other compensation (either direct or indirect) may be collected at any time, including before or after the filing or approval of the petition, from a beneficiary of an H–2B petition by a petitioner, agent, facilitator, recruiter, or similar employment service as a condition of an offer or condition of H–2B employment (other than the lower of the actual cost or fair market value of transportation to such employment and any government-mandated passport, visa, or inspection fees, to the extent that the passing of such costs to the beneficiary is not prohibited by statute, unless the employer, agent, facilitator, recruiter, or similar employment service has agreed with the beneficiary that it will pay such costs and fees).

(*1*) If USCIS determines that the petitioner has collected or entered into an agreement to collect such fee or compensation, the H–2B petition will be denied or revoked on notice, unless the petitioner demonstrates that, prior to the filing of the petition, either the petitioner reimbursed the beneficiary in full for such fees or compensation or the agreement to collect such fee or compensation was terminated before the fee or compensation was paid by the beneficiary.

(*2*) If USCIS determines that the petitioner knew or should have known at the time of filing the petition that the beneficiary has paid or agreed to pay any agent, facilitator, recruiter, or similar employment service as a condition of an offer of the H–2B employment, the H–2B petition will be denied or revoked on notice unless the petitioner demonstrates that, prior to filing the petition, either the petitioner or the agent, facilitator, recruiter, or similar employment service reimbursed the beneficiary in full for such fees or compensation or the agreement to collect such fee or compensation was terminated before the fee or compensation was paid by the beneficiary.

(*3*) If USCIS determines that the beneficiary paid the petitioner such fees or compensation as a condition of an offer of H–2B employment after the filing of the H–2B petition, the petition will be denied or revoked on notice.

(*4*) If USCIS determines that the beneficiary paid or agreed to pay the agent, facilitator, recruiter, or similar employment service such fees or compensation after the filing of the H–2B petition and that the petitioner knew or had reason to know of the payment or agreement to pay, the petition will be denied or revoked unless the petitioner demonstrates that the petitioner or agent, facilitator, recruiter, or similar employment service reimbursed the beneficiary in full, that the parties terminated any agreement to pay before the beneficiary paid the fees or compensation, or that the petitioner has notified DHS within 2 work days of obtaining knowledge, in a manner specified in a notice published in the **Federal Register**.

(C) *Effect of petition revocation* Upon revocation of an employer's H–2B petition based upon paragraph (h)(6)(i)(B) of this section, the alien beneficiary's stay will be authorized and the beneficiary will not accrue any period of unlawful presence under section 212(a)(9) of the Act (8 U.S.C. 1182(a)(9)) for a 30-day period following the date of the revocation for the purpose of departure or extension of stay based upon a subsequent offer of employment. The employer shall be liable for the alien beneficiary's reasonable costs of return transportation to his or her last place of foreign residence abroad, unless such alien obtains an extension of stay based on an approved H–2B petition filed by a different employer.

(D) *Reimbursement as condition to approval of future H–2B petitions. (1) Filing subsequent H–2B petitions within 1 year of denial or revocation of previous H–2B petition.* A petitioner filing an H–2B petition within 1 year after a decision denying or revoking on notice an H–2B petition filed by the same petitioner on the basis of paragraph (h)(6)(i)(B) of this section must demonstrate to the satisfaction of USCIS, as a condition of the approval of the later petition, that the petitioner or agent, facilitator, recruiter, or similar employment service reimbursed in full each beneficiary of the denied or revoked petition from whom a prohibited fee was collected or that the petitioner has failed to locate each such beneficiary despite the petitioner's reasonable efforts to locate them. If the petitioner demonstrates to the satisfaction of USCIS that each such beneficiary was reimbursed in full, such condition of approval shall be satisfied with respect to any subsequently filed H–2B petitions, except as provided in paragraph (h)(6)(i)(D)(*2*) of this section. If the petitioner demonstrates to the satisfaction of USCIS that it has made reasonable efforts to locate but has failed to locate each such beneficiary within 1 year after the decision denying or revoking the previous H–2B petition on the basis of paragraph (h)(6)(i)(B) of this section, such condition of approval shall be deemed satisfied with respect to any H–2B petition filed 1 year or more after the denial or revocation. Such reasonable efforts shall include contacting all of each such beneficiary's known addresses.

(2) *Effect of subsequent denied or revoked petitions.* An H–2B petition filed by the same petitioner subsequent to a denial under paragraph (h)(6)(i)(B) of this section shall be subject to the condition of approval described in paragraph (h)(6)(i)(D)(*1*) of this section, regardless of prior satisfaction of such condition of approval with respect to a previously denied or revoked petition.

(E) *Eligible countries.* (*1*) H–2B petitions may be approved for nationals of countries that the Secretary of Homeland Security has designated as participating countries, with the concurrence of the Secretary of State, in a notice published in the **Federal Register**, taking into account factors, including but not limited to:

(*i*) The country's cooperation with respect to issuance of travel documents for citizens, subjects, nationals and residents of that country who are subject to a final order of removal;

(*ii*) The number of final and unexecuted orders of removal against citizens, subjects, nationals, and residents of that country;

(*iii*) The number of orders of removal executed against citizens, subjects,

nationals and residents of that country; and

(*iv*) Such other factors as may serve the U.S. interest.

(*2*) A national from a country not on the list described in paragraph (h)(6)(i)(E)(*1*) of this section may be a beneficiary of an approved H–2B petition upon the request of a petitioner or potential H–2B petitioner, if the Secretary of Homeland Security, in his sole and unreviewable discretion, determines that it is in the U.S. interest for that alien to be a beneficiary of such petition. Determination of such a U.S. interest will take into account factors, including but not limited to:

(*i*) Evidence from the petitioner demonstrating that a worker with the required skills is not available from among foreign workers from a country currently on the list described in paragraph (h)(6)(i)(E)(*1*) of this section;

(*ii*) Evidence that the beneficiary has been admitted to the United States previously in H–2B status;

(*iii*) The potential for abuse, fraud, or other harm to the integrity of the H–2B visa program through the potential admission of a beneficiary from a country not currently on the list; and

(*iv*) Such other factors as may serve the U.S. interest.

(*3*) Once published, any designation of participating countries pursuant to paragraph (h)(6)(i)(E)(*1*) of this section shall be effective for one year after the date of publication in the **Federal Register** and shall be without effect at the end of that one-year period.

(F) *Petitioner agreements and notification requirements.* (*1*) *Agreements.* The petitioner agrees to notify DHS, within 2 work days, and beginning on a date and in a manner specified in a notice published in the **Federal Register** if: An H–2B worker fails to report for work within 5 work days after the employment start date stated on the petition; the nonagricultural labor or services for which H–2B workers were hired were completed more than 30 days early; or an H–2B worker absconds from the worksite or is terminated prior to the completion of the nonagricultural labor or services for which he or she was hired. The petitioner also agrees to retain evidence of such notification and make it available for inspection by DHS officers for a one-year period beginning on the date of the notification.

(*2*) *Abscondment.* An H–2B worker has absconded if he or she has not reported for work for a period of 5 consecutive work days without the consent of the employer.

(ii) * * *

(B) *Nature of petitioner's need.* Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

* * * * *

(iv) * * *

(A) *Secretary of Labor's determination.* An H–2B petition for temporary employment in the United States, except for temporary employment on Guam, shall be accompanied by an approved temporary labor certification from the Secretary of Labor stating that qualified workers in the United States are not available and that the alien's employment will not adversely affect wages and working conditions of similarly employed United States workers.

* * * * *

(D) *Employment start date.* Beginning with petitions filed for workers for fiscal year 2010, an H–2B petition must state an employment start date that is the same as the date of need stated on the approved temporary labor certification. A petitioner filing an amended H–2B petition due to the unavailability of originally requested workers may state an employment start date later than the date of need stated on the previously approved temporary labor certification accompanying the amended H–2B petition.

(v) * * *

(A) *Governor of Guam's determination.* An H–2B petition for temporary employment on Guam shall be accompanied by an approved temporary labor certification issued by the Governor of Guam stating that qualified workers in the United States are not available to perform the required services, and that the alien's employment will not adversely affect the wages and working conditions of United States resident workers who are similarly employed on Guam.

(C) [Reserved]

(D) [Reserved]

* * * * *

(vi) * * *

(A) *Labor certification.* An approved temporary labor certification issued by the Secretary of Labor or the Governor of Guam, as appropriate;

(B) [Reserved]

(C) *Alien's qualifications.* In petitions where the temporary labor certification application requires certain education, training, experience, or special requirements of the beneficiary who is present in the United States, documentation that the alien qualifies for the job offer as specified in the application for such temporary labor certification. This requirement also applies to the named beneficiary who is abroad on the basis of special provisions stated in paragraph (h)(2)(iii) of this section;

* * * * *

(viii) *Substitution of beneficiaries.* Beneficiaries of H–2B petitions that are approved for named or unnamed beneficiaries who have not been admitted may be substituted only if the employer can demonstrate that the total number of beneficiaries will not exceed the number of beneficiaries certified in the original temporary labor certification. Beneficiaries who were admitted to the United States may not be substituted without a new petition accompanied by a newly approved temporary labor certification.

(A) To substitute beneficiaries who were previously approved for consular processing but have not been admitted with aliens who are outside of the United States, the petitioner shall, by letter and a copy of the petition approval notice, notify the consular office at which the alien will apply for a visa or the port of entry where the alien will apply for admission. The petitioner shall also submit evidence of the qualifications of beneficiaries to the consular office or port of entry prior to issuance of a visa or admission, if applicable.

(B) To substitute beneficiaries who were previously approved for consular processing but have not been admitted with aliens who are currently in the United States, the petitioner shall file an amended petition with fees at the USCIS Service Center where the original petition was filed, with a copy of the original petition approval notice, a statement explaining why the substitution is necessary, evidence of the qualifications of beneficiaries, if applicable, evidence of the beneficiaries' current status in the United States, and evidence that the number of beneficiaries will not exceed the number allocated on the approved temporary labor certification, such as employment records or other documentary evidence to establish that the number of visas sought in the amended petition were not already issued. The amended petition must retain a period of employment within the same half of the same fiscal year as the original petition. Otherwise, a new

temporary labor certification issued by DOL or the Governor of Guam and subsequent H–2B petition are required.

(ix) *Enforcement.* The Secretary of Labor may investigate employers to enforce compliance with the conditions of a petition and Department of Labor-approved temporary labor certification to admit or otherwise provide status to an H–2B worker.

* * * * *

(8) * * *

(ii) * * *

(A) Each alien issued a visa or otherwise provided nonimmigrant status under sections 101(a)(15)(H)(i)(b), 101(a)(15)(H)(i)(c), or 101(a)(15)(H)(ii) of the Act shall be counted for purposes of any applicable numerical limit, unless otherwise exempt from such numerical limit. Requests for petition extension or extension of an alien's stay shall not be counted for the purpose of the numerical limit. The spouse and children of principal H aliens are classified as H–4 nonimmigrants and shall not be counted against numerical limits applicable to principals..

* * * * *

(9) * * *

(i) * * *

(B) The petition may not be filed or approved earlier than 6 months before the date of actual need for the beneficiary's services or training, except that an H–2B petition for a temporary nonagricultural worker may not be filed or approved more than 120 days before the date of the actual need for the beneficiary's temporary nonagricultural services that is identified on the temporary labor certification.

(iii) * * *

(B) *H–2B petition.* (1) The approval of the petition to accord an alien a classification under section 101(a)(15)(H)(ii)(b) of the Act shall be valid for the period of the approved temporary labor certification.

* * * * *

(10) * * *

(ii) *Notice of denial.* The petitioner shall be notified of the reasons for the denial and of the right to appeal the denial of the petition under 8 CFR part 103. The petition will be denied if it is determined that the statements on the petition were inaccurate, fraudulent, or misrepresented a material fact. There is no appeal from a decision to deny an extension of stay to the alien.

(11) * * *

(i) * * *

(A) * * * However, H–2A and H–2B petitioners must send notification to DHS pursuant to paragraphs (h)(5)(vi) and (h)(6)(i)(F) of this section respectively.

* * * * *

(iii) * * *

(A) * * *

(*2*) The statement of facts contained in the petition or on the application for a temporary labor certification was not true and correct, inaccurate, fraudulent, or misrepresented a material fact: or

* * * * *

(13) * * *

(i) * * *

(B) When an alien in an H classification has spent the maximum allowable period of stay in the United States, a new petition under sections 101(a)(15)(H) or (L) of the Act may not be approved unless that alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the time limit imposed on the particular H classification. Brief trips to the United States for business or pleasure during the required time abroad are not interruptive, but do not count towards fulfillment of the required time abroad. A certain period of absence from the United States of H–2A and H–2B aliens can interrupt the accrual of time spent in such status against the 3-year limit set forth in 8 CFR 214.2(h)(13)(iv). The petitioner shall provide information about the alien's employment, place of residence, and the dates and purposes of any trips to the United States during the period that the alien was required to reside abroad.

* * * * *

(iv) *H–2B and H–3 limitation on admission.* An H–2B alien who has spent 3 years in the United States under section 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status, or be readmitted to the United States under sections 101(a)(15)(H) and/or (L) of the Act unless the alien has resided and been physically present outside the United States for the immediately preceding 3 months. An H–3 alien participant in a special education program who has spent 18 months in the United States under sections 101(a)(15)(H) and/or (L) of the Act; and an H–3 alien trainee who has spent 24 months in the United States under sections 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status, or be readmitted to the United States under sections 101(a)(15)(H) and/or (L) of the Act unless the alien has resided and been physically present outside the United States for the immediate prior 6 months.

(v) *Exceptions.* The limitations in paragraphs (h)(13)(iii) through (h)(13)(iv) of this section shall not apply to H–1B, H–2B, and H–3 aliens who did not reside continually in the United States and whose employment in the United States was seasonal or intermittent or was for an aggregate of 6 months or less per year. In addition, the limitations shall not apply to aliens who reside abroad and regularly commute to the United States to engage in part-time employment. An absence from the United States can interrupt the accrual of time spent as an H–2B nonimmigrant against the 3-year limit. If the accumulated stay is 18 months or less, an absence is interruptive if it lasts for at least 45 days. If the accumulated stay is greater than 18 months, an absence is interruptive if it lasts for at least two months. To qualify for this exception, the petitioner and the alien must provide clear and convincing proof that the alien qualifies for such an exception. Such proof shall consist of evidence such as arrival and departure records, copies of tax returns, and records of employment abroad.

* * * * *

## PART 215—CONTROLS OF ALIENS DEPARTING FROM THE UNITED STATES

■ 6. The authority citation for part 215 continues to read as follows:

**Authority:** 8 U.S.C. 1104; 1184; 1185 (pursuant to Executive Order 13323, published January 2, 2004), 1365a note, 1379, 1731–32.

■ 7. Section 215.9 is revised to read as follows:

### § 215.9 Temporary Worker Visa Exit Program.

An alien admitted on certain temporary worker visas at a port of entry participating in the Temporary Worker Visa Exit Program must also depart at the end of his or her authorized period of stay through a port of entry participating in the program and must present designated biographic and/or biometric information upon departure. U.S. Customs and Border Protection will publish a Notice in the **Federal Register** designating which temporary workers must participate in the Temporary Worker Visa Exit Program, which ports of entry are participating in the program, which biographical and/or biometric information would be required, and the format for submission of that information by the departing designated temporary workers.

**Paul A. Schneider,**

*Deputy Secretary.*

[FR Doc. E8–30094 Filed 12–18–08; 8:45 am]

**BILLING CODE 4410–10–P**


Federal Register

**Friday,**

**December 19, 2008**

# Part VIII

# Department of Labor

## Veterans' Employment and Training Service

**20 CFR Part 1010**

**Priority of Service for Covered Persons; Final Rule**

## DEPARTMENT OF LABOR

### Veterans' Employment and Training Service

### 20 CFR Part 1010

**RIN 1293–AA15**

### Priority of Service for Covered Persons

**AGENCY:** Veterans' Employment and Training Service, Labor

**ACTION:** Final rule.

**SUMMARY:** The Veterans' Employment and Training Service (VETS) of the Department of Labor (Department or DOL) is issuing this final rule to implement priority of service in qualified job training programs prescribed in section 2(a)(1) of the Jobs for Veterans Act (JVA). DOL issued a notice of proposed rulemaking (NPRM) on August 15, 2008 outlining proposed provisions implementing priority of service for covered persons in qualified DOL job training programs.

**DATES:** *Effective Date:* The final rule will become effective on January 19, 2009.

**FOR FURTHER INFORMATION CONTACT:** Pamela Langley, Chief, Division of Grant Programs, Veterans' Employment and Training Service, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–1312, Washington, DC 20210, *Langley.Pamela@dol.gov*, (202) 693–4708 (this is not a toll-free number) or (202) 693–4760 (TTY/TDD).

**SUPPLEMENTARY INFORMATION:** This preamble contains three sections. Section I provides general background information on the development of the final rule. Section II discusses the comments received on the NPRM and the related regulatory provisions included in the final rule. Section III addresses the administrative requirements for the final rule, as mandated by statute and executive order.

## I. Background

On August 15, 2008, the Department published an NPRM (73 FR 48086) proposing regulations to implement priority of service in qualified job training programs prescribed in section 2(a)(1) of the JVA. We invited comments for a 60-day period, which closed on October 14, 2008. All comments received during the comment period have been posted on *www.regulations.gov*.

On November 7, 2002, President Bush signed the Jobs for Veterans Act, Public Law (Pub. L.) 107–288 (Nov. 7, 2002). One provision of the JVA, codified at 38 United States Code (U.S.C.) Section 4215, creates a priority of service requirement for covered persons in qualified DOL job training programs. Since the passage of the Act, the Department has provided policy guidance to the workforce investment system regarding the implementation of priority of service, including the Department's Employment and Training Administration (ETA) issuance of Training and Employment Guidance Letter (TEGL) No. 05–03 in September 2003. TEGL No. 05–03 applies to a majority of the job training programs impacted by priority of service. On December 22, 2006, President Bush signed the Veterans' Benefits, Health Care, and Information Technology Act of 2006 (Pub. L. 109–461). Section 605 of that statute requires the Department to implement priority of service via regulation. The final rule implements priority of service in response to that requirement.

The JVA provides that veterans and eligible spouses of veterans (as defined in § 1010.110) are identified as covered persons and are entitled to priority over non-covered persons for the receipt of employment, training, and placement services provided under new or existing qualified job training programs, notwithstanding any other provision of law. The JVA defines qualified job training programs as ''any workforce preparation, development or delivery program or service that is directly funded, in whole or in part, by the Department.'' 38 U.S.C. 4215(a)(2). Currently, such programs are offered by many agencies within the Department, including, but not limited to, ETA, VETS, the Women's Bureau, and the Office of Disability Employment Policy (ODEP).

The JVA, and the priority of service it requires, is an important acknowledgment of the sacrifices of the men and women who have served in the U.S. armed forces. The Department's strategic vision for priority of service to covered persons honors veterans and eligible spouses of veterans as our ''heroes at home'' and envisions that DOL-funded employment and training programs, including the publicly-funded workforce investment system, will identify, inform and deliver comprehensive services to covered persons as part of strategic workforce development activities across the country. Veterans and eligible spouses possess unique attributes and contribute greatly in the workplace. They are an important source of highly skilled and experienced talent and play an important role in regional workforce development strategies. They are highly sought after by employers and they make excellent employees. Implementation of priority of service is designed to provide covered persons with clear entry points into high-growth, high wage civilian jobs and easily accessible post-secondary education and training to support their advancement along career pathways which will benefit regional economies.

One-Stop Career Centers are the delivery point for a significant percentage of qualified job training programs and services covered by the JVA and are required to implement priority of service. All One-Stop Career Centers should have clear strategies for providing veterans and eligible spouses of veterans with the highest quality of service at every phase of services offered. This can range from basic functions of the One-Stop System, such as assistance with job search and identification of needed skills, to more customized initiatives such as creating career pathways, with corresponding competency assessments and training opportunities, or other strategies which allow covered persons to advance their careers in high growth sectors of the economy. The Department expects that the One-Stop System will draw on all available resources to support the reemployment needs of covered persons.

Veterans and their eligible spouses have specific needs and concerns that can be addressed by DOL-funded employment and training program providers developing strategies for serving covered persons. When military service has ended, a major concern for many veterans is getting a good job. Some veterans may experience particular difficulty, both in finding employment and in readjusting to civilian work environments. DOL-funded employment and training programs should work with employers to ensure that the value a veteran brings to the table is understood and to address any concerns that employers may have about hiring veterans.

Those veterans who have sustained injuries or illnesses as a result of their military service may require additional support in developing skills to secure employment. Similarly, those spouses of recently separated veterans who are eligible for priority also may need employability development assistance. DOL, the Department of Defense and the Department of Veterans Affairs are collaborating in closely monitoring the rehabilitation of wounded and injured veterans assessing their job readiness and assisting their preparations for civilian employment. In those instances in which civilian employment does not appear to be a realistic objective for the

veteran, employability development activities should, if appropriate, focus upon the spouse who is eligible for priority. These ''heroes at home'' should be immediately provided the full array of employment and training services to ensure that they make a successful transition into employment that supports their economic independence.

In addition to assisting recently separated veterans and eligible spouses to meet the challenges of their specific situation, priority of service also is intended to assist those veterans and eligible spouses for whom military service concluded some time ago. These veterans and eligible spouses are likely to have significant civilian labor market experience. However, they may experience dislocation or find that they are underemployed relative to their skills and experience. Priority of service is intended to assist all veterans and eligible spouses to improve their civilian sector employment and earnings.

Priority of service does not change a program's intended functions; covered persons still need to meet all statutory eligibility and program requirements for participation. Some DOL-funded employment and training programs have only general program eligibility requirements and do not statutorily target specific groups. These programs require only a straightforward implementation of priority of service. However, some DOL-funded employment and training programs do carry existing statutory targeting provisions that must be taken into account when applying priority of service. The purpose of this final rule is to articulate how priority of service is to be applied across all existing and new qualified DOL job training programs.

## II. Discussion of the Comments and Regulatory Provisions

*Summary of Comments*

The Department received 28 submissions commenting on the NPRM by the close of the comment period. All comments were carefully reviewed. Of the 28 comments, 17 were from organizations with an interest in veterans' employment services. Of the 17 comments from organizations, 13 were from State Workforce Agencies, one was from a State veterans' commission, one was from a local Workforce Investment Board (WIB), one was from a private non-profit service provider and one was from a national association of State Workforce Agencies. Of the 11 comments from individuals, three identified themselves as employees of State Workforce Agencies.

A number of comments supported the proposed rule for implementing priority of service to veterans and eligible spouses of veterans in all employment and training programs funded in whole or in part by DOL. We discuss these comments here, but otherwise have no formal response to them. One commenter suggested that many veterans experience extreme hardships financially and physically due to their service to our country. This commenter suggested that veterans deserve to receive priority assistance to reintegrate back into civilian life. A second commenter was supportive of informing veterans of their entitlement to priority of service at the point of entry. A third commenter pointed out that priorities for veterans already exist in DOL programs. Two other commenters fully supported DOL efforts to ensure that veterans and their eligible spouses receive priority access to employment, training, and placement services. Another commenter agreed with DOL's efforts to ensure covered persons receive priority to employment, training, and placement services. This commenter indicated that his State already has a process for veterans to identify themselves upon check-in, with the help of front-line staff.

In addition to the comments that supported the proposed rule, nearly all the comments offered suggestions to facilitate the provision of priority of service to veterans and other eligible persons. All relevant comments are discussed below.

*Discussion of Comments on Subpart A—Purpose and Definitions*

This subpart addresses the purpose and scope of these regulations (§ 1010.100) and the definitions that apply for the purpose of these regulations (§ 1010.110). We received no comments in reference to § 1010.100 but we did receive some comments regarding § 1010.110. Those comments and our responses follow.

*Defining Key Terms (§ 1010.110)*

Veteran

*Comment:* Seven comments suggested that program administration by the States would be facilitated if the definition of veteran that appears at 38 U.S.C. 4211(4) were substituted in place of the definition that appears at 38 U.S.C. 101(2) and is specified in § 1010.110 of these regulations. One commenter stated that in his opinion expanding the definition to give priority of service to non-disabled veterans who served less than 180 days would dilute the concept of priority of service and result in the diversion of priority away from those veterans who truly deserve priority in an environment of limited resources.

*Response:* We have not changed the definition of ''veteran'' for purposes of providing priority to DOL-funded employment and training programs because we are bound by law to use the definition proposed. In our view, Congress clearly intended that priority be made available to a broad category of former service members. The statute is quite clear at 38 U.S.C. 4215(a)(1)(A) that ''covered person'' for purposes of priority includes a ''veteran'' rather than the more narrow definition of ''eligible veteran'' that is applied, for example, to statutory reporting requirements for Wagner-Peyser State Grants and to program eligibility requirements for Jobs for Veterans State Grants. Since section 4215 does not specifically define the term ''veteran'' for purposes of applying the priority, we are required to look to title 38's general definition of that term in section 101. *See, Florida Dept. of Banking and Finance* v. *Board of Governors of the Federal Reserve System,* 800 F. 2d 1534, 1536 (11th Cir 1986) (''It is an elementary precept of statutory construction that the definition of a term in the definitional section of a statute controls the construction of that term wherever it appears throughout the statute.''). The definition we proposed in § 1010.110, comes from 38 U.S.C. 101(2) which provides the broad definition of ''veteran'' that is required to be used for purposes of title 38.

We recognize that the definition of veteran to be applied for the purposes of the priority differs from and is broader than the definition of eligible veteran, which is applied for program eligibility for Jobs for Veterans State Grants, but we also note that section 4215 and these regulations do not change eligibility for such services nor for any other program. Section 1010.210(b) of this rule clearly provides that covered persons still must meet the statutory eligibility requirements applicable to qualified job training programs. Similarly, the definition of veteran to be applied for the purposes of the priority does not alter the statutory reporting requirements for Wagner-Peyser State Grants, which require application of the more narrowly defined definition of eligible veteran.

While we are unable to change the definition of veteran for purposes of the priority, we acknowledge the concerns of several commenters that the broad definition used in § 1010.110 fails to take into account such factors as length of service, nature of separation, combat

experience, etc. We have determined that it would impose undue burdens on the workforce system and on covered persons to establish further priorities among covered persons at this time (see discussion of § 1010.310 below). Therefore, we intend to focus on implementing the regulations as proposed, while anticipating that these types of factors will inform our consideration of additional priorities among covered persons in the future.

*Comment:* Four comments pointed out that program administration by the States would be facilitated by using one definition common to all, rather than the several different definitions of ''veteran'' in use for various DOL and other federally funded programs.

*Response:* A benefit of using a definition of veteran that replicates the definition in 38 U.S.C. 101(2) is that it is the one that is most compatible with the affected DOL programs' respective other eligibility criteria. In effect, adoption of this definition of veteran is expected to result in the maximum feasible amount of the commonality or standardization that is recommended by these comments.

With respect to the different definitions of veteran established by statute for eligibility for certain workforce programs, such as the broad definition established for eligibility under the Workforce Investment Act (WIA) and the narrow definition established for eligibility under the Jobs for Veterans State Grants, the Department does not have the authority to revise these definitions through these regulations. The Department is aware that Government Accounting Office (GAO) recently recommended (GAO–07–594) that the Congress consider standardizing the veteran definition applicable for eligibility in all workforce programs.

*Comment:* Three comments cited the need to clarify the veteran definition in the regulations to assure that it is understood that an individual must serve a period of ''active duty'' to be considered a ''veteran,'' and that National Guard members and Reservists may be considered ''veterans'' if they served on active duty.

*Response:* We agree with the commenters that the rule will be improved by clarifying the eligibility for priority of National Guard members and Reservists who served on active duty. As described above, we look to 38 U.S.C. 101 for the definition of the term ''veteran'' because it is not specifically defined in sec. 4215. Among the requirements to qualify as a veteran under sec. 101(2), an individual must have served in ''active military, naval or air service.'' Participation in such service is determined by the standards in definitions at section 101(21), (22), (23) and (24). Those subsections define ''active military, naval or air service'' and the meanings of active duty, active duty for training, and inactive duty for training relevant to National Guard and Reserve members. These provisions establish that full-time National Guard and Reserve duty, other than full-time duty for training purposes, qualifies as active duty. Accordingly, we are revising the definition of ''veteran'' in § 1010.110 by adding a new sentence at the end to state: ''Active service includes full-time duty in the National Guard or a Reserve component, other than full-time duty for training purposes.''

*Comment:* Other comments on the definition of ''veteran'' questioned whether it matters if National Guard members served domestically or overseas or if an individual left the armed forces prior to completion of training.

*Response:* In both cases, these circumstances are irrelevant to the determination of veteran status for purposes of applying priority. Under § 1010.110, as amended in the final rule, the location of the service of a National Guard member, a member of the Reserve forces, or for that matter, by a member of the regular Armed Forces, is irrelevant with respect to his or her status as a veteran. The determining factor is whether the person has a qualifying period of ''active duty'' as provided in § 1010.110. Similarly, it is the nature of the discharge (other than dishonorable) not the details of the person's service career that is the determining factor in the definition of ''veteran.''

*Comment:* One comment proposed simplifying the definition of ''veteran'' to, ''any veteran with a DD–214 with a discharge status other than dishonorable is a covered person.''

*Response:* We have determined that such a change would not be beneficial and we have not revised the definition of veteran. It would codify in regulations reliance upon a single document, which could be replaced or change over time and which may not be the only reliable source for verifying veteran status. As discussed below in the response to a comment on § 1010.300, DOL intends to identify supplementary documents that provide equivalent verification of veteran status and to establish in policy guidance their acceptability for this purpose. That guidance is expected to be revised over time as the agencies responsible for maintaining the supplementary documentation modify their procedures. Codification of the DD–214 in these regulations as the sole criterion for veteran status would preclude this flexibility and impose practical burdens, both upon the persons intended to be the beneficiaries of this statute and the agencies that administer the affected programs.

Eligible Spouse

Five comments suggested that, in the final rule, the Department should add to the list of ''covered persons'' defined in section 1010.110 the spouses of persons who died while on active military duty.

*Response:* DOL is sympathetic to that proposal but finds no evidence that Congress intended the definition of ''eligible spouse'' enacted in the Jobs for Veterans Act to be interpreted to include the spouses of those who died while on active duty. The law clearly delineates the circumstances in which a spouse may qualify as a covered person:

(1) Any veteran who died of a service-connected disability;

(2) Any member of the Armed Forces serving on active duty who, at the time of application for the priority, is listed in one or more of the following categories and has been so listed for a total of more than 90 days:

(i) Missing in action;

(ii) Captured in line of duty by a hostile force; or

(iii) Forcibly detained or interned in line of duty by a foreign government or power;

(3) Any veteran who has a total disability resulting from a service-connected disability, as evaluated by the Department of Veterans Affairs;

(4) Any veteran who died while a disability, as indicated in paragraph (3) of this section, was in existence.

From this list, we can only infer that had the statute intended to cover the spouses of service members who died while on active duty, it would have done so explicitly.

*Comment:* One comment requested further clarification as to what defines a ''spouse'' by asking whether State law, Federal law, or military law is the statutory authority, and also asked the corollary question about documentation that would be required to prove the spouse status.

*Response:* Existing Departmental policy guidance to the States regarding programs affected by the priority of service regulation gives the States the authority to determine marital status issues in accordance with State law, unless the relevant Federal law governing a program is prescriptive in those respects, and also, therefore, to determine the appropriate form(s) of

documentation required as proof of eligibility for services or benefits that are based on marital status. We think it unnecessary to embed such guidance in these regulations.

*Comment:* One comment stated that only a spouse with U.S. citizenship married to the veteran at the time of discharge or retirement should be eligible for assistance.

*Response:* The JVA does not exclude from eligibility spouses who were not citizens at the time that the veteran was discharged or retired, nor does it stipulate that a spouse had to be married to the veteran at the time of his or her discharge or retirement. Therefore, the Department sees no compelling reason to deny assistance to any spouse on either basis. However, covered persons are required to meet all program eligibility requirements, which may include legal authorization to engage in employment.

*Comment:* One comment inquired about any time limits that apply to the ''eligible spouse'' status, and also about the impact of re-marriage following death of the veteran on the eligibility of the widow(er) to be considered a covered person.

*Response:* Although we are not revising the rule in response this comment, we appreciate the comment, recognize the need to clarify through policy guidance the distinctions identified below and we intend to do so. Criteria (1) and (4) of the eligible spouse definition (spouse of a veteran who died of a service-connected disability or while a service-connected total disability was in existence) clearly imply that the spouse becomes eligible under those two criteria upon the death of the veteran. The JVA does not include a disqualification clause pertaining to re-marriage following the death of the veteran and we see no reason to assume that one was intended. Similarly, if a widow(er) who qualifies under either of those criteria does not lose eligibility through remarriage, we cannot envision any other type of time limit that might apply.

In contrast, criteria (2) and (3) of the eligible spouse definition (spouse of a service member who is missing in action, etc., or of a veteran who has a total disability resulting from a service-connected disability) clearly imply that the eligibility of the spouse is based upon the status of a service member or veteran who is still living. In the case of criterion (2), which is based upon the status of an active duty service member, the statutory wording makes it clear that the spouse is eligible only during the time that the service member remains in that status. Similarly, in the case of criterion (3), which is based upon the disability status of a living veteran, it is clear that the statute intends to confer eligibility on the spouse based on a marriage that is currently in effect. Therefore, if a spouse who is eligible under criterion (3) becomes divorced from the disabled veteran, the spouse would lose the eligibility to priority at that point. Similarly, if a spouse is eligible on the basis of a total disability, as defined by criterion (3), and the veteran were to lose the total service-connected disability rating, the spouse would lose the eligibility to priority at that point.

*Discussion of Comments on Subpart B—Understanding Priority of Service*

This subpart addresses what priority of service is (§ 1010.200), the programs affected by priority of service (§ 1010.210), the implementation of priority of service by recipients (§ 1010.220), the responsibilities of States and their subdivisions (§ 1010.230), the monitoring of priority of service (§ 1010.240), and the possibility of waiving priority of service (§ 1010.250). We received no comments on § 1010.230 or § 1010.250; but we did receive comments on the other four sections of this subpart. Those comments and our responses follow.

Identifying Qualified Job Training Programs (§ 1010.210)

*Comment:* Two of the comments raised questions regarding the application of priority of service to non-DOL program partners in One-Stop Career Centers. One commenter requested a clarification of how priority of service applies to any non-DOL program partner and a second commenter suggested the inclusion of Vocational Rehabilitation programs among the programs required to provide priority of service.

*Response:* The Department will not modify this section in response to these comments because the priority only applies to qualified job training programs funded in whole or in part by the Department of Labor, as defined in sec. 4215(a)(2). The Department does not have the authority to impose priority of service on programs funded by non-DOL sources. However, the Department, through policy guidance and technical assistance, will encourage all partners in One-Stop Career Centers to focus on providing services to veterans as a standard operating procedure within their respective service delivery strategies.

*Comment:* One comment questioned why Unemployment Insurance (UI) was not included in the regulations as a program impacted by priority of service, apparently referring to the fact that UI recipients who are considered likely to exhaust their eligibility for UI benefits are referred to employment services through a process known as worker profiling.

*Response:* The Department did not include UI because it is an income benefit program and not a qualified job training program, as defined in sec. 4215(a)(2) of the JVA. With respect to worker profiling, the Department issued guidance following the passage of the JVA (Training and Employment Guidance Letter No. 5–03, as well as program-specific guidance and technical assistance) explaining that priority of service requires that veterans, whose likelihood of benefit exhaustion qualifies them for referral to employment services, must be referred to employment services prior to or in conjunction with the referral of non-veterans. That policy remains in effect and is not affected by these regulations.

Implementing Priority of Service (§ 1010.220)

Funding Constraints

*Comment:* Two comments expressed concerns about providing priority of service in a limited funding environment, particularly if large numbers of additional veterans choose to access the services of the One-Stop Career system. One commenter asserted that more resources for all DOL core workforce programs will be required to ensure that veterans and other workers receive the help they need. A second commenter expressed particular concern about the current resource capacity for their Management Information System.

*Response:* The Department acknowledges that the publicly-funded workforce investment system is operating under a tight Federal budget, which means that Federal resources must be used strategically to meet a variety of competing local, regional, and State priorities. Given that priority of service has been in effect since 2003 and transitioning veterans have been provided information on accessing One-Stop Career Centers through the Transition Assistance Program for many years, DOL does not anticipate a significant increase in veteran customers. With regard to new reporting requirements associated with this rule and the companion Information Collection Request (ICR) package (ICR Reference Number 200805–1205–001), DOL acknowledges that the new data to be collected will require some changes. However, DOL has attempted to

minimize the changes required by utilizing, to the maximum extent possible, existing data collection processes to collect the new data.

Service Delivery Processes

*Comment:* A number of comments addressed the provision of priority of service at the point of entry to the workforce system. Three commenters indicated a need to assist front-line staff in applying regulations and policies at the point of entry and called for a more detailed explanation of the regulations and their impact on One-Stop operations. Other commenters requested guidance on how to handle priority of service affirmation during self-registration, whether at program operators' sites or from remote locations. One commenter pointed out that modifications to electronic technologies may be required to ensure the same point of entry data being collected in physical locations is also collected for those accessing services remotely.

*Response:* DOL intends to provide extensive guidance and technical assistance on implementing priority of service under this rule. This may include policy guidance, webinars, question and answer documents, and highlights of best practices, and will address issues such as self-registration.

*Comment:* Several comments identified service delivery procedures that may be impacted by the regulations. One commenter stated that implementing priority of service for covered persons would be unmanageable for certain services that are usually provided through personal appointments with service provider staff and also may create bad feelings or ill-will among non-covered customers. A second commenter asked for guidance regarding the processes that State agencies could use if they have to ''bump'' a non-veteran in order to give priority to a covered person. Another commenter objected to implementing priority of service as a ''cut in line'' policy.

*Response:* It is important to note that priority of service under the JVA has been in effect since 2003 and recipients should already have policies and procedures in place to ensure priority of service to veterans. As part of implementation of this rule, recipients will need to reexamine their policies and procedures and change them if necessary to ensure priority of service is provided to covered persons. For example, program operators might consider adjusting policies to leave appointment slots open for covered persons, or designating staff to see covered persons on a walk-in basis on certain days. Regarding the creation of bad feelings or ill-will toward covered persons, customers of DOL-funded services need to be made aware which populations receive priority. Clearly posting this information is likely to decrease ill-will. DOL will provide extensive guidance and technical assistance in how to implement priority of service under this rule.

Interference With the Intent of Priority of Service

*Comment:* One comment asked what is to prevent Workforce Investment Boards from developing a plan that minimizes the participation of covered persons by placing the majority of program funds into training that might be of minimal interest to veterans, such as basic computer training and nurse's aide training.

*Response:* DOL believes this scenario is extremely unlikely to occur. First, whichever occupations are targeted by local workforce areas, covered persons would still receive priority of service. Second, local workforce areas are governed by Workforce Investment Boards (WIBs) and the majority of WIB members are representatives of business. Based on local labor market conditions, WIBs determine the industries and occupations that will be a focus for training programs. Third, since local workforce areas must meet performance targets under the Workforce Investment Act for entered employment, employment retention and average earnings, it is unlikely that they would choose occupations not in demand, as this could result in not meeting their performance goals. Finally, if selected recipients do interfere with the intent of priority of service by emphasizing occupational areas unattractive to veterans, it is likely that the unusually low rates of participation by veterans in those programs or services will be documented through reporting and remedied through monitoring and any follow-up activities determined to be warranted.

Monitoring Priority of Service (§ 1010.240)

*Comment:* One comment noted that, although the preamble of the NPRM refers to the measure mentioned in the JVA about covered persons being represented in affected programs in proportion to their incidence in the labor market, the proposed rule does not include specific performance standards related to that comparison. This commenter suggested that serving covered persons in proportion to their incidence in the labor market should be specified as a minimum achievement level for priority of service.

*Response:* The Department has concluded that it would be premature at this point to attempt to establish performance targets for priority of service in these regulations. With respect to the labor market criterion that is specified in the JVA and noted in the comment, we interpret that criterion to be primarily applicable to the overall performance of the Department in implementing priority of service at the national level. While this criterion also could be applied to the specific performance of the recipients of DOL funds, its application at lower levels is limited by the fact that the estimates of the incidence of veterans in sub-national labor markets are less statistically precise. This issue is discussed further in our response to a comment received about § 1010.320.

In light of these considerations, the Department has determined that enhanced data collection and reporting, coupled with joint monitoring, offer the most appropriate avenues currently available to ensure compliance with priority of service. Specifically, for those programs serving over 1,000 covered persons annually, data collection systems will be modified to accommodate new priority of service data elements and analysis of that information will be a key component of monitoring.

*Comment:* One comment suggested that the VETS State Directors monitor the implementation of priority of service in partnership with the State agency officials who coordinate or supervise the operations of the Jobs for Veterans State Grants program.

*Response:* While the Department is generally supportive of the type of cooperative Federal-State relations between grantor and grantees that is conceptualized in this comment, we do not believe that it is appropriate to include a requirement of this type in regulations. These regulations have established, in § 1010.240(b), that federal monitoring will be conducted jointly by a representative of the administering federal agency and a representative of VETS. We believe that the combined perspectives of these designated officials are fully adequate for federal monitoring purposes. Since states also will have their own monitoring responsibilities, we would have no objection if states exercised their option to apply the suggested approach for state monitoring purposes.

*Comment:* One comment noted that the preamble language in the NPRM stated that submission of a corrective

action plan ''will'' be required if a recipient is found not to be in compliance with the priority of service requirement, but the regulatory text itself states that a corrective action plan ''may'' be required. The commenter suggested that we change the regulatory text to require a corrective action plan.

*Response:* The Department will not change the regulation. The regulatory language is correct and it provides DOL with the authority to require a corrective action plan, when appropriate. There may be circumstances where minimal technical assistance will result in correction of a priority of service issue. Where any substantial changes to a program operator's policies or business practices are required, a formal corrective action plan will be required.

*Comment:* One comment included a number of questions related to the Department's monitoring of the implementation of and compliance with the priority of service rule. The questions include whether the joint responsibility for oversight by ETA and VETS extends to the review of the State and local plans and any impact on State grant funds if a State ignores the requirements of the rule.

*Response:* The Department believes that these concerns are adequately addressed by existing provisions of these regulations. Therefore, we do not intend to modify the rule in response to these comments. With respect to State and local planning, § 1010.230(a) requires the inclusion of priorities and procedures addressing priority of service in State plans, while § 1010.230(b) requires States to impose similar requirements for local plans. In addition, review of these plans by DOL staff as a monitoring activity is authorized by § 1010.240(a). With respect to the potential impact of non-compliance with priority of service on State grant funds, a grantee's non-compliance will be handled in accordance with the respective program's established compliance review processes, as required by § 1010.240(c).

*Discussion of Comments on Subpart C—Applying Priority of Service*

This subpart addresses identifying covered persons (§ 1010.300), applying priority of service to programs with differing eligibility requirements (§ 1010.310), reporting on priority of service (§ 320), and collecting and maintaining data on priority of service (§ 1010.330). We received comments on all four sections of this subpart. Those comments and our responses follow.

Identifying Covered Persons (§ 1010.300)

We received a number of comments about the inter-related subjects of Identifying Covered Persons (§ 1010.300) and Collecting and Maintaining Data (§ 1010.330). For ease of organization, the responses to comments are treated under those two topic areas. However, these two sections should be read in conjunction with one another. In § 1010.300, we primarily discuss when and how a covered person is identified. In § 1010.330, we provide detailed information on collection processes that occur simultaneously with that identification.

*Comment:* One comment stated that, due to a variety of factors, affected programs will not be able to enroll covered persons in numbers sufficient to attain the proportion of such persons in the labor market, unless all program operators subject to the priority of service regulations are mandated to conduct outreach efforts to recruit covered persons.

*Response:* The commenter did not provide, and the Department does not have from other sources, evidence to support the contention that affected program operators will not attract covered persons as applicants for services in the numbers equal to or in excess of their incidence in the local labor markets. In addition, the JVA does not include provisions about outreach. Therefore, other than requiring (in §§ 1010.230 and 1010.300) that program operators identify covered persons and inform them about the priority, the Department will not compel program operators through regulations to commence or enhance outreach efforts, as suggested by the commenter. However, the Department encourages all program operators to assess the adequacy of their sources of candidates for services and, if that assessment indicates that implementing outreach to covered persons would be beneficial, the Department encourages them to do so.

*Comment:* One comment suggested that State agencies should be authorized to verify covered persons' status through means other than obtaining an official copy of a DD–214 document. The commenter suggested several other available sources.

*Response:* As indicated in our prior response to a comment on § 1010.110, the Department does not oppose allowing DOL-supported program agencies to use alternative sources, such as databases maintained by State veterans affairs divisions or commissions, to verify an individual's claim of veteran's status, as long as those other sources can certify the veracity of their records and have effective procedures for matching the covered person with those records. However, addressing the specifics of such verification sources is more appropriate for policy guidance than for regulations; we intend to address that topic in detail in future guidance.

*Comment:* One comment claimed that, in order to prove his or her right to ''priority of service'' at the initial point of entry into the State Workforce Agency's network of program services, a covered person would have to provide personal information not required of non-covered persons. The commenter stated that such requirements could cause some customer satisfaction issues.

*Response:* It is the Department's intent that individuals identified as covered persons will not be required to verify their status as veterans or eligible persons at the point of entry unless they immediately undergo eligibility determination and formal enrollment in a program. To clarify that the requirement to identify covered persons at the point of entry does not imply that verification of covered person status is required at that point, a new paragraph (b) has been added to § 1010.300 of the final rule. Even in those instances in which eligibility determination and enrollment take place at the point of entry, the Department believes that the covered person should be enrolled and given immediate priority and then be permitted to follow-up subsequently with any required verification of his/her status as a covered person.

In the more common instances in which eligibility determination and enrollment do not take place at the point of entry, the only procedures applicable to covered persons at that point (i.e., assignment of a unique identifier and deciding whether or not to respond voluntarily to the questions required to be asked for EEO purposes) are minimally burdensome. In addition, those procedures are equally applicable to non-covered persons at the point of participation.

*Comment:* Two comments inquired how covered persons will be identified in a self-registration system.

*Response:* Recipients will be required to have processes by which individuals who reach the point of entry to universal access programs through electronic technologies will be provided the opportunity to indicate their covered person status. However, DOL will not require documents that verify their status (e.g., DD–214 discharge form) at this stage. However, proof of status will be required during formal

determination for program eligibility. The DD–214 discharge form is considered the ''gold standard'' document for verification purposes. However, DOL will be developing a list of acceptable alternatives that correspond to WIA definition of covered person. This will be especially important for any new documentation needed for covered spouses. Covered spouses whose eligibility is based on the disability of the veteran should receive the relevant documentation from the Department of Veterans Affairs. Covered spouses whose eligibility is based on one of the three specific statuses of an active duty service member should receive the relevant documentation from the Department of Defense.

Applying Priority of Service (§ 1010.310)

*Comment:* Several comments suggested or implied that a tiered system of sub-priorities should be established within the overall priority. For example, one comment included a detailed treatment of the nature of military discharges, e.g., honorable, other than honorable, dishonorable, bad conduct, etc., and proposed, within the universe of covered persons, institution of a tiered priority system that would reward those who are honorably discharged above all others. Another comment included a recommendation that priority of service be given first to veterans who actually served in combat zones and who were assigned to military occupational specialties directly oriented toward combat, such as infantry. A third comment expressed support for priority for service-connected disabled veterans, but pointed out that for many years, women in the military were kept out of combat zones, so giving priority to combat zone veterans would discriminate against veterans who were not allowed to earn that benefit and, in effect, perpetuate discrimination against women. This commenter expressed her belief that priority should be given on the basis of need, rather than disability.

*Response:* Section 4215(b)(2) of the JVA states that ''The Secretary of Labor may establish priorities among covered persons * * *'' However, we do not intend to revise the rule at this time to specify sub-priorities within the overall priority. The principal factor underlying that decision is the Department's determination that specifying further sub-priorities within the overall priority at this time is very likely to be unduly burdensome, both to the system responsible for serving covered persons and to those covered persons intended to benefit from a sub-priority. Although the requirement to provide priority is not new, six major workforce programs will be required to implement new data collection procedures for covered persons at the point of entry under new reporting requirements that accompany these regulations. In addition, these regulations are expected to take effect at a time that is characterized by an expectation of increased demand for services over the near term in response to deteriorating economic conditions. In that context, the Department believes that implementing tiered sub-priorities at this time would impose an unreasonable burden by requiring: (a) Workforce professionals (or electronic systems) to make distinctions at the point of entry among sub-priorities within the overall priority; and, (b) covered persons to affirm their eligibility for differing levels of priority at the point of entry, based on distinctions of considerable complexity and subtlety. In summary, the Department believes that imposition of those burdens at this time would be very likely to generate results that are directly contrary to the intent of the statute and these regulations.

The Department also recognizes that the intent of these regulations and the accompanying data collection requirements are likely to be assimilated by the workforce system over time. Therefore, the Department acknowledges that, at a future time and under more favorable conditions, it may be appropriate to undertake a revision of these regulations to further specify certain sub-priorities within the overall priority.

*Comment:* One comment requested information on how income would be considered in determining eligibility for priority of service.

*Response:* Income is not a relevant factor for a priority determination. For purposes of eligibility for the underlying programs, all income eligibility determinations should be based on the requirements of the program in which services are being sought. For example, in the Workforce Investment Act programs, the regulation at 20 CFR 667.255 states that, ''any amounts received as military pay or allowances by any person who served on active duty, and certain other specified benefits must be disregarded. This applies when determining if a person is a 'low-income individual' for eligibility purposes.''

Reporting on Priority of Service (§ 1010.320)

*Comment:* A comment stated that in order to measure whether or not covered persons are being represented in affected programs in proportion to their incidence in the labor market, the Department needs to clarify exactly what is meant by ''the labor market.''

*Response:* This comment refers to section 4215(d) of the JVA, which requires the Secretary to report to Congress annually on priority of service. The referenced section of the statute includes language requiring the Secretary to evaluate, ''whether the representation of veterans in such programs is in proportion to the incidence of representation of veterans in the labor market * * *'' The requirements included in §§ 1010.320, 1010.330 and the accompanying ICR are expected to enhance the Secretary's capacity to fulfill that Congressional reporting responsibility. Since enactment of the JVA, the Department has fulfilled this requirement by comparing the rate of veteran participation in workforce programs nationally with the incidence of veteran representation in the labor market at the national level. The rate or incidence of veterans in the labor market has been determined each year based upon data provided by the Bureau of Labor Statistics and derived from the Current Population Survey.

When the comparison described above is made at the national level, it represents a measure of the performance of the Department rather than a measure of the performance of the recipients of DOL funding. If a similar comparison were to be made below the national level (e.g., for a State workforce system), the Department would first need to identify the source of valid and reliable data on the rate of incidence of veterans within the labor market, at the level at which the comparison is to be made.

Collecting and Maintaining Data (§ 1010.330)

Subsections (a) and (b) of § 1010.330 and the ICR associated with this regulation establish new reporting requirements for those programs that serve over 1,000 covered persons per year nationally, including: WIA Adult, WIA Dislocated Worker, Wagner-Peyser Employment Service/Jobs for Veterans State Grants, National Emergency Grants (NEGs), Trade Adjustment Assistance (TAA), and the Senior Community Service Employment Program (SCSEP). All other qualified job training programs are exempt from this information collection but will be required to adopt the covered, non-covered, veteran and eligible spouse definitions as outlined in the JVA the next time their reporting requirements are renewed.

The new reporting requirements for those job training programs that serve

over 1,000 persons annually are described more fully in the associated ICR (ICR Reference Number 200805–1205–001) but primarily involve: (1) Identifying covered persons at the point of entry, which is the earliest point that a covered person contacts the system in either a physical location (e.g., One-Stop Career Center or affiliate site) or remotely through electronic technologies); and (2) the collection of individual entrant records for all covered persons. Note: These new reporting requirements exempt the collection of information for non-covered persons.

In order to fully appreciate the context, it is helpful to review the discussion that follows in conjunction with the responses treated previously under the subheading Identifying Covered Persons (§ 1010.300), since the new collection is based largely on identifying covered persons at the point of entry. The specific comments on (§ 1010.300) and our responses follow.

*Comment:* Four comments raised questions around self-registration of covered persons. Of these, one commenter specifically asked about what type of client inquiry would trigger the collection of data.

*Response:* Paragraphs (a) and (b) of § 1010.330 require that programs that serve over 1,000 covered persons nationally per year must identify and capture data on covered persons at the initial point of entry. This is the earliest point that a covered person first makes contact with the workforce investment system and is triggered by entry at either a physical location (e.g., One-Stop Career Center or affiliate site) or remotely through electronic technologies. DOL acknowledges that program operators will need to adjust manual and electronic intake processes to accommodate the new reporting requirements.

*Comment:* Three comments addressed the covered person entry date. Of those, two commenters expressed the need for clarification in the definition and one commenter asked whether this information should be tracked retroactively for persons who entered the system years ago.

*Response:* Although these comments were submitted in response to the NPRM, they treat topics that are not specifically addressed in § 1010.330 of the rule, but are addressed in the ICR associated with these regulations. Therefore, the Department will address these issues through the ICR clearance process and through the issuance of guidance on the implementation of the new data collection procedures, if necessary.

*Comment:* Several comments raised concerns about the difficulty in making programming changes to the current MIS systems to capture the individual entrant record data elements. One commenter also expressed concerns over the logistics, including the short timeframe to implement the new reporting requirements, stating it will place an undue hardship on the State.

*Response:* DOL acknowledges that information technology adjustments will need to be made to accommodate the new data fields and is aware that such adjustment can be a challenge, given resource constraints. Consequently, the Department has kept the data elements to a minimum in order to reduce the number of required modifications and to keep costs in check. DOL is examining the feasibility of coordinating the application of the new priority of service reporting requirements with the implementation of the new Workforce Investment Standardized Performance Reporting (WISPR) system. The Department will be issuing additional guidance on the implementation timeframes for these two new and related sets of reporting requirements.

*Comment:* We received ten comments that focused on the perceived burdens that would be placed on the States by the new data collection requirements. Eight commenters specifically alluded to cost burdens. One commenter noted that the introduction of new client classifications will require changes to the current ETA 9002 and VETS 200 performance reports. Another commenter recommended that the implementation of priority of service reporting occur simultaneously with implementation of the WISPR requirement to avoid the cost of making multiple changes to reporting systems. Another commenter recommended that changes be compatible with the existing Workforce Investment Act Standardized Record Data (WIASRD).

*Response:* As indicated above, DOL agrees that it would be advantageous if WISPR and the proposed priority of service reporting requirements were to take effect on the same date, and DOL is considering the feasibility of implementing the priority of service requirements in conjunction with the implementation of WISPR. If the implementation of the new priority of service reporting is coordinated with the implementation of WISPR, challenges with the ETA 9002 and VETS 200 reports will be eliminated. That is because those two sets of reports will be replaced by other reports under WISPR. Similarly, changes to existing reporting systems will be avoided if the new priority of service reporting is implemented in conjunction with WISPR, because the priority of service requirements will be included in WISPR from the outset (i.e. there would be no ''retrofitting'' of existing reporting systems to accommodate the priority of service reporting).

In the absence of coordinated implementation of priority of service reporting and WISPR, reporting entities will be required to amend existing reporting systems. Guidance will be forthcoming on the implementation processes and timeframes applicable to these two related reporting requirements, along with significant technical assistance in support of their implementation.

*Comment:* Two comments raised questions about the adequacy of this data collection. One of the commenters recommended that the data collection be expanded to include non-covered persons so a comparison could be made with the covered person information. Another commenter suggested that there is no mechanism for determining whether, on the whole, covered persons received priority in obtaining employment enhancing services or, conversely, the frequency with which non-veterans did.

*Response:* DOL considered including non-covered persons and realizes the advantages in helping to draw comparisons between the two populations, but determined that the benefits did not outweigh the potential costs and burden. The workforce system currently serves about 15 million individuals and about ten percent of those served are covered persons. Tracking the estimated 1.5 million covered entrants gives a narrower lens for analysis but provides the additional data point to illustrate the numbers of veterans accessing the workforce system. This data point, combined with normal participant data, will help the Department to better determine which of our covered person customers go on to receive services (or conversely, do not receive services). In addition, DOL intends to supplement this data by sponsoring random surveys of covered *and* non-covered persons accessing the workforce system to assist in comparing the delivery of services to the two groups. DOL agrees that the covered entrant data alone will not tell the complete story of priority of service but it will add crucial information that has been missing from the discussion. Based on this information, the Department will be able to determine the number of veterans who enter the system compared to the number who receive services. This indicator will help us to

determine if the system is, in fact, serving those who come to our system and are entitled to priority. To complete the assessment, DOL will apply information gathered through the priority of service evaluation, random surveys of covered and non-covered persons, and additional monitoring to help ensure that covered persons are receiving priority for publicly-funded workforce services.

**III. Administrative Information**

*Regulatory Flexibility Analysis, Executive Order 13272, and Small Business Regulatory Enforcement Fairness Act*

The Regulatory Flexibility Act (RFA), 5 U.S.C. Chapter 6, requires the Department to evaluate the economic impact of this final rule with regard to small entities. The RFA defines small entities to include small businesses, small organizations including not-for-profit organizations, and small governmental jurisdictions. The Department must determine whether the rule imposes a significant economic impact on a substantial number of such small entities.

The Department has determined that there is no significant economic impact resulting from this final rule. The JVA mandates that veterans receive priority of service in all qualified job training programs. The purpose of this rule is to implement the JVA's priority of service requirement. It defines the program and reporting requirements for ongoing programs funded by the Department (and any new programs created in the future) and administered by funding recipients. The priority of service provisions in the JVA do not create any new job training programs; rather, the programs affected by the priority of service are ongoing. The final rule requires that these programs give priority to veterans for the services provided by the programs. The rule requires funding recipients to do certain things, such as implement processes to identify covered persons at the point of entry and report on priority of service. However, the Department funds these programs and the funds are meant to include such activities as administration and reporting. Although certain funding recipients that operate qualified job training programs may be small entities, the Department certifies that this final rule does not have a significant economic impact on a substantial number of small entities under the provisions of the RFA and also under the provisions of Executive Order 13272.

Finally, the Department has also determined that this final rule is not a ''major rule'' for purposes of The Small Business Regulatory Enforcement Fairness Act (SBREFA), 5 U.S.C. Chapter 8, which requires agencies to take certain actions when a ''major rule'' is promulgated. SBREFA defines a ''major rule'' as one that has or is likely to result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices for, among other things, State or local government agencies; or in significant and adverse effects on the U.S. business climate. For the reasons already discussed, this final rule will not have any significant financial impact. Accordingly, none of the definitions of ''major rule'' apply in this instance.

*Executive Order 12866*

Executive Order 12866 requires that for each ''significant regulatory action'' proposed by the Department, the Department conduct an assessment of the proposed regulatory action and provide the Office of Management and Budget (OMB) with the proposed regulation and the requisite assessment prior to publishing the regulation. A significant regulatory action is defined to include an action that will have an annual effect on the economy of $100 million or more, as well as an action that raises a novel legal or policy issue.

The priority of service implemented by this final rule will not have an annual effect on the economy of $100 million or more, for the reasons outlined above. While much of the rule is consistent with current DOL policy, certain portions may raise novel policy issues. Accordingly, OMB has reviewed this final rule.

*Paperwork Reduction Act*

The final rule for 20 CFR part 1010 titled Priority of Service for Covered Persons contains information collection (paperwork) requirements that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA–95), 44 U.S.C. 3501 et seq., and OMB's regulations at 5 CFR part 1320. PRA–95 defines ''collection of information'' as ''the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public of facts or opinions by or for an agency regardless of form or format * * *'' (44 U.S.C. 3502(3)(A)). The information collection requirements contained in the proposed rule for 20 CFR Part 1010 were submitted to OMB on August 15, 2008. On September 19, 2008, OMB instructed the Department to consider comments submitted in response to the Notice of Proposed Rulemaking and to resubmit the Information Collection Request (ICR) to OMB at the Final Rule stage.

Pursuant to OMB's instructions and in accordance with the requirements of the PRA, the Department submitted an ICR to OMB requesting approval for the information collection requirements contained in this Final Rule. OMB approved the ICR on December 17, 2008, under OMB Control Number 1205–0468 which will expire on July 31, 2011.

The Department notes that a Federal agency cannot conduct or sponsor a collection of information unless it is approved by OMB under the PRA, and displays a currently valid OMB control number, and the public is not required to respond to a collection of information unless it displays a currently valid OMB control number. Also, notwithstanding any other provision of law, no person shall be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number.

In response to the publication of the ICR, four comments were submitted to OMB and transmitted to DOL. Three of these comments also had been submitted to DOL in response to the NPRM and duplicates of those comments were separately submitted to OMB. The fourth comment was submitted only to OMB and specifically addressed the ICR. Based on that comment, one data item was added to the Quarterly Aggregate Report and the burden estimate has been revised to reflect that addition.

The Department has summarized and responded to those comments that addressed the general data collection and reporting provisions included in section 1010.330 of the rule in Section II of this preamble, as part of the summary and responses to comments on that section of the rule. Similarly, the Department has summarized and responded to those comments that addressed the specific data collection and reporting provisions of the ICR in conjunction with Item A.8 of the revised Supporting Statement.

The final ICR estimates the number of respondents and burden hours as follows:

| Respondents | Number of respondents | Units of time per respondent | Burden hours |
|---|---|---|---|
| Covered Entrants | 1,586,815 | 3.15 minutes | 83,308 |
| New Covered Participants | 151,530 | 22.4 minutes | 56,571 |
| Grantees | 237 | 82.49 hours | 19,550 |
| Total | | | 159,429 |

*Total Estimated Burden Hours:* 159,429

*Total Estimated Cost Burden:* $0

*Executive Order 13132*

The Department has reviewed this final rule in accordance with Executive Order 13132 regarding federalism and has determined that it does not have ''federalism implications.'' The rule does not ''have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' This rule implements the priority of services for qualified job training programs. Although States are recipients of funds for many qualified job training programs, this rule does not have a substantial direct effect on the States; it merely establishes certain conditions on the receipt of program funds. This rule does nothing to alter either the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. Accordingly, this final rule does not have ''federalism implications.''

*Unfunded Mandates Reform Act of 1995*

For purposes of the Unfunded Mandates Reform Act (UMRA) of 1995, this final rule does not include any Federal mandate that may result in increased expenditures by State, local and tribal governments, or by the private sector. This rule merely establishes that recipients of qualified job training funds must provide priority of service to veterans served with such funds. As this final rule does not impose any unfunded Federal mandate, the UMRA is not implicated.

*Executive Order 13045*

Executive Order 13045 concerns the protection of children from environmental health risks and safety risks. This rule implements the priority of service provisions for qualified job training programs funded by the Department. This final rule has no impact on safety or health risks to children.

*Executive Order 13175*

Executive Order 13175 addresses the unique relationship between the Federal Government and Indian tribal governments. The order requires Federal agencies to take certain actions when regulations have ''tribal implications.'' Required actions include consulting with Tribal Governments prior to promulgating a regulation with tribal implications and preparing a tribal impact statement. The order defines regulations as having ''tribal implications'' when they have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

The Department has reviewed this final rule and concludes that it does not have tribal implications. Although tribal governments are recipients of some qualified job training program funds, this rule merely establishes certain conditions on the receipt of program funds. Indian tribes will not even be required to perform the new reporting duties described in this rule because the programs they administer do not serve an average of 1000 covered persons per year. The rule does nothing to affect either the relationship or the distribution of power and responsibilities between the Federal Government and Indian tribes. Therefore, this final rule does not have tribal implications for purposes of Executive Order 13175.

*Environmental Impact Assessment*

The Department has reviewed this final rule in accordance with the requirements of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*), the regulations of the Council on Environmental Quality (40 CFR part 1500), and the Department's NEPA procedures (29 CFR part 11). The final rule will not have a significant impact on the quality of the human environment, and thus the Department has not prepared an environmental assessment or an environmental impact statement.

*Assessment of Federal Regulations and Policies on Families*

Section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105–277, 112 Stat. 2681), requires the Department to assess the impact of this rule on family well-being. A rule that is determined to have a negative affect on families must be supported with an adequate rationale. The Department has assessed this final rule and has determined that it will not have a negative effect on families.

*Privacy Act*

The Privacy Act of 1974 (5 U.S.C. 552a) provides safeguards to individuals concerning their personal information which the Government collects. The Act requires certain actions by an agency that collects information on individuals when that information contains personally identifying information such as Social Security Numbers or names. Because this final rule does not require a new collection of personally-identifiable information, the Privacy Act does not apply in this instance.

*Executive Order 12630*

This final rule is not subject to Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, because it does not involve implementation of a policy with takings implications.

*Executive Order 12988*

This final rule has been drafted and reviewed in accordance with Executive Order 12988, Civil Justice Reform, and will not unduly burden the Federal court system. The regulation has been written so as to minimize litigation and provide a clear legal standard for affected conduct, and has been reviewed carefully to eliminate drafting errors and ambiguities.

*Executive Order 13211*

This final rule is not subject to Executive Order 13211, because it will not have a significant adverse effect on the supply, distribution, or use of energy.

*Plain Language*

The Department drafted this final rule in plain language.

*Catalogue of Federal Domestic Assistance Number*

This final rule is not program-specific; rather it applies across a broad spectrum of qualified job training programs. Therefore, designation of a listing in the Catalog of Federal Domestic Assistance would not be appropriate.

**List of Subjects in 20 CFR Part 1010**

Employment, Grant programs—Labor, Veterans.

■ For reasons stated in the preamble, 20 CFR Ch. IX is amended by adding part 1010 to read as follows:

## PART 1010—APPLICATION OF PRIORITY OF SERVICE FOR COVERED PERSONS

**Subpart A—Purpose and Definitions**



**Subpart B—Understanding Priority of Service**



**Subpart C—Applying Priority of Service**



**Authority:** Pub. L. 109–461 (Dec. 22, 2006), section 605 [38 U.S.C. 4215 Note]; 38 U.S.C. 4215.

## Subpart A—Purpose and Definitions

### § 1010.100 What is the purpose and scope of this part?

(a) Part 1010 contains the Department regulations implementing priority of service for covered persons. Priority of service for covered persons is authorized by section 2(a)(1) of JVA (38 U.S.C. 4215). These regulations fulfill section 605 of the Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. 109–461 (Dec. 22, 2006), which requires the Department to implement priority of service via regulation.

(b) As provided in § 1010.210, this part applies to all qualified job training programs.

### § 1010.110 What definitions apply to this part?

The following definitions apply to this part:

*Covered person* as defined in section 2(a) of the JVA (38 U.S.C. 4215(a)) means a veteran or eligible spouse.

*Department or DOL* means the United States Department of Labor, including its agencies and organizational units and their representatives.

*Eligible Spouse* as defined in section 2(a) of the JVA (38 U.S.C. 4215(a)) means the spouse of any of the following:

(1) Any veteran who died of a service-connected disability;

(2) Any member of the Armed Forces serving on active duty who, at the time of application for the priority, is listed in one or more of the following categories and has been so listed for a total of more than 90 days:

(i) Missing in action;

(ii) Captured in line of duty by a hostile force; or

(iii) Forcibly detained or interned in line of duty by a foreign government or power;

(3) Any veteran who has a total disability resulting from a service-connected disability, as evaluated by the Department of Veterans Affairs;

(4) Any veteran who died while a disability, as indicated in paragraph (3) of this section, was in existence.

*Grant* means an award of Federal financial assistance by the Department of Labor to an eligible recipient.

*Jobs for Veterans Act (JVA)* means Public Law 107–288 (2002). Section 2(a) of the JVA, codified at 38 U.S.C. 4215(a), provides priority of service for covered persons.

*Non-covered person* means any individual who meets neither the definition of ''veteran,'' as defined in this section, nor the definition of ''eligible spouse'' as defined in this section.

*Qualified job training program* means any program or service for workforce preparation, development, or delivery that is directly funded, in whole or in part, by the Department of Labor.

*Recipient* means an entity to which federal financial assistance, in whole or in part, is awarded directly from the Department or through a sub-award for any qualified job training program.

*Secretary* means the Secretary of the Department of Labor.

*Veteran* means a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable, as specified in 38 U.S.C. 101(2). Active service includes full-time duty in the National Guard or a Reserve component, other than full-time duty for training purposes.

## Subpart B—Understanding Priority of Service

### § 1010.200 What is priority of service?

(a) As defined in section 2(a) of the JVA (38 U.S.C. 4215(a)) ''priority of service'' means, with respect to any qualified job training program, that a covered person shall be given priority over a non-covered person for the receipt of employment, training, and placement services provided under that program, notwithstanding any other provision of the law.

(b) Priority in the context of providing priority of service to veterans and other covered persons in qualified job training programs covered by this regulation means the right to take precedence over non-covered persons in obtaining services. Depending on the type of service or resource being provided, taking precedence may mean:

(1) The covered person receives access to the service or resource earlier in time than the non-covered person; or

(2) If the service or resource is limited, the covered person receives access to the service or resource instead of or before the non-covered person.

### § 1010.210 In which Department job training programs do covered persons receive priority of service?

(a) Priority of service applies to every qualified job training program funded, in whole or in part, by the Department, including:

(1) Any such program or service that uses technology to assist individuals to access workforce development programs (such as job and training opportunities, labor market information, career assessment tools, and related support services); and

(2) Any such program or service under the public employment service system, One-Stop Career Centers, the Workforce Investment Act of 1998, a demonstration or other temporary program; any workforce development program targeted to specific groups; and those programs implemented by States

or local service providers based on Federal block grants administered by the Department.

(b) The implementation of priority of service does not change the intended function of a program or service. Covered persons must meet all statutory eligibility and program requirements for participation in order to receive priority for a program or service.

**§ 1010.220 How are recipients required to implement priority of service?**

(a) An agreement to implement priority of service, as described in these regulations and in any departmental guidance, is a condition for receipt of all Department job training program funds.

(b) All recipients are required to ensure that priority of service is applied by all sub-recipients of Department funds. All program activities, including those obtained through requests for proposals, solicitations for grant awards, sub-grants, contracts, sub-contracts, and (where feasible) memoranda of understanding or other service provision agreements, issued or executed by qualified job training program operators, must be administered in compliance with priority of service.

**§ 1010.230 In addition to the responsibilities of all recipients, do States and political subdivisions of States have any particular responsibilities in implementing priority of service?**

(a) Pursuant to their responsibility under the Workforce Investment Act of 1998, States are required to address priority of service in their comprehensive strategic plan for the State's workforce investment system. Specifically, States must develop policies for the delivery of priority of service by the State Workforce Agency or Agencies, Local Workforce Investment Boards, and One-Stop Career Centers for all qualified job training programs delivered through the State's workforce system. The policy or policies must require that processes are in place to ensure that covered persons are identified at the point of entry and given an opportunity to take full advantage of priority of service. These processes shall be undertaken to ensure that covered persons are aware of:

(1) Their entitlement to priority of service;

(2) The full array of employment, training, and placement services available under priority of service; and

(3) Any applicable eligibility requirements for those programs and/or services.

(b) The State's policy or policies must require Local Workforce Investment Boards to develop and include in their strategic local plan, policies implementing priority of service for the local One-Stop Career Centers and for service delivery by local workforce preparation and training providers. These policies must establish processes to ensure that covered persons are identified at the point of entry so that covered persons are able to take full advantage of priority of service. These processes shall ensure that covered persons are aware of:

(1) Their entitlement to priority of service;

(2) The full array of employment, training, and placement services available under priority of service; and

(3) Any applicable eligibility requirements for those programs and/or services.

**§ 1010.240 Will the Department be monitoring for compliance with priority of service?**

(a) The Department will monitor recipients of funds for qualified job training programs to ensure that covered persons are made aware of and afforded priority of service.

(b) Monitoring priority of service will be performed jointly between the Veterans' Employment and Training Service (VETS) and the DOL agency responsible for the program's administration and oversight.

(c) A recipient's failure to provide priority of service to covered persons will be handled in accordance with the program's established compliance review processes. In addition to the remedies available under the program's compliance review processes, a recipient may be required to submit a corrective action plan to correct such failure.

**§ 1010.250 Can priority of service be waived?**

No, priority of service cannot be waived.

## Subpart C—Applying Priority of Service

**§ 1010.300 What processes are to be implemented to identify covered persons?**

(a) Recipients of funds for qualified job training programs must implement processes to identify covered persons who physically access service delivery points or who access virtual service delivery programs or Web sites in order to provide covered persons with timely and useful information on priority of service at the point of entry. Point of entry may include reception through a One-Stop Career Center established pursuant to the Workforce Investment Act of 1998, as part of an application process for a specific program, or through any other method by which covered persons express an interest in receiving services, either in-person or virtually.

(b)(1) The processes for identifying covered persons at the point of entry must be designed to:

(i) Permit the individual to make known his or her covered person status; and

(ii) Permit those qualified job training programs specified in § 1010.330(a)(2) to initiate data collection for covered entrants.

(2) The processes for identifying covered persons are not required to verify the status of an individual as a veteran or eligible spouse at the point of entry unless they immediately undergo eligibility determination and enrollment in a program.

(c) The processes for identifying covered persons must ensure that:

(1) Covered persons are identified at the point of entry to allow covered persons to take full advantage of priority of service; and

(2) Covered persons are to be made aware of:

(i) Their entitlement to priority of service;

(ii) The full array of employment, training, and placement services available under priority of service; and

(iii) Any applicable eligibility requirements for those programs and/or services.

**§ 1010.310 How will priority of service be applied?**

(a) Recipients of funds for qualified job training programs must implement processes in accordance with § 1010.300 to identify covered persons at the point of entry, whether in person or virtual, so the covered person can be notified of their eligibility for priority of service. Since qualified job training programs may offer various types of services including staff-assisted services as well as self-services or informational activities, recipients also must ensure that priority of service is implemented throughout the full array of services provided to covered persons by the qualified job training program.

(b) Three categories of qualified job training programs affect the application of priority of service: universal access, discretionary targeting and statutory targeting. To obtain priority, a covered person must meet the statutory eligibility requirement(s) applicable to the specific program from which services are sought. For those programs that also have discretionary or statutory priorities or preferences pursuant to a Federal statute or regulation, recipients must coordinate providing priority of

service with applying those other priorities, as prescribed in paragraphs (b)(2) and (b)(3) of this section.

(1) *Universal access programs* operate or deliver services to the public as a whole; they do not target specific groups. These programs are required to provide priority of service to covered persons.

(2) *Discretionary targeting programs* focus on a particular group, or make efforts to provide a certain level of service to such a group, but do not specifically mandate that the favored group be served before other eligible individuals. Whether these provisions are found in a Federal statute or regulation, priority of service will apply. Covered persons must receive the highest priority for the program or service, and non-covered persons within the discretionary targeting will receive priority over non-covered persons outside the discretionary targeting.

(3) *Statutory targeting programs* are programs derived from a Federal statutory mandate that requires a priority or preference for a particular group of individuals or requires spending a certain portion of program funds on a particular group of persons receiving services. These are mandatory priorities. Recipients must determine each individual's covered person status and apply priority of service as described below:

(i) Covered persons who meet the mandatory priorities or spending requirement or limitation must receive the highest priority for the program or service;

(ii) Non-covered persons within the program's mandatory priority or spending requirement or limitation, must receive priority for the program or service over covered persons outside the program-specific mandatory priority or spending requirement or limitation; and,

(iii) Covered persons outside the program-specific mandatory priority or spending requirement or limitation must receive priority for the program or service over non-covered persons outside the program-specific mandatory priority or spending requirement or limitation.

**§ 1010.320 Will recipients be required to collect information and report on priority of service?**

Yes. Every recipient of funds for qualified job training programs must collect such information, maintain such records, and submit reports containing such information and in such formats as the Secretary may require related to the provision of priority of service.

**§ 1010.330 What are the responsibilities of recipients to collect and maintain data on covered and non-covered persons?**

(a) *General Requirements.* Recipients must collect information in accordance with instructions issued by the Department.

(1) Recipients must collect two broad categories of information:

(i) For the qualified job training programs specified in paragraph (a)(2) of this section, information must be collected on covered persons from the point of entry, as defined in § 1010.300(a), and as provided in paragraph (b) of this section; and,

(ii) For all qualified job training programs, including the programs specified in paragraph (a)(2) of this section, information must be collected on covered and non-covered persons who receive services, as prescribed by the respective qualified job training programs, as provided in paragraph (c) of this section.

(2) For purposes of paragraph (a)(1) of this section, qualified job training programs that served, at the national level, 1,000 or more veterans per year for the three most recent years of program operations (currently the Wagner-Peyser, WIA Adult, WIA Dislocated Worker, WIA National Emergency Grant, and Senior Community Service Employment Programs) must collect information and report on covered entrants. The Trade Adjustment Assistance Program must collect information and report on covered entrants on the effective date of the next information collection requirement applicable to that program, whether that is for a renewal of an existing approved information collection or for approval of a new information collection.

(3) For purposes of this section, covered persons at the point of entry are referred to as ''covered entrants.'' This group includes two further subgroups: veterans and eligible spouses as defined in § 1010.110.

(b) *Collection and Maintenance of Data on Covered Entrants.* In accordance with instructions issued by the Department, recipients of assistance for the programs specified in paragraph (a)(2) of this section must collect and report individual record data for all covered entrants from the point of entry.

(c) *Collection and Maintenance of Data on Covered and Non-Covered Persons Who Receive Services.* In accordance with instructions issued for individual qualified job training programs, all recipients must collect and maintain data on covered and non-covered persons who receive services, including individual record data for those programs that require establishment and submission of individual records for persons receiving services.

(1) The information to be collected shall include, but is not limited to:

(i) The covered and non-covered person status of all persons receiving services;

(ii) The types of services provided to covered and non-covered persons;

(iii) The dates that services were received by covered and non-covered persons; and;

(iv) The employment outcomes experienced by covered and non-covered persons receiving services.

(2)(i) Except as provided in paragraph (c)(2)(ii) of this section, for persons receiving services, recipients must apply the definitions set forth in § 1010.110 to distinguish covered from non-covered persons receiving services and, within covered persons, to distinguish veterans from eligible spouses.

(ii) Until qualified job training programs adopt the definitions for covered and non-covered persons set forth at § 1010.110 through the publication of requirements pursuant to the Paperwork Reduction Act, recipients must collect data on the services provided to and the outcomes experienced by veterans (however defined) and non-veterans receiving services in accord with regulations, policies and currently approved information collections.

(d) All information must be stored and managed in a manner that ensures confidentiality.

Signed at Washington, DC, this 15th day of December 2008.

**Charles S. Ciccolella,**

*Assistant Secretary, Veterans Employment and Training Service.*

[FR Doc. E8–30166 Filed 12–18–08; 8:45 am]

**BILLING CODE 4510–79–P**

Federal Register

Friday,
December 19, 2008

## Part IX

# The President

**Proclamation 8329—Wright Brothers Day, 2008**

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# Presidential Documents

**Title 3—**

## The President

**Proclamation 8329 of December 16, 2008**

## Wright Brothers Day, 2008

**By the President of the United States of America**

**A Proclamation**

Our history is rich with pioneers and innovators who used their God-given talents to improve our Nation and the world. On Wright Brothers Day, we commemorate two brothers, Orville and Wilbur Wright, who took great risks and ushered in a new era of travel and discovery.

With intrepid spirits and a passion for innovation, Orville and Wilbur Wright became the first to experience the thrill of manned, powered flight. On December 17, 1903, Orville Wright flew for 12 seconds over the North Carolina sand dunes in the presence of only five people. In the span of one lifetime, our Nation has seen aviation progress from the first tentative takeoff at Kitty Hawk to an age of supersonic flight and space exploration.

On this Wright Brothers Day, we recognize all those who have taken great risks and contributed to our country's legacy of exploration and discovery. This year, we also celebrate the centennial of the world's first passenger flight. By remaining dedicated to extending the frontiers of knowledge, we can ensure that the United States will continue to lead the world in science, innovation, and technology, and build a better future for generations to come.

The Congress, by a joint resolution approved December 17, 1963, as amended (77 Stat. 402; 36 U.S.C. 143), has designated December 17 of each year as ''Wright Brothers Day'' and has authorized and requested the President to issue annually a proclamation inviting the people of the United States to observe that day with appropriate ceremonies and activities.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, do hereby proclaim December 17, 2008, as Wright Brothers Day.

IN WITNESS WHEREOF, I have hereunto set my hand this sixteenth day of December, in the year of our Lord two thousand eight, and of the Independence of the United States of America the two hundred and thirty-third.

[FR Doc. E8–30371
Filed 12–18–08; 8:45 am]
Billing code 3195–W9–P

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Tennessee; Approval of Revisions to the Knox County Portion of the Tennessee State Implementation Plan - Permit by Rule Provision; comments due by 12-24-08; published 11-24-08 [FR E8-27740]

Environmental Statements; Notice of Intent:

Coastal Nonpoint Pollution Control Programs; States and Territories—

Florida and South Carolina; Open for

## LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "P L U S" (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws.html*.

The text of laws is not published in the **Federal Register** but may be ordered in "slip law" (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.gpoaccess.gov/plaws/index.html*. Some laws may not yet be available.

**H.R. 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)

**Last List December 2, 2008**

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